U.S. Department of Labor

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

BRB No. 18-0536 BLA

ARTHUR L. BROWNING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NELSON BROTHERS LLC	)	DATE ISSUED: 11/13/2019
	)	
and	)	
	)	
GREAT AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Felicia A. Snyder (Snyder Law Offices, PLLC), Lexington, Kentucky, for employer.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05525) of Administrative Law Judge Natalie A. Appetta on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on March 30, 2015.[1]

The administrative law judge determined claimant established thirty to thirty-six years of surface coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. She therefore found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). She further found employer failed to rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant's work as a blaster constituted the work of a miner and therefore in finding claimant established at least fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Employer also asserts the administrative law judge erred in determining it did not rebut the presumption. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the award of benefits.[3]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational,

[1] Claimant's prior claim was withdrawn. Director's Exhibit 1; Decision and Order at 2 n.4. Additionally, claimant's cross-appeal in this proceeding was dismissed at his request. *Browning v. Nelson Brothers LLC*, 18-0536 BLA and 18-0536 BLA-A (Feb. 6, 2019) (unpub. Order).

[2] Under Section 411(c)(4), claimant is presumed to be totally disabled due to pneumoconiosis if he 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), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability. *See* 20 C.F.R. §718.204(b)(2); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-18.

supported by substantial evidence, and in accordance with applicable law.[4] 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 Presumption – Length of Qualifying Coal Mine Employment

Because claimant established total disability, he is entitled to the Section 411(c)(4) presumption if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. The administrative law judge found claimant worked for thirty to thirty-six years as a driller and blaster at surface coal mines in conditions substantially similar to those in an underground mine.[5] Decision and Order at 8-10.

We reject employer's assertion claimant's work as a blaster was not the work of a miner. Employer's Brief at 8-9. A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). The implementing regulation provides "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, has held that duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986); *Eplion v. Director, OWCP*, 794 F.2d 935, 937 (4th Cir. 1986). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility; under the function requirement, the miner must have been employed in the extraction or preparation of coal. *Krushansky*, 923 F.2d at 41.

[4] We will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Decision and Order at 3 & n.6.

[5] The administrative law judge did not determine how many years claimant spent as a driller or as a blaster. Rather, she found both jobs constituted qualifying coal mine employment for thirty to thirty-six years in total. Decision and Order at 8, 10. Thus, while she noted claimant also worked as a blaster in road construction where coal was removed, she found it unnecessary to determine whether this work constituted additional coal mine employment. *Id.* at 8 n.8.

Employer argues claimant's work as a blaster at surface mines did not satisfy the function requirement because he did not participate in the extraction of coal.[6] Employer states: "[c]laimant's job was to hold the hose while blasting material was pumped into the ground" and "[t]he hole would be drilled when the [c]laimant arrived." Employer's Brief at 8. Contrary to employer's contention, however, the function requirement "does not require that an individual be engaged in the actual extraction or preparation of coal" but only that his work "be essential to coal mining." *Ray v. Williamson Shaft Contracting Co*., 14 BLR 1-105, 1-110 (1990) (en banc); *see also Krushansky*, 923 F.2d at 42. As the administrative law judge rationally found, blasting is integral and necessary to the extraction of coal because the rock in a surface mine must be removed in order to reach the coal seam and remove coal. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); Decision and Order at 8. Thus, we reject employer's contention and affirm the administrative law judge's finding claimant's work as a blaster at surface mines constituted employment as a miner. 20 C.F.R. §725.202(a); Decision and Order at 8.

We further affirm, as supported by substantial evidence, the administrative law judge's findings that claimant was "regularly exposed to coal mine dust throughout his [thirty to thirty-six year] mining career as a driller and blaster" and, therefore, worked in conditions substantially similar to those in an underground mine.[7] 20 C.F.R.

[6] Employer does not dispute that claimant worked as a blaster at surface coal mines. Employer's Brief at 8. Employer asserts, however, claimant cannot be considered a miner because he was not around the area of the mine where coal was being extracted or produced on a daily basis. *Id*. at 9. To the extent this argument can be construed as a challenge to the situs requirement, we reject it. Claimant is not required to work in the area of the mine where the coal is being extracted. The situs requirement only necessitates that an individual spend a significant portion of time in or around a coal mine, which claimant did. *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 933 (6th Cir. 1989); *see Clifford v. Director, OWCP*, 7 BLR 1-817, 1-819 (1985); Employer's Exhibit 2 at 23-24; Employer's Exhibit 4 at 21.

[7] As the administrative law judge observed, claimant testified he was regularly exposed to coal dust during his work as a blaster and a driller, including during his employment as a blaster for employer. Decision and Order at 9-10; Hearing Transcript at 22-33, 45-48. Specifically, claimant stated he held a hose while blasting material was pumped into the ground and was exposed to coal dust during drilling, from the pit where coal was loaded out and from coal trucks driving back and forth. *Id*. at 33, 45-48; Employer's Exhibit 2 at 18-20, 30. Employer's managers testified that blasters are not exposed to coal dust but admitted there is rock, dirt, and mining dust, all of which constitute coal mine dust. Employer's Exhibits 3 at 12, 4 at 11-12, 5 at 10-11; *see Garrett v. Cowin*

§718.305(b)(2); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 (10th Cir. 2014) ("substantial similarity" is established if claimant proves the miner was regularly exposed to coal-mine dust); Decision and Order at 9-10. As employer raises no other challenge to the administrative law judge's length of coal mine employment determination, we affirm her finding that claimant established thirty to thirty-six years of qualifying coal mine employment sufficient to invoke the presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-490 (6th Cir. 2014); Decision and Order at 9, 18.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[8] 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 employer failed to establish rebuttal by either method.[9]

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 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). The administrative law judge considered

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& Co., Inc., 16 BLR 1-77, 1-81 (1990) ("[T]he legal definition of 'coal dust' and 'coal mine dust' is not limited to dust from the substance coal itself, but includes all dust from any substance arising from the extraction or preparation of coal.").

[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). Clinical pneumoconiosis is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

[9] The administrative law judge determined employer disproved clinical pneumoconiosis, but did not disprove legal pneumoconiosis. Decision and Order at 20-22.

Dr. Gaziano's opinion that claimant has legal pneumoconiosis and Dr. Broudy's contrary opinion. Decision and Order at 21-22; Director's Exhibits 17, 21-22; Claimant's Exhibit 1; Employer's Exhibit 1. She accorded "the most weight" to Dr. Gaziano's opinion, finding it better explained. Decision and Order at 21. Thus, the administrative law judge concluded employer did not meet its burden of proving claimant does not have legal pneumoconiosis. *Id*. at 22.

We reject employer's contention the administrative law judge erred in crediting Dr. Gaziano's opinion. First, there is no merit to employer's assertion that the administrative law judge credited Dr. Gaziano based on his credentials without giving adequate consideration to Dr. Broudy's credentials. Employer's Brief at 6. The administrative law judge noted Dr. Gaziano is authorized to perform Department of Labor (DOL)-sponsored complete pulmonary evaluations and did so in this case.[10] Decision and Order at 15. She also took official notice that he is Board-certified in internal medicine and chest diseases based on her familiarity with his credentials and "numerous evaluations and reviews [he has performed] on behalf of the [DOL]."[11] Decision and Order at 17. While employer asserts Dr. Broudy is also on the list of physicians authorized to perform DOL evaluations, any error in the administrative law judge's failure to independently search the list for Dr.

[10] Section 413(b) of the Act requires the Department of Labor (DOL) to provide each miner who files a claim for benefits with a complete pulmonary examination. *See* 30 U.S.C. §923(b); 20 C.F.R. §725.406(a), (e). The Office of Workers' Compensation Program's Division of Coal Mine Workers' Compensation maintains a list of physicians authorized to perform these evaluations for miners. *See* 20 C.F.R. §725.406(b); Office of Workers' Compensation Programs BLBA Bulletin 15-05, https://www.dol.gov/owcp/dcmwc/blba/indexes/BL15.05OCR.pdf.

[11] The administrative law judge found neither Dr. Gaziano's credentials nor Dr. Broudy's credentials are in the record. Decision and Order at 17. She stated she is familiar with Dr. Gaziano's credentials, however, because he has performed numerous evaluations and reviews on behalf of the DOL. *Id.* at 15, 17. Thus, she took official notice of his credentials. *Id.* at 15. The record evidence supports her findings: Dr. Gaziano performed the DOL examination in this case and his letterhead identifies certification as a B-reader, as well as board certifications in Internal Medicine and Pulmonary Medicine. Director's Exhibits 17, 21. In contrast, the administrative law judge noted that while Dr. Broudy's letterhead reports he is a B-reader and physician, his credentials are otherwise unknown. *Id.* at 16, 17. Employer asserts that because Dr. Broudy is also on the DOL approved provider list, the administrative law judge was required to take official notice of his credentials and give his and Dr. Gaziano's opinions "the same weight" on that basis. Employer's Brief at 5-6.

Broudy's name and take judicial notice of that fact is harmless as she specifically declined to credit or discredit either physician based on his credentials. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 17; Employer's Brief at 5-6. Instead, she evaluated whether their opinions were reasoned and documented and assigned them weight on this basis. *See* Decision and Order at 17 & n.15, 21, 24.

We also reject employer's assertion that Dr. Gaziano's opinion lacks credibility because he allegedly did not know claimant worked as a blaster at a surface mine, not an underground mine. *See* Employer's Brief at 6-7. In his October 22, 2015 report, Dr. Gaziano noted claimant was a "coal miner [for forty years] – strip mines blaster and drilling." Director's Exhibit 17. In his November 4, 2016 supplemental report he similarly recorded claimant "worked for forty years in the mining industry. He did strip mine work as a blaster and driller with exposure to coal dust." Director's Exhibit 21. In addition, at his deposition, Dr. Gaziano testified he was aware the majority of claimant's coal mine employment was surface mining but was not aware of the "specific breakdown" of the work. Claimant's Exhibit 1 at 13-14. Thus, Dr. Gaziano was aware claimant worked on the surface, not underground.

Further, Dr. Gaziano explained that he formed his opinion primarily based on the duration of claimant's dust exposure and there is no merit to employer's contention that he relied on an inaccurate exposure history. Employer's Brief at 7-8; Claimant's Exhibit 1 at 14-15. While Dr. Gaziano's initial reports relied on forty years of exposure, he testified his opinion would be unchanged if claimant had only thirty-six years of coal mine dust exposure. Claimant's Exhibit 1 at 5. Although he also stated his opinion might be different if claimant had less than thirty to forty years of coal dust exposure, the administrative law judge's finding of thirty to thirty-six years of regular dust exposure is within the range Dr. Gaziano identified. *See* Decision and Order at 9-10; Claimant's Exhibit 1 at 14-15. We thus reject employer's contention that Dr. Gaziano's indication his opinion might change if claimant had fewer years of dust exposure rendered his opinion unreliable.[12] Employer's Brief at 6-7.

[12] As we have affirmed the administrative law judge's finding claimant had thirty to thirty six years of qualifying coal mine employment, we reject employer's additional contention that Dr. Gaziano failed to consider "[c]laimant was a blaster and did not work as an actual miner in determining the number of years he was exposed to coal dust." Employer's Brief at 8.

Employer also suggests Dr. Gaziano's opinion should be discredited because it was based in part on an x-ray when the administrative law judge found the x-rays negative for clinical pneumoconiosis. Employer's Brief at 7-8. As the record shows, however, Dr. Gaziano interpreted claimant's October 22, 2015 x-ray as negative for clinical pneumoconiosis, consistent with the administrative law judge's finding. Decision and Order at 20; Director's Exhibits 17, 21; Claimant's Exhibit 1 at 5. Further, nothing in the record suggests Dr. Gaziano diagnosed claimant with clinical pneumoconiosis or relied on any such diagnosis in opining claimant has legal pneumoconiosis. As employer raises no further arguments regarding the credibility of Dr. Gaziano's opinion, we affirm the administrative law judge's permissible determination that it "is well documented and reasoned and entitled to considerable weight." Decision and Order at 21; *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998). As employer raises no other allegations of error regarding the administrative law judge's weighing of the medical opinions, we affirm her finding that Dr. Gaziano's opinion diagnosing legal pneumoconiosis is more persuasive than Dr. Broudy's contrary opinion. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (The Board is not empowered to reweigh the evidence.). Accordingly, we affirm the administrative law judge's findings that employer failed to disprove legal pneumoconiosis and, therefore, failed to rebut the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 22, 25.

The administrative law judge next considered whether employer established that "no part of [claimant'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). She rationally discounted Dr. Broudy's opinion that claimant's disability is not due to pneumoconiosis because he did not diagnose legal pneumoconiosis, contrary to her determination employer did not disprove the existence of the disease.[13] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 115-16 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); Decision and Order at 24-25. We therefore affirm the administrative law judge's finding employer did not rebut the Section 411(c)(4)

[13] Dr. Broudy did not offer an opinion on disability causation independent of his belief claimant does not have legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Director's Exhibit 22; Employer's Exhibit 1.

presumption by establishing no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge