U.S. Department of Labor

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

BRB No. 17-0575 BLA

LON HARVEY MORTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTH AKERS MINING COMPANY, LLC	)	
	)	
and	)	DATE ISSUED: 11/14/2018
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler, Jr. (Kirk Law Firm), Pikeville, Kentucky, for claimant.

Denise Hall Scarberry and Paul E. Jones (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order – Awarding Benefits (2012-BLA-06061) of Administrative Law Judge Alan L. Bergstrom 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, 2011.[1]

The administrative law judge credited claimant with 27.72 years of coal mine employment at underground mines and found that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c),[2] and 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).[3] The

[1] This is claimant's second claim for benefits. Director's Exhibit 3. His prior claim, filed on August 9, 2004, was denied by the district director on October 19, 2006 because he failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until filing this subsequent claim on October 25, 2011.

[2] Where 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 did not establish any element of entitlement. Director's Exhibit 3. Consequently, to obtain review of the merits of his claim, claimant had to establish one element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Based on claimant's testimony, the administrative law judge found that all of his coal mine work was performed either underground or above ground at an underground mine site. Decision and Order at 16; Hearing Tr. at 12-14; Director's Exhibit 21-7. Thus, the administrative law judge found that all of claimant's coal mine work constitutes qualifying work for the purposes of the fifteen-year presumption. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee at

administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer asserts that the administrative law judge erred in finding that claimant has at least fifteen years of qualifying coal mine employment and, therefore, erred in finding that he invoked 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 of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[4]

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.[5] 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 Section 411(c)(4) Presumption

Length of Coal Mine Employment

In order to invoke the Section 411(c)(4) presumption, claimant must establish that he worked for at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]"[6] 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of

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an underground coal mine); *Kanawha Coal Co. v. Director, OWCP* [*Kuhn*], 539 F. App'x 215, 218 (4th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-503-504 (1979).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that all of claimant's coal mine work was performed either underground or above ground at an

proof to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method of calculation and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge considered claimant's deposition and hearing testimony together with his application for benefits, employment history form, and Social Security Administration (SSA) earnings records.[7] Decision and Order at 15-18. For claimant's employment from 1957-1959, a period during which SSA reported earnings on a quarterly basis, the administrative law judge credited claimant with each quarter of coal mine employment during which he earned at least $50.00, and for the remaining years the administrative law judge used the formula set forth at 20 C.F.R. §725.101(a)(32)(iii).[8]

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underground mine site. *See Skrack*, 6 BLR at 1-711; Decision and Order at 16; Hearing Tr. at 12-14; Director's Exhibit 21-7.

[7] The administrative law judge found that claimant's Social Security Administration (SSA) earnings records reflect potential coal mine employment as follows: Elkhorn Fuel, in the last quarter of 1957, all four quarters of 1958, and the last quarter of 1959, and from the second quarter of 1974 through 1982; Indian Mountain Fuel for the last quarter of 1959; Mokie Coal Company in the last two quarters of 1975, the first two quarters of 1976, and from 1982 through 1984; Cabin Knoll Coal Company in 1977; H & B Coal Company from 1985 to 1986; AA & W Coals from 1987 to 1996; Wells Fargo Coal in 1987; and South Akers Mining Company from 1996 to 2010. Decision and Order at 16-17; Director's Exhibit 7.

[8] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii). The administrative law judge applied this formula by dividing claimant's yearly income by the BLS-reported average daily earnings of employees in coal mining to determine the number of days claimant worked that year. Decision and Order at 15-18; *see Exhibit 610 of the Coal Mine (BLBA) Procedure Manual*.

Decision and Order at 15-16. Using these methods, the administrative law judge found that claimant had 9.34 years of employment at Elkhorn Fuel, 1.19 years at Mokie Coal Company, 0.53 years at H & B Coal Company, 9.02 years at AA & W Coals, 0.13 years at Wells Fargo Coal, and 7.51 years at South Akers Mining Company.[9] Decision and Order at 17-18. Totaling these periods, the administrative law judge credited claimant with 27.72 years of qualifying coal mine employment. *Id*. at 18.

Employer argues that the administrative law judge erred in crediting claimant with any time worked for Elkhorn Fuel because there is no evidence that this constituted coal mine employment or, if so, that claimant was exposed to coal dust while working there. Employer's Brief at 5-7.

It is the administrative law judge's function to weigh the evidence and draw his conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We affirm, as unchallenged on appeal, the administrative law judge's determinations to credit claimant with periods of coal mine employment at Mokie Coal Company, H & B Coal Company, AA & W Coals, Wells Fargo Coal, and South Akers Mining Company, totaling 18.38 years.[10] *See Skrack v. Island*

Then, based on the definition of "year" at 20 C.F.R. §725.101(a)(32), the administrative law judge credited claimant with one full year of coal mine employment during each calendar year in which he worked at least 125 days, or a fraction of a year if he worked less than 125 days. *Id*. Because employer has not raised any error with respect to the administrative law judge's use of this formula to calculate the length of claimant's coal mine employment, the administrative law judge's methodology is affirmed. *See Skrack*, 6 BLR at 1-711.

[9] Based on claimant's testimony, the administrative law judge found that claimant's work from 2004 to 2010 on a farm owned by South Akers Mining Company did not constitute coal mine employment. Decision and Order at 17-18; Hearing Tr. at 17-18; Director's Exhibit 21 at 8-9. Further, to avoid duplication of periods of coal mine employment with Elkhorn Fuel, the administrative law judge did not credit claimant with his work for Indian Mountain Fuel in the final quarter of 1959, the 0.08 years that he worked for Mokie Coal Company in 1976, and the 0.14 years that he worked for Cabin Knoll Coal Company in 1977. Decision and Order at 17.

[10] Based on its contention that claimant should not be credited with employment at Elkhorn Fuel, employer asserts that claimant established only 5.82 years of coal mine employment from 1974-1982 and 1983-1989. Employer's Brief at 6. Employer does not address, however, the remaining fourteen calendar years, 1990-2003, during which

Creek Coal Co., 6 BLR 1-710, 1-711 (1983). Thus, even without 9.34 years of employment at Elkhorn Fuel, claimant established more than the fifteen years of qualifying coal mine employment needed to invoke the Section 411(c)(4) presumption. Any error by the administrative law judge in crediting claimant with employment at Elkhorn Fuel is therefore harmless. *See Larioni v. Director, OWCP,* 6 BLR 1-1276, 1-1278 (1984). We, therefore, affirm the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 24.

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 claimant has neither legal nor clinical pneumoconiosis,[11] or that "no part of [his] 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 establish rebuttal by either method.

After finding that employer disproved the existence of clinical pneumoconiosis, 20 C.F.R. §718.202(a)(1), the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis. To disprove legal pneumoconiosis, employer must establish that claimant does not have a chronic lung disease or impairment that is "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)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

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claimant was credited with more than thirteen years of coal mine employment with AA & W Coals and South Akers Mining. Decision and Order at 16-18.

[11] 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 includes, but is not limited to, 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). 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).

The administrative law judge considered the medical opinions of Drs. Dahhan and Broudy.[12] Dr. Dahhan opined that claimant does not have legal pneumoconiosis but suffers from a disabling obstructive impairment probably related to cigarette smoking, hyperactive airway disease or bronchial asthma, and unrelated to coal dust exposure. Director's Exhibits 15, 16. Dr. Broudy opined that claimant does not have legal pneumoconiosis but suffers from a severe respiratory impairment, with partial reversibility that may be associated with chronic obstructive pulmonary disease (COPD) from cigarette smoking or some predisposition to asthma or bronchospasm. Employer's Exhibit 2. The administrative law judge found that the opinions of Drs. Dahhan and Broudy are not well-reasoned and, therefore, do not rebut the presumption of legal pneumoconiosis. Decision and Order at 27-28.

Employer argues that the administrative law judge applied an incorrect standard by requiring employer's medical experts to "rule out" coal mine dust exposure as a cause of claimant's respiratory impairment. Employer's Brief at 7-8. Contrary to employer's assertion, the administrative law judge did not find that the opinions of Drs. Dahhan and Broudy are insufficient to disprove the existence of legal pneumoconiosis on the basis that they failed to "rule out" coal dust exposure as a causative factor of claimant's respiratory impairment. Decision and Order at 27-28. Rather, the administrative law judge found that their opinions are not credible based on the rationale each physician provided for why claimant does not have legal pneumoconiosis. *Id*. As employer does not allege specific error in the administrative law judge's credibility determinations, we affirm them. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because we affirm the administrative law judge's discrediting of the opinions of Drs. Dahhan and Broudy, the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis. Thus, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); Decision and Order at 28.

[12] The administrative law judge also considered the medical opinions of Drs. Baker and Fino. Dr. Baker opined that claimant suffers from legal pneumoconiosis in the form of chronic obstructive pulmonary disease and chronic bronchitis related to coal dust exposure and cigarette smoking. Director's Exhibit 14. Dr. Fino opined that claimant's pulmonary emphysema cannot be explained by cigarette smoking and that coal mine dust cannot be excluded as a contributing factor. Claimant's Exhibit 1.

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing 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)(ii). The administrative law judge found that the same reasons for which he discredited the opinions of Drs. Dahhan and Broudy that claimant does not have legal pneumoconiosis also undercut their opinions that claimant's disabling respiratory impairment is unrelated to pneumoconiosis. *See Big Branch Resources, 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 28-29. Employer has not raised any specific challenge to this finding. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. Therefore, we affirm the administrative law judge's finding that employer failed to prove 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).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, claimant has established his entitlement to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge