U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0268 BLA

GARY D. JUSTICE Claimant-Respondent v. JUSTICE TRUCKING and TRAVELERS INDEMNITY COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/27/2015 DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order - Award of Benefits (2012-BLA-5327) of Administrative Law Judge Richard T. Stansell-Gamm with respect to a claim filed on August 20, 2010, 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 acknowledged the parties' stipulation that claimant had at least thirty years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R.

Part 718. The administrative law judge determined that claimant had four and one-half years of underground coal mine employment and that his twenty-five and one-half years of surface employment as a coal truck driver were equivalent to at least twelve years and nine months of underground coal mine employment. Therefore, the administrative law judge credited claimant with at least fifteen years of employment in underground coal mines, or in conditions substantially similar to those in an underground mine. Based on the filing date of the claim and his determination that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the fifteen years of qualifying coal mine employment necessary for invocation of the presumption at amended Section 411(c)(4). Relevant to rebuttal, employer contends that the administrative law judge did not properly weigh the x-ray evidence. Employer further challenges the administrative law judge's rationale for discrediting the disability causation opinions of Drs. Rosenberg and Jarboe. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[1] 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 AMENDED SECTION 411(c)(4) PRESUMPTION: QUALIFYING COAL MINE EMPLOYMENT

In order to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), claimant must establish at least fifteen years of "employment in one or more underground coal mines," or in surface coal mine employment, in conditions that were "substantially similar to conditions in an underground mine," and that he has a totally disabling respiratory or pulmonary

[1] The record reflects that claimant's last coal mine employment was in Virginia. Decision and Order at 3 n.6; Hearing Transcript at 29-30. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

impairment. 30 U.S.C. §921(c)(4); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). Pursuant to 20 C.F.R. §718.305(b)(2), "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there."[2] 20 C.F.R. §718.305(b)(2); *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). Although claimant bears the burden of establishing comparability between dust conditions in underground and surface mine employment, he "must only establish that he was exposed to sufficient coal dust in his surface mine employment." *Leachman*, 855 F.2d at 512-13; *see Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-202 (7th Cir. 1995). Claimant is not required to directly compare his work environment to conditions underground, but can establish similarity by proffering "sufficient evidence of the surface mining conditions in which he worked," whereupon it is the function of the administrative law judge, based on his expertise and knowledge of the industry, "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Leachman*, 855 F.2d at 512.

Employer argues that the administrative law judge erred in finding that half of claimant's twenty-five and one-half years of coal mine employment as a truck driver was

[2] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013).

equivalent to twelve years and nine months of underground coal mine employment.[3] Employer maintains that "[c]laimant's testimony on the level, duration or frequency of his dust exposure confirmed that his employment conditions were not substantially similar to those in an underground mine." Employer's Brief in Support of Petition for Review at 17. Employer also argues that the administrative law judge's finding does not satisfy the Administrative Procedure Act (APA), 500 U.S.C. *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a).[4] These allegations of error are without merit.

In considering whether claimant established the requisite fifteen years of qualifying coal mine employment, the administrative law judge noted that claimant testified that he "was 'regularly exposed' to coal mine dust at coal mines when he loaded raw coal into his truck, drove along coal company roads, and dumped coal at tipples." Decision and Order at 6, *quoting* 20 C.F.R. §718.305(b)(2). As summarized by the administrative law judge, claimant testified about the conditions of his above ground coal mine employment as follows:

> [Claimant] testified that during the loading of raw coal with front end loaders, the coal dust "would just boil out," covering him and his truck. At the tipple, as the coal was dropped 20 feet into the tipple hopper which had a shaker at the bottom, the coal dust would also "boil out." Both at the mines and tipples, even with the use of tarps and air-conditioned trucks, coal dust would get into the truck through openings in the firewall as he drove along coal company roads. When he washed his hair at night, the water would be "black."

Decision and Order at 6 n.16, *quoting* Hearing Transcript at 23, 25, 45. The administrative law judge noted that claimant testified that the usual distance between the mine and the tipple was about sixty miles, including seven miles of company road at the mines and three miles of company road at the tipple. Decision and Order at 6 n.17. The administrative law judge also acknowledged, however, that claimant testified that while he transported coal along the public highways, for a distance of about fifty miles, he was

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established four and one-half years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6.

[4] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

not exposed to coal mine dust. Decision and Order at 6. The administrative law judge thus found that:

> As a result, the nature of [claimant's] usual trip as a coal truck driver consisted of two parts: a) regular exposure to coal mine dust at the mines, on the coal company roads, and at the tipples, and b) only sporadic, if any, exposure to coal mine dust while transporting raw coal on public highways.

Id. The administrative law judge then made the following calculations:

> In apportioning the qualifying versus non-qualifying portions of a typical trip which he took each way[,] about six to seven times a day, I note that [claimant] indicated the loading of the raw coal at the mine sites, as well as the dumping at the tipple, each took about 15 minutes, for a total of a half an hour. Additionally, his 50 mile trip on the public roads took about 40 minutes. And, finally, considering that the average speed along the 10 miles of coal company roads would have been less than 60 miles an hour, I will allocate 15 minutes for [claimant] to travel that distance. Consequently, [claimant's] typical coal transportation trip consisted of qualifying exposure at the mine and tipple locations (30 minutes), non-qualifying exposure along the public highway (40 minutes), and qualifying exposure on the coal company roads (15 minutes).

Id. at 7.

The method by which the administrative law judge determined that "more than half of [claimant's] typical trip to move raw coal from the mine to the tipple involved regular exposure to coal mine dust," is rational and is supported by substantial evidence, in the form of claimant's description of his working conditions as a coal truck driver aboveground. Decision and Order at 7; *see Leachman*, 855 F.2d at 512-13; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge's finding is, therefore, consistent with the "substantially similar" requirement of amended Section 411(c)(4), as implemented by 20 C.F.R. §718.305(b)(2). *See Leachman*, 855 F.2d at 512-13; *Harris v. Cannelton Indus.*, 24 BLR 1-217 (2011). Accordingly, we affirm the administrative law judge's determination that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the amended Section 411(c)(4) presumption. *Id*. Because employer does not challenge the administrative law judge's finding that claimant established that he has a totally disabling respiratory impairment, we also affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

II. REBUTTAL OF THE AMENDED SECTION 411(c)(4) PRESUMPTION

In light of the administrative law judge's finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Under the implementing regulation, employer must establish that claimant does not have legal and clinical pneumoconiosis,[5] or establish that no part of the claimant's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(i), (ii).

The administrative law judge initially considered the x-ray evidence and rendered a finding as to whether each x-ray was positive or negative for clinical pneumoconiosis. Decision and Order at 13-15. The administrative law judge indicated that he would assign greater weight to readings by physicians who are dually qualified as Board-certified radiologists and B readers. *Id*. at 13. Using this standard, the administrative law judge found that the x-ray dated December 21, 2010 was positive for pneumoconiosis, while the x-rays dated April 25, 2011, November 9, 2011, and June 28, 2012 were inconclusive.[6] *Id*. at 14-15. The administrative law judge stated that the December 21,

[5] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201 (a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201 (a)(2).

[6] Drs. Alexander and Miller, both dually qualified as B readers and Board-certified radiologists, read the December 21, 2010 x-ray, as positive for pneumoconiosis. Director's Exhibits 10, 13. Dr. Meyer, also a dually qualified radiologist, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 15. With respect to the April 25, 2011 x-ray, Dr. Halbert, who is a dually qualified radiologist, interpreted it as negative for pneumoconiosis, while Dr. Alexander interpreted this x-ray as positive for the disease. Director's Exhibits 11, 14. Dr. Meyer interpreted the November 9, 2011 x-ray as negative for pneumoconiosis, and Dr. Miller interpreted the x-ray as positive for the disease. Claimant's Exhibit 1; Employer's Exhibit 6. Dr. West, a dually qualified radiologist, interpreted the June 28, 2012 x-ray as negative for pneumoconiosis, while Dr.

2010 x-ray "represents the preponderance of the probative chest x-rays in the evidentiary record." *Id*. at 15. The administrative law judge further found that claimant invoked the rebuttable presumption, set forth in 20 C.F.R. §718.203(b), that his clinical pneumoconiosis arose out of coal mine employment. He concluded that "[e]mployer is unable to demonstrate under 20 C.F.R. §718.305 that [claimant] does not have clinical pneumoconiosis arising out of coal mine employment." *Id*.

Employer argues that the administrative law judge did not properly weigh the interpretations of the December 21, 2010 x-ray. Employer maintains that the administrative law judge should have accorded greater weight to Dr. Meyer's negative interpretation, than to the contrary positive interpretations of Drs. Miller and Alexander, based on Dr. Meyer's "impressive academic appointment in Radiology."[7] Employer's Brief in Support of Petition for Review at 23.

Employer's allegations are without merit. Contrary to employer's contention, although an administrative law judge may give greater weight to the interpretations of a physician based upon his or her academic qualifications, he is not required to do so. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Bateman v. Eastern Associated Coal Corp*., 22 BLR 1-255, 1-261 (2003). In this case, the administrative law judge considered the physicians' qualifications as B readers and Board-certified radiologists and permissibly assigned equal weight to the readings by Drs. Meyer, West, Halbert, Alexander and Miller on the ground that he considered them to be similarly qualified. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-6-9 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). Because the administrative law judge performed both a quantitative and qualitative analysis of the x-ray evidence, and explained how he resolved the conflicts in the evidence, we affirm, as supported by substantial evidence, his finding that the x-ray evidence was positive and, thus, that employer failed to meet its burden to establish that claimant does not have clinical pneumoconiosis. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i)(B); *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. In light of the administrative law judge's finding that employer could not disprove the existence of clinical pneumoconiosis,

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Alexander interpreted the x-ray as positive for the disease. Claimant's Exhibit 2; Employer's Exhibit 1.

[7] The record reflects that Dr. Meyer is a Professor of Diagnostic Radiology at the University of Wisconsin. Director's Exhibit 15.

employer was precluded from establishing rebuttal by proving that claimant does not have legal pneumoconiosis.[8] *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i). We affirm, therefore, the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis.

Regarding the second method of rebuttal, employer states that "the administrative law judge's rationale for discrediting of the disability causation opinions of Drs. Rosenberg and Jarboe should be vacated." Employer's Brief in Support of Petition for Review at 23. However, employer's statement does not properly invoke the Board's review authority. *See* 20 C.F.R. §802.211(b). Employer has done no more than assert that the administrative law judge has erred, without identifying the errors that he purportedly made. Thus, the Board has no basis upon which to assess the administrative law judge's determination that employer failed to establish that claimant is not totally disabled due to pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 447, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We affirm, therefore, the administrative law judge's finding that employer did not establish rebuttal by disproving the presumed causal relationship between pneumoconiosis and claimant's totally disabling respiratory impairment. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(ii); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

[8] On the issue of the existence of legal pneumoconiosis, the administrative law judge found that the opinions of all of the physicians were of "diminished probative value," based on "various documentation and reasoning shortfalls." Decision and Order at 22.

Accordingly, the administrative law judge's Decision and Order - Award of Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur in the result.

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JUDITH S. BOGGS
Administrative Appeals Judge