U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 17-0436 BLA
and 17-0436-BLA-A

JAMES WARREN FANNIN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BIZZACK CONSTRUCTION, INCORPORATED	)	DATE ISSUED: 06/18/2018
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeals of the Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Leonard Slayton, Inez, Kentucky, for claimant.

William H. Partin, Jr. and W. Clayton Stone, II (Ward, Hocker & Thornton, PLLC), Lexington, Kentucky, for employer/carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor, Maia S. Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2013-BLA-05992) of Administrative Law Judge Steven D. Bell, rendered on a claim filed on May 21, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established 15.33 years of coal mine employment, working in conditions that were substantially similar to those in an underground coal mine. He also found that claimant established a totally disabling respiratory or pulmonary impairment and thus invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[1] The administrative law judge further determined that employer did not rebut the presumption and awarded benefits.

Employer appeals, arguing that the administrative law judge erred in finding that claimant did the work of a miner in his job as a drill operator for employer on highway construction projects. Employer therefore asserts that the administrative law judge erred in finding that claimant's 9.092 years with employer constituted coal mine employment. Alternatively, employer asserts that even if claimant's work for employer qualified as coal mine employment, the administrative law judge erred in finding that it was substantially similar to underground employment. Employer also contends that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary impairment and invoked the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's finding that claimant worked as a miner for employer and that he established the requisite fifteen years of qualifying coal mine employment for

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

invocation of the presumption. Claimant responds, urging affirmance of the award of benefits. Claimant also cross-appeals, asserting that if the case is remanded for any reason, the administrative law judge should count additional periods of claimant's work for employer as qualifying coal mine employment.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption – Qualifying Coal Mine Employment

A. Work as a Miner

Employer argues that the administrative law judge erred in finding that claimant worked as a miner during his 9.092 years with employer and thus erred in finding that claimant established the requisite fifteen years of coal mine employment for invocation of the Section 411(c)(4) presumption. Employer's argument is without merit.

Whether a worker is a miner is a factual finding to be made by the administrative law judge. *See Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985). The Act's definition of a miner is comprised of a "situs" requirement (claimant must have worked in or around a coal mine or coal preparation facility) and a "function" requirement (claimant must have worked in the extraction or preparation of coal). 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202(a); *see Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 25 BLR 2-659, 2-663-64 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*],

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established 6.238 years of qualifying coal mine employment with other companies prior to working for employer. *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983); Decision and Order at 11; Director's Exhibit 11.

[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

884 F.2d 926, 929-30, 13 BLR 2-38, 2-41-42 (6th Cir. 1989). The Act defines a coal mine as "an area of land . . . used in, or to be used in . . . the work of extracting" coal. 20 C.F.R. §725.101(a)(12). Additionally, 20 C.F.R. §725.202(a) provides that "there shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." To satisfy the function requirement, the miner's work must be integral or necessary to the extraction or preparation of coal, not merely incidental or ancillary. *See Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922, 12 BLR 2-271, 2-278 (6th Cir. 1989).

The administrative law judge observed that coal was extracted at the road construction sites where claimant worked.[4] Decision and Order at 8. Citing *Smith v. Director, OWCP*, 9 BLR 1-25, 1-26-1-27 (1986), he also stated correctly that the situs requirement is met if employer had a "sufficient economic interest" in the coal generated from the road construction projects such that coal mining was a substantial part of claimant's work. Decision and Order at 7; *see Montel v. Weinberger*, 546 F.2d 679, 681, 1 BLR 2-16, 2-18 (6th Cir. 1976).

Based on employer's records and the hearing testimony, the administrative law judge found that employer had a sufficient economic interest in the extraction of coal:

> Employer not only profited off of the coal which the highway projects produced, but it anticipated the discovery of coal on many projects, even deducting the estimated profits from the cost of its bids on the highway projects. The encounter of coal was not happenstance or incidental, but planned. Every time that a highway project was located over a coal seam that was more than *de minimis*, the company required Claimant and other construction workers to stop drilling above the coal seam so that the coal could be extracted and sold. After the coal was removed, it was cleaned off, loaded onto trucks, and sold for profit. Employer sold nearly 700,000 tons[5] of coal from just the projects in which Claimant participated after 1996.

[4] Employer acknowledges that claimant's "primary duty throughout his course of employment with employer was the operation of a hydraulic percussion drill," which was used "to blast away rock to excavate a path for a highway." Employer's Brief at 4, *citing* Hearing Transcript at 25. Employer also concedes that coal is prevalent in the region where claimant worked and that during the course of drilling, coal seams are often discovered and claimant's job at that point was to stop drilling and assist with the extraction of the coal, which was later sold by employer for profit. Employer's Brief at 4.

[5] The 700,000 tons of coal were sold for $22,849,418.93. Hearing Transcript at 106.

> Employer was governed by [the Mine Safety and Health Administration (MSHA)] and employees were given MSHA training.

Decision and Order at 8 (footnotes omitted), *citing* Hearing Transcript at 84, 88; Claimant's Exhibits 3 at 78, 4 at 93; Employer's Exhibit 1; *see Smith*, 9 BLR at 1-26-1-27. Thus, we affirm as rational, the administrative law judge's determination that claimant's 9.092 years of employment with employer satisfies the situs requirement.[6] 20 C.F.R. §725.101(a)(12); *see Hinton v. Director, OWCP*, 762 F.2d 1008 (Table) (6th Cir. 1985); S*outhard v. Director, OWCP*, 732 F.2d 66, 69, 6 BLR 2-26, 2-30 (6th Cir. 1984);

We also affirm the administrative law judge's determination that claimant's work with employer satisfies the function requirement. The administrative law judge rationally concluded that claimant's work was integral to the extraction and preparation of coal, as he "drill[ed] through rock in order to get to the coal and assist[ed] in the cleaning of the coal before it was loaded onto trucks and driven away as well as assist[ed] the blasting crew in placing charges in order to remove the coal."[7] Decision and Order at 6, *citin*g Hearing Transcript at 35-38, 58; *see Clemons*, 873 F.2d at 922, 12 BLR at 2-278. Accordingly, we affirm the administrative law judge law judge's finding that claimant performed the duties of a "miner" while working for employer for 9.092 years.

B. Substantial Similarity

Section 411(c)(4) requires that a miner work for at least fifteen years either in "underground coal mines," or in "substantially similar" conditions. 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

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[6] Employer argues that coal extraction was only an incidental part of employer's business, with "coal being only one percent of the material actually excavated from 1996 to 2008," with rock making up the majority of the removed material. We agree, however, with the Director, Office of Workers' Compensation Programs, that employer's comparison of coal to rock extracted is unpersuasive because "the record fails to show that the extracted rock was of financial value." Director's Brief at 3.

[7] We reject employer's argument that claimant was not miner because his job was to drill down to the coal seam "but not through them so as to not damage the coal." Employer's Brief at 11. Employer has failed to demonstrate why claimant's work drilling to expose the coal seam under the rock was not integral to the extraction of the coal.

Employer argues that the administrative law judge erred in finding that claimant's testimony sufficiently established that he was regularly exposed to coal-mine dust in performing his job. We disagree. An administrative law judge is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *See Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). The administrative law judge permissibly found that "throughout his testimony," claimant stated that the drilling work he performed regularly exposed him to dust, "even after the introduction of a cab with a filtration system." Decision and Order at 8. As noted by the administrative law judge, claimant specifically stated that there was dust in the air and that he was exposed to it hourly: "after [ten] hours you'd have half [an] inch of dust in the cab where it settled down in it." *Id*. at 9, *quoting* Hearing Transcript at 36-37.

Employer's argument that claimant's exposure was primarily to rock dust rather than coal mine dust is similarly unavailing. As the Director correctly points out, the exact composition of the dust to which claimant was exposed while mining is irrelevant. Director's Brief at 3, *citing* 65 Fed. Reg. 79,920, 79,958 (Dec. 20, 2000) ("'Coal mine dust' means any dust generated in the course of coal mining operations, including construction."); s*ee Pershina v. Consolidation Coal Co.*, 14 BLR 1-55 (1990) (en banc); *George v. Williamson Shaft Contracting Co.*, 8 BLR 1-91 n.1, 1-93 (1985); *Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309, 1-311 (1984).

Because we have rejected employer's allegations of error, we affirm the administrative law judge's finding that claimant worked in conditions substantially similar to underground coal mining, as it is rational and supported by substantial evidence. *See Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011). Accordingly, we further affirm the administrative law judge's finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i).

II. Invocation of the 411(c) Presumption – Total Disability

A miner is considered to be totally disabled if he has a respiratory or pulmonary impairment which, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). Total disability is established by pulmonary function studies, blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinion evidence.[8] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R.

judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found that claimant established total disability based on the blood gas study and medical opinion evidence.[9] Employer generally asserts that there is no specific evidence to establish that claimant is totally disabled from operating a drill or other construction equipment. Employer states that claimant only had to "sit and operate controls." Employer's Brief at 16. Employer maintains that claimant's testimony that he "got a little slower" performing his job duties, *see* Claimant's Deposition at 9, is "not indicative of someone completely incapable of performing their job operating construction equipment." *Id*. Employer's arguments are rejected as without merit.

The administrative law judge rationally found that claimant's usual coal mine work was as a drill operator which "required a heavy exertional level through the frequent lifting of heavy explosives [weighing fifty pounds] and difficult changing of heavy [steel] drill bits." Decision and Order at 24; *see* Hearing Transcript 35, 37-38; Director's Exhibit 22. Considering the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv),[10] the administrative law judge permissibly credited the opinions of Drs. Rasmussen and Sood that claimant has a totally disabling pulmonary or respiratory impairment. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 26; Director's Exhibit 14; Claimant's Exhibit 1. Drs. Rasmussen and Sood examined claimant, took relevant work and medical histories, and obtained pulmonary function and blood gas studies. Each physician described the exertional requirements of claimant's job as a drill operator and explained that claimant is unable to do his job based on the June 25, 2012 qualifying blood gas study obtained during Dr.

Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), based on the qualifying post-exercise blood gas study conducted by Dr. Rasmussen on June 25, 2012. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25; Director's Exhibit 14.

[10] As there was no evidence of cor pulmonale with right-sided congestive heart failure, claimant is unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii).

Rasmussen's examination.[11] Director's Exhibit 14 at 106-7, 111; Claimant's Exhibit 1 at 2, 7. We see no error in the administrative law judge's permissible finding that both opinions are documented and reasoned and consistent with the available medical evidence. *See Crockett Collieries, Inc., v. Director, OWCP* [*Barrett*], 478 F.3d 350, 355, 23 BLR 2-472, 2-482 (6th Cir. 2007); Decision and Order at 25.

With regard to Dr. Dahhan's opinion, the administrative law judge noted correctly that in his initial report and deposition, Dr. Dahhan opined that claimant is not disabled. Decision and Order at 26, Director's Exhibit 17. However, in a follow-up report, Dr. Dahhan summarized Dr. Sood's findings and stated, "[i]t appears to me that nobody disagrees that the patient has a disabling restrictive impairment." Employer's Exhibit 3 at 3. To the extent the administrative law judge found that Dr. Dahhan did not explain why he appeared to change his diagnosis on total disability, we see no error in the administrative law judge's finding that Dr. Dahhan's opinion is entitled to "little probative weight." Decision and Order at 26; *see Barrett*, 478 F.3d at 355, 23 BLR at 2-482; 866 F.2d at 185, 12 BLR at 2-129.

We therefore affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), as rational and supported by substantial evidence. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). We further affirm the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment, taking into consideration the contrary probative evidence. Decision and Order at 26. Thus, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. We further affirm the administrative law judge's finding that employer did not rebut the presumption, as it is not challenged by employer in this appeal.[12] *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983); Decision and Order at 27-31.

[11] Dr. Sood also opined, based on the results of claimant's pulmonary function study, that claimant is unable to perform work at a "median level of exertion for coal miners for prolonged periods." Claimant's Exhibit 1 at 9.

[12] Because we affirm the administrative law judge's award of benefits, it is not necessary that we address claimant's cross-appeal.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge