U.S. Department of Labor

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

BRB No. 17-0419 BLA

DON C. SHEPHERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOR-COAL, INCORPORATED	)	
	)	
and	)	
	)	
ARROWPOINT CAPITAL/SECURITY INSURANCE COMPANY OF HARTFORD	)	DATE ISSUED: 05/31/2018
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

Ann Marie Scarpino (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2015-BLA-05878) of Administrative Law Judge Daniel F. Solomon, awarding benefits on a claim filed on December 11, 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 credited claimant with sixteen years and four months of coal mine employment[1] in conditions substantially similar to those in underground mines, and found that he 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 presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] that he is totally disabled due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that it was "improperly brought" before the administrative law judge and therefore should be dismissed as the responsible operator. Employer's Brief at 12. Employer also contends that the administrative law judge erred in finding that claimant worked in conditions substantially similar to those in underground mines and is totally disabled, and therefore erred applying the Section 411(c)(4) presumption. Employer also argues that even if the Section 411(c)(4) presumption applies, the administrative law judge erred in finding that employer failed to rebut it. Claimant

[1] Claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more years of underground or substantially similar coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), contends in her response that employer is the properly named responsible operator. Employer has filed a reply brief, reiterating its arguments.

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. Responsible Operator

Employer argues that it should be dismissed as the responsible operator because the district director's Proposed Decision and Order awarding benefits, issued on August 21, 2013, was not served on employer as required under 20 C.F.R. §725.418(b). Employer's Brief at 11-12; Director's Exhibit 20. Although the administrative law judge remanded this claim to the district director to correct the service error, employer contends that under 20 C.F.R. §725.407(d), "once a claim proceeds to the Office of Administrative Law Judges and an Employer is improperly there, the Employer should be dismissed from the case." Employer's Brief at 11-12.

We decline to address employer's argument because, as the Director points out, employer conceded before the administrative law judge that it is the responsible operator. Director's Brief at 1. Employer submitted a Notice of Withdrawal of Responsible Operator Contestation on May 24, 2016, stating that it was withdrawing the issue from contention and was willing to stipulate "that it is the potentially responsible operator in this claim." In a Joint Status Report on July 19, 2016, employer again indicated that it was withdrawing the responsible operator issue. Finally, at a hearing on August 30, 2016, employer's counsel affirmed that employer had withdrawn the issue. Hearing Transcript (Aug. 30, 2016) at 8. Therefore, the administrative law judge reasonably found, as stipulated by the parties, that employer is the responsible operator. Decision and Order at 2. Because employer is bound by its stipulations below, *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730, 25 BLR 2-405, 2-418 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), we decline to address its argument on appeal, and we affirm the administrative law judge's finding.

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

A. Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish that he worked for at least fifteen years at underground coal mines, or at surface mines in

conditions "substantially similar" to those in underground mines. 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). The administrative law judge accepted the parties' stipulation that claimant had sixteen years and four months of coal mine employment. Decision and Order at 2, 4. Noting that only six months of claimant's coal mine employment was at underground mines, the administrative law judge considered claimant's evidence regarding his working conditions and determined that it "established an equivalency to underground mining in excess of 15 years." Decision and Order at 4-5.

Employer contends that the conditions of claimant's work at surface mines "were not similar to underground mining, and he has failed to prove that they were." Employer's Brief at 18. Employer argues further that claimant's "mere testimony should not be considered sufficient evidence" that his working conditions were substantially similar to those in underground coal mines. *Id*.

Employer's arguments lack merit. The administrative law noted that, in describing his job duties for employer and other coal mine operators, claimant wrote that he repaired and maintained mining equipment in "very dusty" work environments. Decision and Order at 4; Director's Exhibit 5. The administrative law judge also cited claimant's testimony at the hearing, when he was asked if his work at surface mines was "just as heavy and just as difficult and just as dusty" as his work at underground mines: "Yes, sir. I worked as a welder and mechanic in the coal pits, on the tipples and on the (indiscernible), so it was continuously rock dust and coal dust." Decision and Order at 4; Hearing Transcript (May 19, 2016) at 16. Contrary to employer's contentions, the administrative law judge reasonably found, based on claimant's uncontested job description and testimony, that he worked in conditions substantially similar to those in an underground mine. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664, 25 BLR 2-725, 2-735-36 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490, 25 BLR 2-633, 2-643-44 (6th Cir. 2014). Therefore, we affirm the administrative law judge's finding that claimant has more than fifteen years of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption.

B. Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative

law 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 determined that claimant established total disability based on the pulmonary function studies and medical opinion evidence. Decision and Order at 5-15. Employer acknowledges that claimant's pulmonary function studies are qualifying,[3] along with some of his blood gas studies, and that "some medical opinions" support a finding of total disability.[4] Employer's Brief at 15. Employer argues, however, that "disability in a federal black lung claim should be permanent disability," and that the administrative law judge erred by finding claimant to be totally disabled without considering that every physician agreed that claimant's pulmonary condition would improve if he lost weight. *Id*. at 15-16. Employer contends that claimant does not have a permanent respiratory impairment, and thus should not be considered totally disabled pursuant to 20 C.F.R. §718.204(b). *Id*. at 16.

Employer's argument lacks merit, as it is entirely speculative. No physician opined that claimant would be able to perform his usual coal mine work, or would not be totally disabled, if he lost weight. Moreover, the *cause* of a claimant's disabling respiratory or pulmonary impairment is addressed at 20 C.F.R. §718.204(c) or, when a claimant has invoked the Section 411(c)(4) presumption, on rebuttal at 20 C.F.R. §718.305(d)(1)(ii).

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[3] A "qualifying" pulmonary function study or arterial 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. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] Drs. Rao, Green, and Rothfleisch concluded that claimant is unable to return to his usual coal mine employment and is totally disabled. Decision and Order at 8-11; Director's Exhibits 13, 18; Employer's Exhibit 4 at 11, 16-18, 28; Claimant's Exhibits 1, 2. Dr. Jones determined that claimant's pulmonary function studies revealed a "mild obstructive defect/significant restrictive defect with reduced diffusion capacity that corrects with alveolar volume," consistent with morbid obesity. Employer's Exhibit 1 at 3. Dr. Jones concluded that claimant "may be limited with shortness of breath secondary to mild COPD [chronic obstructive pulmonary disease]," but that claimant does not have pneumoconiosis and his symptoms "are more consistent with [m]orbid [o]besity." *Id*. The administrative law judge found that Dr. Jones did not consider claimant's work requirements and make a determination about his capacity to perform his usual coal mine employment, pursuant to 20 C.F.R. §718.204(b)(1). Decision and Order at 12.

See 20 C.F.R. §718.204(a) ("If . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis."). Because employer raises no other arguments, we affirm the administrative law judge's finding that the pulmonary function studies and medical opinion evidence establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Consequently, we also affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

III. Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[5] or that "no part of the miner'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 found that employer failed to rebut the presumption by either method.

Rebutting the presumption that claimant has legal pneumoconiosis required employer to prove that the miner's pulmonary or respiratory impairment "was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(2)(i)(A). The administrative law judge considered the medical opinions of Drs. Rao, Green, and Rothfleisch, each of whom concluded that claimant has legal pneumoconiosis, as well as the contrary opinion of Dr. Jones.[6] Director's Exhibit 18, Claimant's Exhibits 1, 2;

[5] "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).

[6] Dr. Rao concluded that claimant has chronic obstructive and restrictive lung disease, and that "his work in the coal mines has played a significant role in his respiratory impairment." Director's Exhibit 18. Dr. Green diagnosed pneumoconiosis and COPD based on claimant's history of coal mine employment "with exposure to respirable coal and rock dust and the associated symptoms of chronic cough, wheezing, and shortness of breath and mucus expectoration." Claimant's Exhibit 1. Dr. Rothfleisch concluded that claimant has pneumoconiosis and chronic bronchitis, with coal dust "at least a significant aggravating factor" in claimant's bronchitis. Claimant's Exhibit 2. Dr. Jones diagnosed a

Employer's Exhibit 1. The administrative law judge discredited Dr. Jones's opinion because Dr. Jones "disregarded" and "failed to account" for claimant's coal mine employment. Decision and Order at 17-19; *see Crockett Colleries, Inc., v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis.[7] *Id*. at 19.

Employer argues that the administrative law judge erred in crediting the opinions of Drs. Rao, Green, and Rothfleisch, but does not challenge the administrative law judge's decision to discount Dr. Jones's opinion. Employer's Brief at 13-15. We therefore affirm, as unchallenged, the administrative law judge's discrediting of Dr. Jones's opinion. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17-19. Because it is employer's burden to rebut the presumption that claimant has legal pneumoconiosis, and because the administrative law judge discredited the only opinion that could help employer meet its burden, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis, and thus failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[8]

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mild obstructive defect and significant restrictive defect and determined that claimant "may be limited with shortness of breath secondary to mild COPD," but opined that "this does not fit the clinical picture" of pneumoconiosis, and that claimant's symptoms "are more consistent with Morbid Obesity." Employer's Exhibit 1 at 3.

[7] The administrative law judge also found that employer failed to prove that claimant does not have clinical pneumoconiosis, crediting a positive reading by Dr. Crum of the most recent x-ray over a negative reading of the same x-ray by Dr. Klassen, because Dr. Crum, a Board-certified radiologist and a B reader, has better qualifications than Dr. Klassen, a Board-certified radiologist. Decision and Order at 17; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995).

[8] We need not address employer's arguments that the administrative law judge erred in crediting the opinions of Drs. Rao, Green, and Rothfleisch, because those opinions do not assist employer in establishing that claimant does not have legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Nor do we need to address employer's argument that the administrative law judge erred in finding that it failed to prove that claimant does not have clinical pneumoconiosis, as its failure to disprove legal pneumoconiosis precludes a finding that it rebutted the presumption at 20 C.F.R. §718.305(d)(1). *See id.*; Employer's Brief at 12-13.

Finally, the administrative law judge found that employer did not rebut the presumption by establishing 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. Employer contends that Dr. Jones's opinion establishes that claimant's pulmonary impairment arose from his smoking history, obesity, elevated hemidiaphragm, and congestive heart failure. Employer's Brief at 18-21. Contrary to employer's argument, the administrative law judge rationally discounted Dr. Jones's opinion on the cause of claimant's disability because he did not diagnose claimant with pneumoconiosis, contrary to the administrative law judge's findings 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. Therefore, we 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).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge