U.S. Department of Labor

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

BRB No. 18-0051 BLA

BILLY BEAMS CAIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CAIN & SON, INCORPORATED[1]	)	
	)	DATE ISSUED: 11/26/2018
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 Alice M. Craft, 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.

[1] On February 22, 2018, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Reform the Caption to Accurately Name the Responsible Operator on the grounds that the administrative law judge erroneously listed Shamrock Coal Company as the responsible operator in this case, whereas Cain & Son, Incorporated is the properly designated responsible operator. Based on the hearing transcript and service sheets contained in the record listing Cain & Son, Incorporated as the employer, the Board granted the Director's motion on March 1, 2018. *Cain v. Cain & Son, Inc.*, BRB No. 18-0051 BLA (Mar. 1, 2018) (unpub. Order).

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05725) of Administrative Law Judge Alice M. Craft 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 April 4, 2012.[2] Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[3] the administrative law judge credited claimant with "greater than" fifteen years[4] of surface coal mine employment in conditions substantially similar to those in an underground mine and found that the new evidence established 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 pursuant to Section 411(c)(4), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's determination that the conditions in claimant's surface coal mine employment were substantially similar to those in an underground mine. Employer also argues that the administrative law judge

[2] Claimant filed two previous claims that were both finally denied. Claimant's most recent prior claim, filed on January 24, 2003, was denied by Administrative Law Judge Daniel J. Roketenetz because claimant failed to establish pneumoconiosis and total disability due to pneumoconiosis and, therefore, failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Director's Exhibit 1 at 38. Claimant did not further pursue his January 2003 claim. Claimant filed the current subsequent claim on April 4, 2012. Director's Exhibit 3.

[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.

[4] The administrative law judge found that employer conceded that claimant worked for "greater than" fifteen years in coal mine employment. Decision and Order at 4.

erred in finding that it failed to rebut the Section 411(c)(4) presumption.[5] Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response to employer's appeal.[6]

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.[7] 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

To invoke the Section 411(c)(4) presumption, claimant must establish that he worked for at least fifteen years "in one or more 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." 30 U.S.C. §921(c)(4). The conditions of a miner's

[5] On August 29, 2018, employer filed a Motion to Remand this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge, based on the Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. The Director responded, arguing that employer waived the argument by failing to raise it in its opening brief before the Board. Because employer first raised its Appointments Clause argument seven months after filing its Memorandum in Support of Petition for Review, employer forfeited the issue. *See Lucia*, 138 S. Ct. at 2055 ("one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a totally disabling 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(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

surface coal mine employment will be considered substantially similar to those in underground mines "if the miner was regularly exposed to coal-mine dust while working there."[8] 20 C.F.R. §718.305(b)(2).

In finding that claimant has more than fifteen years of coal mine employment, the administrative law judge credited claimant's testimony that he first worked as an underground coal miner for "five or six months," but spent the rest of his coal mining career, from 1950 or 1951 to "maybe" 1990, at surface mines.[9] Decision and Order at 4; Director's Exhibit 1 at 17-20, 22, 26; Hearing Transcript at 12. His first coal mining jobs

---

[8] The comments accompanying the Department of Labor's regulations further explain that:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013).

[9] Claimant's employment history form, CM-911a, similarly alleges coal mine employment during 39 calendar years. According to the information provided, claimant "loaded coal" at underground mines from January 1949 to September 1949 for Kay Jay Coal; loaded coal at underground mines from 1949 to 1950 for Kentucky Jellico Coal; cleaned coal, operated a shovel, and loaded coal at surface mines from 1950 to 1960 for Ikerd Coal Co.; operated a dozer and loaded coal at surface mines from 1960 to 1972 for Arnold Coal Co.; was a foreman and dozer operator from 1974 to 1975 at surface mines for Kyle Coal Co.; and was a foreman and dozer operator at surface mines from 1977 to 1989 for Cain & Son, Inc. Director's Exhibit 4. Claimant's Social Security Administration earnings records reflect income from various coal companies during at least seventy-eight quarters between 1949 and 1975, in addition to income from Cain & Sons from the second quarter of 1977 through 1989. Director's Exhibit 12.

included loading coal underground using a shovel, cleaning coal from strip jobs, and "get[ting] down [to] scrap up the coal." Director's Exhibit 1 at 17. His coal mining jobs at various employers thereafter consisted of cleaning coal and greasing equipment, but primarily involved loading coal as an operator of a steam shovel. *Id*. at 19-20. Claimant estimated that he "spent 33 years loading coal." *Id*. at 20. After he stopped working as a steam shovel operator, claimant and his sons started Cain & Son, Inc., the responsible operator in this claim, in "about [1980]" and "worked [until 1990]." *Id*. at 21. Claimant worked there as a foreman and "part of the time" as a dozer operator.[10] *Id*. at 19.

Employer does not contest the accuracy of claimant's testimony regarding the number of years he worked in coal mine employment, or his duties, and further concedes that claimant "worked more than [fifteen] years in surface coal mine work." Employer's Brief at 14. We therefore affirm the administrative law judge's finding that claimant's testimony establishes greater than fifteen years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

In further finding that claimant was "regularly exposed" to coal mine dust in all of his surface mine employment pursuant to 20 C.F.R. §718.305(b)(2), the administrative law judge credited claimant's testimony regarding the conditions of his employment. Claimant testified that he was exposed to "coal dust and dirt dust" in all of his coal mining jobs since 1950 and, when asked how dusty it was, he responded that he has "seen the mines full of dust." Decision and Order at 4; Director's Exhibit 1 at 21. When asked which of his jobs exposed him to "the most coal dust," claimant responded, "load[ing] coal for years and years." Decision and Order at 4; Hearing Transcript at 12.

Employer does not contest the administrative law judge's finding that claimant's testimony is sufficient to establish that all of his coal mine employment prior to his work for employer was either underground or in conditions substantially similar to those underground. That finding is therefore affirmed. *Skrack*, 6 BLR at 1-711. Employer instead argues that the administrative law judge "failed to consider [that] the exposure [claimant] described occurred much earlier in his mining career" at mines not owned by employer. Employer's Brief at 15. Employer concedes that claimant was exposed to coal dust in his work for employer, but asserts that "it was not proven to be in conditions substantially similar to an underground mine." *Id*.

[10] Claimant stated that he was required "to keep time and keep the men safe" and "run a small dozer [with an open cab] . . . behind the trucks" and "keep the road up." Hearing Transcript at 12.

To the extent employer is arguing that a surface miner cannot invoke the Section 411(c)(4) presumption unless he establishes that his dust exposure specifically with the named responsible operator was substantially similar to underground mining, that argument is rejected. To invoke the presumption, claimant need only show that he "engaged in coal-mine employment for fifteen years in one or more" underground mines, surface mines where he was regularly exposed to coal mine dust, or any combination of the two. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(i); *see e.g. Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 662 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 486 (6th Cir. 2014). As employer does not contest that claimant had fifteen years of coal mine employment prior to working for employer, or the finding that all of that work was either underground or in conditions substantially similar to those underground, we affirm the administrative law judge's rational determination that claimant established more than fifteen years of qualifying coal mine employment and thus invoked the Section 411(c)(4) presumption.[11] *Sterling*, 762 F.3d at 489-490; Decision and Order at 5.

II. 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,[12] 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

[11] Moreover, employer is incorrect that claimant's testimony regarding his dust exposure relates only to the coal mining work he did prior to his work for employer. Employer's Brief at 15. Immediately after testifying about the jobs he held as a surface coal miner between 1950 and 1990, including his final years of work as a foreman and dozer operator for employer, claimant was asked, "During all those jobs from 1950 on, [were] you exposed to dust?" Director's Exhibit 1 at 21. He responded, "Oh, yeah, yeah. . . . Coal dust and dirt dust." Consequently, we reject employer's argument that claimant's testimony relates only to his employment "much earlier in his mining career." *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 488-89 (6th Cir. 2014); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Employer's Brief at 15.

[12] "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).

administrative law judge found that employer disproved that claimant has clinical pneumoconiosis, but failed to disprove that he has legal pneumoconiosis or that his totally disabling impairment was caused by legal pneumoconiosis. Decision and Order at 21-25.

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Jarboe and Rosenberg that claimant does not have legal pneumoconiosis. Employer's Brief at 16-19. We disagree.

To disprove that claimant has legal pneumoconiosis, employer must establish, by a preponderance of the evidence, 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." 20 C.F.R. §718.201(b); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). Dr. Jarboe opined that claimant's totally disabling ventilatory impairment was caused by "severe persistent bronchial asthma and to a lesser extent by cigarette smoking," and is unrelated to coal dust exposure. Director's Exhibit 16. According to Dr. Jarboe, "the thing that sort of sealed . . . the diagnosis is [claimant] had very significant response to bronchodilator agents" during Dr. Jarboe's pulmonary function testing. Employer's Exhibit 4 at 11. The administrative law judge noted, however, that claimant's obstruction was only partially reversible and remained totally disabling even after the bronchodilator treatment. Decision and Order at 23. He therefore permissibly found that Dr. Jarboe did not credibly explain why the irreversible portion of claimant's pulmonary impairment is not due to coal mine dust exposure. *See* 20 C.F.R. §718.201(a)(2); *Kennard*, 790 F.3d at 668; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 23. Further, while Dr. Jarboe opined that claimant's lung volumes exhibited "marked air trapping" that was characteristic of smoking and asthma, but not coal dust exposure, the administrative law judge permissibly found that Dr. Jarboe failed to adequately explain why claimant's asthma was not aggravated by his significant history of coal dust exposure. *See* 20 C.F.R. §718.201(a)(2), (b); *Kennard*, 790 F.3d at 668; Decision and Order at 23; Employer's Exhibits 4, 13.

Dr. Rosenberg diagnosed obstructive lung disease attributable to asthma and chronic obstructive pulmonary disease caused by cigarette smoking. Employer's Exhibits 3, 12. In excluding coal dust as a cause of claimant's impairment, he opined that claimant's "FEV1 was significantly reduced to 34% predicted with a marked reduction of his FEV1/FVC ratio down to around 46%," and that this "extreme decline" in the FEV1/FVC ratio "indicates that the obstruction is entirely related to cigarette smoking."[13] Employer's

[13] Dr. Rosenberg stated that claimant "has demonstrated at times a severe reduction of his FEV1 with a marked reduction of his FEV1/FVC ratio, coupled with a bronchodilator

Exhibit 3 at 7. In accordance with the Sixth Circuit's opinion in *Sterling*, the administrative law judge permissibly discounted this aspect of Dr. Rosenberg's opinion as inconsistent with the Department of Labor's (DOL) recognition that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is related to coal mine dust exposure. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see* 20 C.F.R. §718.204(b)(2)(i)(C); *Sterling*, 762 F.3d at 491; Decision and Order at 23-24. In addition, noting that studies found credible by the DOL recognize that the risks associated with smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited Dr. Rosenberg's opinion because he did not explain why coal dust exposure did not contribute, along with cigarette smoking, to claimant's obstructive impairment. *See Barrett*, 478 F.3d at 356 (administrative law judge permissibly rejected physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); Decision and Order at 24, *referencing* 65 Fed. Reg. at 79,940; *see also* 20 C.F.R. §718.201(b).

As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the opinions of Drs. Jarboe and Rosenberg are insufficient to rebut the presumed fact of legal pneumoconiosis.[14] Consequently, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

As employer has not separately challenged the administrative law judge's finding that it failed to rebut the presumed fact of disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii), that finding is affirmed. *Skrack*, 6 BLR at 1-711. Claimant has therefore established his entitlement to benefits.

---

response, increased air trapping and a low diffusing capacity measurement." Employer's Exhibit 12. He further opined that the pattern of claimant's disabling airflow disease is "classic" for a smoking-related form of chronic obstructive pulmonary disease, and that, over time, claimant "probably" developed airway remodeling from asthma. *Id*.

[14] We also affirm, as unchallenged on appeal, the administrative law judge's finding that the opinion of Dr. Baker, diagnosing legal pneumoconiosis, does not assist employer in rebutting the presumption. *Skrack*, 6 BLR at 1-711.

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