U.S. Department of Labor

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

BRB No. 15-0067 BLA

JAMES E. ELLIOT, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HELEN MINING COMPANY	)	DATE ISSUED: 11/23/2015
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 appeals the Decision and Order Awarding Benefits (2013-BLA-5949) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on September 7, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). The administrative law judge considered the claim pursuant to 20 C.F.R. Part 718, and initially determined that claimant did not prove that he has pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(2). The administrative law judge then addressed the applicability of the presumptions referenced in 20 C.F.R. §718.202(a)(3), noting that to invoke the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4), claimant must establish 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 impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b)(1).

Because employer stipulated to 23.17 years of coal mine employment, without specifying whether it occurred underground, aboveground at an underground mine, or aboveground at a surface mine, the administrative law judge addressed whether claimant satisfied his burden of proving that he had at least fifteen years of qualifying coal mine employment pursuant to 20 C.F.R. §718.305(b)(1)(i). The administrative law judge found that the evidence was sufficient to establish that claimant worked for approximately ten years underground and, during the remainder of his approximately thirteen years of employment, which occurred aboveground, he was regularly exposed to coal dust. Based on this determination, and the parties' stipulation that claimant suffers from a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant was entitled to the amended Section 411(c)(4) presumption. The administrative law judge further determined that employer failed to rebut the presumption, and awarded benefits accordingly.

Employer contends that the administrative law judge erred in finding that claimant established the fifteen years of qualifying coal mine employment sufficient to invoke the amended Section 411(c)(4) presumption. Employer also argues that the administrative law judge did not properly weigh the medical opinion evidence relevant to rebuttal of the presumption. Employer further alleges that the administrative law judge erred in limiting employer to the rebuttal provisions set forth in 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, requesting that the Board reject employer's contention that the administrative law judge improperly restricted the methods of rebuttal available to employer.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and 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).

Invocation of the Amended Section 411(c)(4) Presumption – Length of Qualifying Coal Mine Employment

Employer alleges that the administrative law judge erred in relying on claimant's hearing testimony to establish that his aboveground employment constituted qualifying coal mine employment for purposes of invoking the amended Section 411(c)(4) presumption. Employer maintains that "claimant's testimony at the hearing was insufficient in itself to establish that he was regularly exposed to coal mine dust while employed above ground."[2] Employer's Brief at 15. We reject employer's contention.

To invoke the amended Section 411(c)(4) presumption, the implementing regulation at 20 C.F.R. §718.305 requires the miner to have at least fifteen years of employment in "underground coal mines, or in coal mines other than underground coal mines in conditions substantially similar to those in underground mines, or in any combination thereof. . . ." 20 C.F.R. §718.305(b)(1)(i). 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 the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." The miner need not directly compare his or her work environment to conditions underground, but can establish similarity by offering sufficient evidence of the surface mining conditions in which he or she worked. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). A miner's unrebutted testimony can support a finding of substantial similarity. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001).

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

[2] In its Closing Memorandum to the administrative law judge, employer did not dispute the truthfulness of claimant's hearing testimony concerning the nature and location of his approximately twenty-three years of work with employer, nor did employer identify any evidence to the contrary. October 27, 2014 Responsible Operator's Closing Memorandum at 3-4.

In this case, claimant testified at the hearing that all of his approximately twenty-three years of coal mine employment were with employer. Hearing Transcript at 17. Claimant stated that, for the first ten years, he worked underground as a miner operator, while for the remainder of his time he was employed aboveground as a refuse truck driver, coal loader and tipple operator. *Id*. Claimant further testified that during his aboveground employment, he was regularly exposed to coal dust when performing all three of these positions. *Id*. at 17-19. In his Decision and Order, the administrative law judge acknowledged that "claimant testified at length as to the dusty conditions of his aboveground mining positions."[3] Decision and Order at 5. Based on this testimony, the administrative law judge acted within his discretion as fact-finder in determining that claimant was regularly exposed to coal dust in his aboveground work pursuant to 20 C.F.R. §718.305(b)(2). *See Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Spese v. Peabody Coal Co.*, 19 BLR 1-45, 1-54 (1995); Decision and Order at 5. The administrative law judge permissibly determined, therefore, that "[c]laimant was employed in the coal mining industry for more than the statutorily-relevant fifteen years[.]" Decision and Order at 5; *see Muncy*, 25 BLR at 1-29; *Alexander v. Freeman United Coal Mining Co*., 2 BLR 1-497, 1-504 (1979) (interpreting the originally-enacted Section 411(c)(4)). Accordingly, we affirm the administrative law judge's finding that claimant was entitled to invocation of the amended Section 411(c)(4) presumption, in light of the length of his qualifying coal mine employment and the parties' stipulation that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1).

Rebuttal of the Amended Section 411(c)(4) Presumption

Pursuant to 20 C.F.R. §718.305(d)(1), once the administrative law judge determined that claimant was entitled to the presumption at amended Section 411(c)(4), the burden shifted to employer to affirmatively prove that claimant does not have legal and clinical pneumoconiosis,[4] or that no part of his disability is caused by

[3] The administrative law judge also summarized claimant's application for benefits, on which he listed twenty-seven years of coal mine employment; his Department of Labor CM-911a form listing approximately 23.5 years of coal mining employment; his CM-913 form, where he claimed 23.5 years of coal mining employment; his Social Security Administration records reflecting twenty-three total years of coal mining employment; and the district director's calculation of 23.17 years of coal mine employment. Decision and Order at 5; Director's Exhibits 2-5, 30.

[4] "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

pneumoconiosis as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Initially, we reject employer's contention that applying the rebuttal methods set forth in 20 C.F.R. §718.305(d)(1) improperly restricted employer to the methods of rebuttal provided to the Secretary of Labor under 30 U.S.C. §921(c)(4). In support of its argument, employer cites the statutory language of 30 U.S.C. §921(c)(4),[5] and the United States Supreme Court's holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976), that the rebuttal limitations are inapplicable to coal mine operators. Employer's argument is substantially similar to the one that the Board rejected in *Owens*, and we reject it here for the reasons set forth in that decision. *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring); *see also Bender*, 782 F.3d at 137-40; *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1347-48, 25 BLR 2-549, 2-570-72 (10th Cir. 2014); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1061 n.4, 25 BLR 2-453, 2-472 n.4 (6th Cir. 2013). Moreover, as the Director indicates, the regulations implementing amended Section 411(c)(4) fill the statutory gap created by the omission of a specific reference to responsible operators, clarify ambiguous phraseology, and effectuate the purpose of the Act, i.e., to compensate miners with fifteen or more years of coal mine employment who are disabled by pneumoconiosis. Director's Letter Brief at 1 n.1.

The administrative law judge observed at the outset of his consideration of rebuttal that the only issue was whether employer established that "[c]laimant's total pulmonary or respiratory disability arises from his coal workers' pneumoconiosis due to his past coal mine employment." Decision and Order at 14. The administrative law judge determined that the medical reports and deposition testimony of employer's experts, Drs. Fino and Spagnolo, were insufficient to rebut the presumed fact of total disability causation under 20 C.F.R. §718.305(d)(2)(ii). *Id.* at 17-19. The administrative law judge determined that Drs. Fino and Spagnolo did not provide adequate explanations for their exclusion of legal pneumoconiosis as a contributing cause of claimant's totally disabling asthma,

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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).

[5] The terms of 30 U.S.C. §921(c)(4) provide, "[t]he Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

particularly in light of the medical science that the Department of Labor (DOL) cited in the preamble to the 2001 revisions to the definition of pneumoconiosis. *Id*.

Employer contends that the administrative law judge erred in discrediting the opinions of Drs. Fino and Spagnolo[6] on the issue of total disability causation. Employer maintains the physicians' exclusion of legal pneumoconiosis as a cause of claimant's asthma, and totally disabling obstructive impairment, does not contradict the preamble, because the medical literature cited by DOL identifies only chronic bronchitis and emphysema as chronic obstructive diseases resulting from coal dust exposure. These contentions have no merit.[7]

Contrary to employer's argument, DOL recognized in the preamble to the 2001 revised regulations that "the term 'chronic obstructive pulmonary disease' (COPD) includes three disease processes characterized by airways dysfunction: chronic bronchitis,

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[6] Dr. Fino examined claimant on April 26, 2013, and opined in his report that asthma is the sole cause of claimant's totally disabling obstructive impairment. Director's Exhibit 27 at 8-9. He further identified asthma as a disease of the general population, and indicated that coal dust exposure played no role in claimant's asthma because his shortness of breath began three or four years after he left the mines. *Id*. at 1-2, 10. Dr. Fino testified at his subsequent deposition that he diagnosed asthma based on claimant's wheezing, his response to bronchodilators, and his normal diffusing capacity. Employer's Exhibit 1 at 7, 9. He also indicated that claimant's minimal smoking history had no impact on his impairment. *Id*. at 12-13. Dr. Spagnolo reviewed claimant's medical records and prepared a report dated March 22, 2014. Employer's Exhibit 5. He diagnosed an obstructive impairment caused by asthma, but also indicated that he could not exclude claimant's "continued smoking," as a contributing cause of his obstructive impairment. *Id*. at 7-8. Dr. Spagnolo concluded, "[t]here is no objective evidence that coal dust exposure has in any way caused or contributed to [claimant's] medical conditions." *Id*. at 8. At his subsequent deposition, Dr. Spagnolo stated that claimant's normal DLCO (diffusing capacity of the lung for carbon dioxide) value is consistent with asthma, rather than emphysema or coal workers' pneumoconiosis. Employer's Exhibit 6 at 13, 39. He also testified that coal dust can aggravate asthma, but only until the exposure ends. *Id*. at 36.

[7] Because employer bears the burden of proof on rebuttal, we will not address employer's allegations of error regarding the administrative law judge's consideration of claimant's entitlement to benefits under 20 C.F.R. Part 718, without use of the amended Section 411(c)(4) presumption. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); 30 U.S.C. §902(b).

emphysema, *and asthma*." 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (emphasis added); *see* Decision and Order at 17 n.15. DOL also recognized that there was a consensus among medical experts that coal dust exposure can cause COPD. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2001). DOL revised the definition of pneumoconiosis to reflect these facts, explicitly stating that legal pneumoconiosis includes "any chronic restrictive or *obstructive pulmonary disease* arising out of coal mine employment," and that pneumoconiosis, both legal and clinical, is "a latent and progressive disease that may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(a)(2) (emphasis added), (c). Employer is incorrect, therefore, in alleging that COPD, for the purposes of the preamble and the revised regulations, encompasses only chronic bronchitis and emphysema. Rather, the administrative law judge reasonably determined that the opinions of Drs. Fino and Spagnolo were entitled to little weight because they conflict with DOL's recognition that asthma is a form of obstructive lung disease that can result from coal dust exposure, and that pneumoconiosis is a latent and progressive disease. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-222 (2009); Decision and Order at 17 n.15.

The administrative law judge also permissibly found that Dr. Fino did not adequately reconcile his acknowledgement that the productive cough claimant had while working in the coal mines "may have" been due to coal dust exposure, with his conclusion that claimant's cough is "now" associated with asthma. Employer's Exhibit 1 at 14; *see Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-93 (1988); Decision and Order at 17-18, 19. Similarly, the administrative law judge acted rationally in discrediting Dr. Spagnolo's opinion, because he summarily dismissed any impact by coal mine dust on asthma after exposure ends, without citing any supporting medical literature. *See Worhach*, 17 BLR at 1-110; Decision and Order at 19; Employer's Exhibit 6 at 36.

The administrative law judge reasonably concluded, therefore, that Drs. Fino and Spagnolo did not "sufficiently disassociate" claimant's "asthma, or its severity, from his coal mine dust exposure" to support a finding of rebuttal of the presumed fact of total disability causation. Decision and Order at 19; 20 C.F.R. §§718.201(b), 718.305(d)(2)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015) (Boggs, J., concurring & dissenting); Decision and Order at 19. Thus, we affirm the administrative law judge's determination that employer failed to rebut the

amended Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii).[8] *See Bender*, 782 F.3d at 134-35; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

[8] Because the administrative law judge did not first consider whether employer can rebut the presumed existence of both legal and clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i), he did not determine whether employer established the absence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). Decision and Order at 14. He also appeared to treat claimant's failure to prove that he has clinical pneumoconiosis as equivalent to employer establishing rebuttal at 20 C.F.R. §718.305(d)(1)(i)(B). *Id*. at 8-11, 14. Remand is not required, however. Our affirmance of the administrative law judge's discrediting of the medical opinions of employer's experts on the cause of claimant's obstructive impairment precludes employer from disproving the existence of legal pneumoconiosis, and thereby precludes rebuttal under 20 C.F.R. §718.305(d)(1)(i). *See* 20 C.F.R. §718.201(a)(2), (b); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-447 (6th Cir. 2013). For the same reason, we need not address employer's arguments relating to the administrative law judge's weighing of the x-ray evidence relevant to the existence of clinical pneumoconiosis.

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