U.S. Department of Labor

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

BRB No. 17-0324 BLA

JAMES A. HINKLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RICH MOUNTAIN COAL COMPANY	)	DATE ISSUED: 03/26/2018
	)	
and	)	
	)	
GATLIFF COAL COMPANY, C/O HEALTHSMART, CCS	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, 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/carrier.

Barry H. Joyner (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 the Decision and Order Awarding Benefits (2014-BLA-05067) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on October 25, 2012.[1]

The administrative law judge credited claimant with at least seventeen years of surface coal mine employment[2] in conditions substantially similar to those in an underground mine. The administrative law judge further found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2).[3] Based on those findings, and the filing date of the claim, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[1] Claimant previously filed a claim for benefits on May 14, 2004. Director's Exhibit 1. That claim was denied by Administrative Law Judge Ralph A. Romano on February 9, 2007, because claimant failed to establish any element of entitlement. *Id*. Upon review of claimant's appeal, the Board affirmed the denial of benefits. *J.H.* [*Hinkle*] *v. Rich Mountain Coal Co.*, BRB No. 07-0521 BLA (Mar. 25, 2008) (unpub.).

[2] Claimant's coal mine employment was in Tennessee and Kentucky. Decision and Order at 3; Hearing Transcript at 20-21; Director's Exhibit 18 at 5. 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).

[3] Because the new evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order at 17-21.

[4] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of

On appeal, employer contends that the administrative law judge erred in finding that claimant worked in conditions substantially similar to those in an underground coal mine, and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it failed to rebut the presumption.[5] Claimant has not filed a response to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits.

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. 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

To invoke the Section 411(c)(4) presumption, claimant must establish that he worked at least fifteen years at underground coal mines, or at surface mines in conditions "substantially similar" to those in an underground mine. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i). Conditions at a surface 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." 20 C.F.R. §718.305(b)(2); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65, 25 BLR 2-725, 2-734-36 (6th Cir. 2015); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). Based on claimant's "uncontested" hearing testimony, the administrative law judge found that claimant established that "he 'was regularly exposed to coal [mine] dust' during the course of his coal mine employment." Decision and Order at 21-22.

Employer argues that claimant's testimony was "self-serving," and that the administrative law judge erred in determining that claimant's testimony was sufficient to

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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. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least seventeen years of coal mine employment, total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

establish that he was regularly exposed to coal mine dust. Employer's Brief at 13-14. Employer contends that the administrative law judge erred in assessing the "level, duration[,] or frequency" of claimant's dust exposure. *Id*. at 14. Employer's argument lacks merit.

Claimant testified that all seventeen years of his coal mine employment were at surface coal mines, and that his main duties as a surface miner were working at the drill, running equipment, and working at the tipple. Hearing Transcript at 16. He indicated that when he operated the drill, the conditions were "very dusty," and that he did not wear a mask. *Id*. Claimant specified that as an equipment operator, he operated dozers, trailers, and rock trucks, and that he operated this equipment near the drill and the tipple. *Id*. at 17, 24-25. Claimant stated that the equipment he operated only had closed cabs "part of the time," and, although the closed cabs had air conditioners, the air conditioners did not work eighty percent of the time. *Id*. at 17, 27. Claimant also stated that he operated a crusher near the tipple and that when he operated the crusher, he had to "bust up a lot of coal by hand" with a "slate bar." *Id*. at 24-25. He clarified that this process involved pushing the coal down into the crusher to "bust it up," which created dust. *Id*. at 26. With respect to his exposure during his time as a surface miner, claimant specifically testified that he was exposed to coal mine dust on "a regular basis" because his working conditions were "pretty dusty." *Id*. at 17, 26-27. He stated that he was exposed to coal mine dust on a daily basis, and that he was exposed to "a lot of dust." *Id*. at 26-27.

Contrary to employer's argument, the administrative law judge permissibly determined that claimant's uncontradicted testimony was credible and that it established that claimant was regularly exposed to coal mine dust while working as a driller and equipment operator at surface mines for seventeen years. *See Kennard*, 790 F.3d at 664, 25 BLR at 2-735-36; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490, 25 BLR 2-633, 2-643-44 (6th Cir. 2014) (holding that claimant's testimony that the conditions throughout his employment were "very dusty" met claimant's burden to establish that he was regularly exposed to coal mine dust); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 & n.17, 25 BLR 2-549, 2-564-66 & n.17 (10th Cir. 2014) (holding that claimant's testimony that it was impossible to keep the dust out of the cabs of the vehicles he drove, and that he was exposed to "pretty dusty" conditions "provided substantial evidence of regular exposure to coal mine dust"); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order at 21-22. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment. *Kennard*, 790 F.3d at 664, 25 BLR at 2-735-36.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we further affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[6] or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 23-29.

In determining whether employer established that claimant does not have legal pneumoconiosis,[7] the administrative law judge considered the medical opinions of Drs. Jarboe and Tuteur. Decision and Order at 24-29. Both doctors opined that claimant does not have legal pneumoconiosis, but has a totally disabling obstructive respiratory impairment caused by emphysema and chronic bronchitis, and that those diseases are due solely due to cigarette smoking. Director's Exhibit 11; Employer's Exhibits 3, 8. The administrative law judge discredited both physicians' opinions because he was not persuaded by their explanations for excluding legal pneumoconiosis. Decision and Order at 24-29.

Employer argues that the administrative law judge's sole basis for discrediting the medical opinions of Drs. Jarboe and Tuteur was that the physicians attributed claimant's emphysema and chronic bronchitis, and associated obstructive respiratory impairment, to cigarette smoking rather than coal mine dust exposure. Employer's Brief at 15. Therefore,

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[6] "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). "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 23.

employer asserts that the administrative law judge impermissibly turned the rebuttable presumption at Section 411(c)(4) into an irrebuttable presumption.

Contrary to employer argument, the administrative law judge did not discredit the opinions of Drs. Jarboe and Tuteur simply because they concluded that claimant's lung diseases were due to cigarette smoking rather than coal mine dust exposure. Decision and Order at 24-29. Rather, the administrative law judge acknowledged that claimant had a significant smoking history,[8] and addressed the explanations underlying the conclusions of Drs. Jarboe and Tuteur for why this specific miner does not suffer from legal pneumoconiosis. *Id*. The administrative law judge then set forth his bases for why he found that they did not adequately explain why coal mine dust exposure did not contribute to, or substantially aggravate, claimant's obstructive respiratory impairment. *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); 20 C.F.R. §718.201(b); Decision and Order at 24-29.

Specifically, the administrative law judge noted that Drs. Jarboe and Tuteur both excluded legal pneumoconiosis because claimant's pulmonary function studies evidenced partial reversibility of the obstructive respiratory impairment after bronchodilator treatment. Decision and Order at 25, 28; Director's Exhibit 11; Employer's Exhibits 3, 8. The administrative law judge found this reasoning unpersuasive because the fact that claimant "experienced some relief from bronchodilator treatment does not address the etiology of the fixed portion of his impairment that did not benefit from bronchodilator treatment." Decision and Order at 28; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). The administrative law judge was also not persuaded by the physicians' reliance on statistics and generalizations to exclude legal pneumoconiosis. Decision and Order at 24-27; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008).

Furthermore, the administrative law judge noted that Dr. Jarboe excluded coal mine dust exposure as causing claimant's emphysema because claimant "did not have nodulation visible on his chest x-rays" and "emphysema caused by coal mine dust is associated with 'evidence of dust deposition in the lungs.'" Decision and Order at 25, *quoting* Director's Exhibit 11 at 7. The administrative law judge found that this reasoning was in conflict with the preamble to the 2001 revised regulations, which indicates "that emphysema related to

[8] The administrative law judge found that claimant "smoked [cigarettes] for approximately forty-two pack-years" and that "he likely is exposed to ongoing second-hand smoke." Decision and Order at 4.

coal [mine] dust might develop independently of clinical pneumoconiosis." *Id*; *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-211 (6th Cir. 2012); 65 Fed. Reg. at 79,920, 79,939-43, 79,971. Dr. Jarboe also excluded coal mine dust exposure as causing claimant's chronic bronchitis because claimant left coal mine employment sixteen years before he developed the disease, and chronic bronchitis related to coal mine dust exposure will resolve after the exposure has ceased. Director's Exhibit 11. The administrative law judge found that Dr. Jarboe's reasoning was inconsistent with the regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." Decision and Order at 25; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739, 25 BLR 2-675, 2-685-86 (6th Cir. 2014); 20 C.F.R. §718.201(c). The administrative law judge also found unpersuasive Dr. Jarboe's reasoning that claimant does not have legal pneumoconiosis because he "was not exposed to 'anywhere near' the amount of coal dust that underground miners are exposed to" in his job as surface miner. *Id*. at 27, *quoting* Employer's Exhibit 4 at 19; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

As the administrative law judge's specific credibility determinations are not challenged[9] on appeal, they are affirmed.[10] *See Skrack v. Island Creek Coal Co.*, 6 BLR

[9] Employer argues that the administrative law judge misapplied the preamble to the 2001 revised regulations when discrediting the opinions of Drs. Jarboe and Tuteur because they cited to the reduction of claimant's FEV1/FVC ratio to exclude legal pneumoconiosis. Employer's Brief at 16. The administrative law judge, however, did not cite to this reasoning in discrediting the medical opinions of these physicians. Decision and Order at 23-29. To the extent employer challenges the administrative law judge's use of the preamble to discredit the opinions of Drs. Jarboe and Tuteur, its argument lacks merit. An administrative law judge assessing medical evidence may consider the preamble as a statement of the science accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

[10] Moreover, even if employer's brief could be read as having raised a specific argument, we would hold that substantial evidence supports the administrative law judge's credibility findings. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65, 25 BLR 2-725, 2-734-36 (6th Cir. 2015).

1-710, 1-711 (1983). Substantial evidence supports the administrative law judge's decision to discredit the opinions of Drs. Jarboe and Tuteur, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that employer failed to disprove legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i).

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29-30. The administrative law judge rationally discounted the disability causation opinions of Drs. Jarboe and Tuteur because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 29-30. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the award of benefits.

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