U.S. Department of Labor

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

BRB No. 16-0407 BLA

ANNIS G. MORRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OHIO COUNTY COAL COMPANY/MURRAY ENERGY CORPORATION	)	DATE ISSUED: 05/25/2017
	)	
Employer-Petitioner	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Joseph D. Halbert (Jones, Walters, Turner & Shelton PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-5220) of Administrative Law Judge Thomas M. Burke 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 March 29, 2013.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with seventeen years of qualifying coal mine employment and found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant has sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds in support of the award

[1] Claimant's prior claim, filed on May 7, 2002, was denied on June 18, 2003 because claimant failed to establish any of the elements of entitlement. Decision and Order at 3; Director's Exhibit 1.

[2] 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 in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish any of the elements of entitlement. Thus, in order to obtain review of the merits of his claim, claimant had to establish at least one of the requisite elements. 20 C.F.R. §725.309(c)(3), (4).

of benefits.[4] The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that claimant established seventeen years of qualifying coal mine employment. Section 411(c)(4) requires a claimant to establish at least fifteen years of employment either in "underground coal mines," or in "a coal mine other than an underground mine" in conditions that are "substantially similar" to those in an underground mine. 30 U.S.C. §921(c)(4). The administrative law judge noted the parties' stipulation that claimant established seventeen years of coal mine employment. Decision and Order at 2. The administrative law judge further credited claimant's testimony that all of his coal mine work was at the site of an underground mine.[7] Decision and Order at 2-3, 13; Hearing. Tr. at 14-15. Relying on the Board's decisions in *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011) and *Alexander v. Freeman United Coal Mining Co*., 2 BLR 1-497, 1-501 (1979) (Smith, Chairman, dissenting), the administrative law judge found that because claimant was employed at the site of an underground mine, he was not required to show

[4] Claimant's cross-appeal was dismissed, at his request, on October 13, 2016.

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 12-13. Thus, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Id.*

[6] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 1 (Claimant's July 22, 2002 deposition at 6-8), 5, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[7] As this finding is unchallenged on appeal, it is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 2-3, 13; Employer's Brief at 6, 7.

comparability of environmental conditions in order to invoke the Section 411(c)(4) presumption. Thus, the administrative law judge found that claimant established fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Employer contends that the administrative law judge erred in relying on the Board's holding in *Muncy* in determining that claimant established seventeen years of qualifying coal mine work. Employer argues that the Board's decision in *Muncy* directly contradicts the plain language of the regulation at 20 C.F.R. §718.305(b)(2) that a miner must show that his working conditions were substantially similar to those in an underground mine. Employer's Brief at 6. Thus, employer asserts, claimant must establish that the nature and extent of coal dust exposure at the welding shop where he worked, located approximately one-hundred yards from the mine portal, were substantially comparable to working conditions at an underground mine. Employer's Brief at 5-7. Employer's assertions lack merit.

In *Muncy*, 25 BLR 1-21, 1-28-29, the Board held that in distinguishing between "an underground mine" and a "mine other than an underground mine," the language of Section 411(c)(4), which is echoed in the implementing regulation at 20 C.F.R. §718.305(b)(2), makes clear that it is the *type* of mine (underground or surface), rather than the location of the particular worker (surface or below the ground), that determines whether a miner is required to show comparability of conditions. In this case, because all of claimant's work was performed at the location of an underground mine, the administrative law judge properly found that claimant was not required to show comparability of environmental conditions in order to invoke the Section 411(c)(4) presumption. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013); *Muncy*, 25 BLR at 1-28-29; *Alexander*, 2 BLR at 1-501; Decision and Order at 13. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established fifteen or more years of qualifying coal mine employment. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Muncy*, 25 BLR at 1-27-28.

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 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).

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[8] nor clinical pneumoconiosis,[9] or by establishing 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.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Fino and Vuskovich in finding that it failed to disprove the existence of legal pneumoconiosis.[10] Employer's Brief at 11-12. Dr. Fino opined that claimant does not have legal pneumoconiosis but has a disabling obstructive impairment secondary to cigarette smoking and pulmonary asbestosis. Decision and Order at 8; Director's Exhibits 35, 41. Dr. Vuskovich similarly opined that claimant does not have legal pneumoconiosis, but attributed claimant's disabling pulmonary impairment to congestive

[8] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[9] "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).

[10] While employer generally challenges the administrative law judge's finding that it did not disprove the existence of clinical pneumoconiosis, employer has identified no specific error with respect to this determination. Employer's Brief at 9. Therefore, it is affirmed. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); Decision and Order at 14-15. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. Decision and Order at 15; Employer's Brief at 8-9.

heart failure that significantly degraded claimant's ventilatory capacity. Decision and Order at 9; Employer's Exhibit 3. Dr. Vuskovich also diagnosed mild chronic obstructive pulmonary disease (COPD) but opined that due to claimant's congestive heart failure, it was impossible to determine its cause. *Id.*

The administrative law judge accurately noted that while Dr. Fino attributed claimant's obstructive impairment entirely to the effects of smoking and asbestos exposure, Dr. Fino did not provide any reason for excluding coal dust exposure as a contributing cause of the impairment. Decision and Order at 16; Director's Exhibits 35, 41. Contrary to employer's argument, the fact that Dr. Fino did not state that coal dust played a role in claimant's pulmonary impairment is not, in itself, sufficient to rebut the presumed existence of legal pneumoconiosis. Employer's Brief at 11. Rather, employer must affirmatively disprove the existence of pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 155 n.8 (2015) (Boggs, J., concurring and dissenting).

Further, the administrative law judge properly found that to the extent Dr. Fino attributed claimant's impairment to asbestos exposure, his opinion supports, rather than disproves, the existence of legal pneumoconiosis.[11] Decision and Order at 16. Specifically, the administrative law judge correctly observed that the regulatory definition of pneumoconiosis encompasses any "chronic dust disease of the lung" which is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," and that this definition includes asbestosis arising out of dust exposure in coal mine employment. 20 C.F.R. §718.201(a); *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56, 1-59 (1992); *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990); *see Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 868, 9 BLR 2-79, 2-85-

[11] Dr. Fino stated:

> [Claimant] was clearly exposed to asbestos for [seventeen] years prior to working in the mines. In addition, he tells me that he was exposed to asbestos during his years of working in the mines. I believe that he does have an obstructive defect secondary to smoking. I believe that both the changes due to asbestos and smoking are disabling him. Clearly the asbestosis is related to his work prior to being in the mines. Based on his history, if indeed he had a significant exposure to asbestos in the mines, I cannot rule out his mining work as contributing to the asbestosis.

Director's Exhibit 35 at 8-9. Dr. Fino reiterated his opinion in his supplemental report. Director's Exhibit 41 at 1.

86 (3d Cir. 1986); Decision and Order at 16. Moreover, employer does not dispute the administrative law judge's finding that claimant was exposed to asbestos in the course of his coal mine job duties such as spraying the asbestos insulation inside the welding shop, and into the railroad tank cars used in operating the coal mine, nor does employer dispute the administrative law judge's consideration of this exposure as dust exposure in coal mine employment. Decision and Order at 16; Hearing Tr. at 17-19. Based on the foregoing, we affirm the administrative law judge's finding that Dr. Fino's opinion is not sufficient to meet employer's burden to establish that claimant's pulmonary impairment is not significantly related to or substantially aggravated by coal mine dust exposure**.** *See Shaffer*, 17 BLR at 1-59; *Pershina*, 14 BLR at 1-57; Decision and Order at 16.

Employer next asserts that the administrative law judge erred in discrediting Dr. Vuskovich's opinion that claimant's disabling pulmonary impairment is due to congestive heart failure, and not to coal mine dust exposure.[12] Employer's Brief at 12. Employer asserts that claimant's medical treatment records support Dr. Vuskovich's opinion. *Id.*

As employer correctly asserts, the treatment records from Dr. Wurtzbacher, reflecting that he treated claimant from July 2011 through July 2012 for cardiomyopathy, and discussing the potential future need for "anticongestive treatment" could support Dr. Vuskovich's opinion that claimant suffers from congestive heart failure.[13] Decision and Order at 8-9; Employer's Brief at 12; Director's Exhibit 32; Employer's Exhibit 3 at 1, 4, 8, 10-12. However, the administrative law judge correctly noted that Dr. Vuskovich

[12] Dr. Vuskovich also opined that claimant's spirometry results were consistent with mild chronic obstructive pulmonary disease (COPD), but stated that it was impossible to determine its cause because congestive heart failure can cause the same results. Employer's Exhibit 3 at 8, 10-12. For this same reason, Dr. Vuskovich further opined that it was not possible to tell if claimant has any ventilatory impairment caused by his asbestos exposure. *Id*. at 12. Thus these aspects of Dr. Vuskovich opinion cannot support employer's rebuttal burden to disprove the existence of legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 155 n.8 (2015) (Boggs, J., concurring and dissenting).

[13] Dr. Wurtzbacher did not state that claimant was in congestive heart failure. Director's Exhibit 32. Rather, in his most recent treatment note dated July 25, 2012 Dr. Wurtzbacher stated that claimant was "clinically very stable," and that there was no specific medical treatment planned for the coming year. *Id*. However, Dr. Wurtzbacher further stated that if claimant's condition deteriorated, he would be encouraged to undergo anticongestive treatment. *Id*.

diagnosed congestive heart failure based on his review of the objective testing performed by Drs. Fino and Rasmussen. Decision and Order at 11; Employer's Exhibit 3. The administrative law judge further correctly noted that, in contrast to Dr. Vuskovich, Drs. Fino, Rasmussen, and Lenkey interpreted the pulmonary function studies of record, including the studies upon which Dr. Vuskovich relied, as demonstrating an obstructive impairment and none identified congestive heart failure as its cause. Decision and Order at 11, 16; Director's Exhibits 14, 35, 41, 48; Claimant's Exhibit 3. The administrative law judge permissibly found that as Drs. Fino, Rasmussen, and Lenkey possess superior qualifications to Dr. Vuskovich,[14] Dr. Vuskovich's exclusion of coal mine dust exposure as a cause of claimant's pulmonary impairment, on the basis that claimant's congestive heart failure could fully account for claimant's disabling pulmonary impairment, is not credible. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); Decision and Order at 11, 16. Moreover, employer does not challenge this finding on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's determination that Dr. Vuskovich's opinion is not sufficient to meet employer's burden to rebut the presumed existence of legal pneumoconiosis.[15] *See Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Decision and Order at 16.

Because the administrative law judge permissibly discredited the opinions of Drs. Fino and Vuskovich, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

[14] Specifically, the administrative law judge found that Drs. Fino and Lenkey are Board-certified in both internal and pulmonary medicine and Dr. Rasmussen is Board-certified in internal medicine and specializes in pulmonary medicine. As the administrative law judge's credibility determination that Dr. Vuskovich is the least well-qualified physician is not challenged on appeal, it is affirmed. *See Skrack*, 6 BLR at 1-711; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 11.

[15] As the administrative law judge provided a valid reason for discrediting Dr. Vuskovich's opinion, the administrative law judge's error, if any, in stating that claimant's treatment records do not mention the presence of congestive heart disease, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

The administrative law judge next addressed whether employer established rebuttal by showing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 17. The administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Fino and Vuskovich that claimant does not suffer from legal pneumoconiosis also undercut their opinions that claimant's disabling impairment is not caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-73 (6th Cir. 2013); Decision and Order at 17. Because the opinions of Drs. Fino and Vuskovich are the only opinions that could support employer's burden of proof we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis.[16] *See* 20 C.F.R. §718.305(d)(2)(ii).

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[16] We, therefore, need not address employer's arguments regarding the opinions of Drs. Rasmussen and Lenkey. *See Larioni*, 6 BLR at 1278; Employer's Brief at 9-11.