U.S. Department of Labor

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

BRB No. 18-0580 BLA

EMERY WESTERFIELD Claimant-Respondent v. ARCH ON THE NORTH FORK, INCORPORATED and Self-insured through ARCH COAL, INCORPORATED, c/o UNDERWRITERS SAFETY AND CLAIMS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/05/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05899) of Administrative Law Judge Jason A. Golden 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 subsequent claim filed on August 21, 2015.[1]

The administrative law judge found claimant established eighteen years of coal mine employment either underground, or in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. He therefore found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement.[3] He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant established at least fifteen years of qualifying coal mine employment sufficient to invoke the Section 411(c)(4) presumption. Employer also asserts the administrative law judge

[1] This is claimant's third claim for benefits. On December 18, 2002, the district director denied his most recent prior claim, filed on October 9, 2001, because claimant did not establish any element of entitlement. Director's Exhibit 2. Claimant took no further action on that claim.

[2] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has 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); 20 C.F.R. §718.305.

[3] 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). Because his prior claim was denied for failure to establish any element of entitlement, claimant was required to establish at least one element to obtain a merits review of his subsequent claim. 20 C.F.R. §725.309(c).

erred in finding that it did not rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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

Qualifying Coal Mine Employment

Because claimant established he is totally disabled, he is entitled to the Section 411(c)(4) presumption if he had at least fifteen years of employment in underground coal mines or surface mines "in conditions substantially similar to those in an underground mine." 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1)(ii). "The 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 [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (Kethledge, J., concurring); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

The parties stipulated to eighteen years of coal mine employment.[6] Decision and Order at 5; Hearing Transcript at 5-6. Of that time, the administrative law judge found claimant worked in underground mines for approximately two years and spent the rest of his career at surface mines. Decision and Order at 5. Relying on claimant's uncontradicted

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability and, therefore, established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(c); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18-19; Employer's Brief at 8.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as 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 1.

[6] The parties stipulated to the length but not the nature of claimant's coal mine employment. Decision and Order at 4; Hearing Transcript at 5-6.

testimony, the administrative law judge determined he was regularly exposed to coal mine dust during his surface coal mine employment. *Id*. at 5-6. Thus, he determined claimant worked at surface mines in conditions substantially similar to an underground mine and, therefore, established at least fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. *Id*. at 5-6, 17, 19.

Contrary to employer's argument, claimant was not required to establish his dust exposure was "continuous" or that "the dust conditions during all of his surface employment in the mines was comparable to underground employment."[7] Employer's Brief at 8; *see Duncan*, 889 F.3d at 304 (rejecting argument that claimant must provide evidence of "the actual dust conditions" and citing with approval the Department of Labor's position that "dust exposure evidence will be inherently anecdotal"); *Kennard*, 790 F.3d at 664 (claimant's "uncontested lay testimony" regarding the dust conditions he experienced "easily supports a finding" of regular dust exposure); *Sterling*, 762 F.3d at 490 (claimant's testimony that the conditions of his employment were "very dusty" sufficient to establish regular exposure).

Further, we reject employer's contention that the administrative law judge did not explain his findings concerning the conditions of claimant's surface mine employment in accordance with the Administrative Procedure Act (APA).[8] Employer's Brief at 10. The

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[7] The comments accompanying the Department of Labor's regulations explain claimant's burden in establishing substantial similarity:

> [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).

[8] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions

administrative law judge explained he relied on claimant's testimony concerning his working conditions to find that claimant credibly established regular dust exposure. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the administrative law judge did and why he did it, the duty of explanation under the APA is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); Decision and Order at 5-6.

Specifically, the administrative law judge noted claimant testified he was exposed to the inhalation of coal and rock dust at all of his surface coal mine employers, including River Processing, Kentucky Prince, Polls Creek Coal Company, Buckhorn-Hazard, Ken Mack Coal Company, and employer.[9] Decision and Order at 5-6; Director's Exhibit 1 at 62-65. While claimant acknowledged his dust exposure with employer was not "continuous," he affirmed that "week in and week out" he was exposed to coal and rock dust. Decision and Order at 5; Director's Exhibit 1 at 61-62. He stated that all of his work was at the job site, never in a shop, and he never wore a dust mask for protection. Decision and Order at 6; Hearing Transcript at 17, 27-29. Further, he did not state, as employer contends, that except for his work in the pits he was exposed to less dust on the surface than underground.[10] Employer's Brief at 9. Rather, when asked whether it was fair to say he was exposed to less dust on the surface than underground, he answered,"[w]ell, that's according to what kind of dust you're talking about," and drew a distinction between "coal dust," "rock dust" or "just regular old dust."[11] Decision and Order at 6, *referencing* Hearing

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and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[9] Claimant similarly indicated on his coal mine employment history forms that he was exposed to "dust, gases, or fumes" in all of his surface coal mine work. Director's Exhibits 1, 2, 5.

[10] While claimant stated there was a difference between surface dust exposure and underground dust exposure, he explained the distinction was that in the deep mine he was not exposed to rock dust. Hearing Transcript at 29, 36.

[11] When asked if he could describe how dusty it was in the pits, claimant responded, "[n]ow, are you talking about coal dust or rock dust or just regular old dust?" Hearing Transcript at 35. He clarified that working where they were loading coal in the pits was the dustiest part of the surface mine "[f]or coal dust." *Id.* at 37. Working near the rock trucks was the dustiest for "rock" or "regular" dust exposure because if he was working where overburden was being removed, "180-ton trucks coming through there about 60

Transcript at 35, 37, 38. The administrative law judge, citing 65 Fed. Reg. 79,920, 79,958 in which the Department explained its regulation, noted "the occupational dust exposure at issue under [the Act] is the total exposure arising from coal mining and not only exposure to coal dust itself." Director's Exhibit 1 at 63-65; Hearing Transcript at 34-35. The definition of "coal-mine dust" is not limited to coal dust specifically, but encompasses "the various dusts around a coal mine." *Pershina v. Consolidation Coal Co*., 14 BLR 1-55, 1-57 (1990). Thus, exposure to any kind of coal mine dust may support a finding of substantially similar conditions. *See Kennard*, 790 F.3d at 665; *Garrett v. Cowin & Co., Inc*., 16 BLR 1-77, 1-81 (1990). Because it is supported by substantial evidence, we affirm the administrative law judge's permissible conclusion that claimant's testimony establishes his surface coal mine work occurred in conditions substantially similar to those in an underground mine. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 6.

Employer also argues the administrative law judge erred in crediting claimant with two years of underground coal mine employment. Employer's Brief at 10. While we agree with employer the administrative law judge did not sufficiently explain how he reached this finding, remand is not required on this basis.[12] Whether claimant had two years of

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miles an hour" cause it to be dusty for "rock dust" or "regular dust." *Id*. at 35. The same was true if he was called to repair a truck:

> When a rock truck breaks down on the road . . . they'd pull it in the middle and there'd be trucks running both ways and sometimes you'd have to wait five minutes before you could see on the rock dust.

Id. 37-38. When asked if he was exposed to "coal dust" in other parts of the surface mine besides the pits or on the road, he answered, "[a] pit full of coal dust, no." *Id.* at 38. He did not state these were the only two occasions when he was exposed to dust. Employer's Brief at 9-10.

[12] The length of claimant's underground coal mine employment is not immediately apparent from his testimony. At his 1993 deposition, claimant testified he worked for Hazard Mining "in the deep mines" in 1969 and 1970. Director's Exhibit 1 at 64. At the hearing, in response to a question about the underground work he did for Hazard Mining in 1969, claimant stated that it was "six or eight months. I'm guessing. I don't know." *Id*. at 22. He further testified that when he worked for Buckhorn-Hazard Coal Company in 1971 and 1972, he spent two to four hours per day, five days per week "in the deep mines . . . but the rest of it was on a strip job." Hearing Transcript at 23-24. When asked how long he worked in underground mines, claimant replied "roughly give or take two years. That's all for Hazard Mining." Hearing Transcript at 35-36. When asked if those two

underground employment, or only six to eight months as employer asserts, is of no consequence in light of employer's stipulation to eighteen years of coal mine employment, and our affirmance of the administrative law judge's finding claimant was regularly exposed to coal mine dust in all his surface mine employment. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984). Thus we 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. *See Martin*, 400 F.3d at 305; Decision and Order at 6, 19.

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[13] 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.

To disprove legal pneumoconiosis, employer must demonstrate 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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the new opinions of Drs. Jarboe and Dahhan, who opined claimant does not have legal pneumoconiosis but suffers from an obstructive impairment due solely to cigarette

years included the days he spent working both underground and at the surface in strip mines he responded, "All except Hazard Mining. It was eight or ten hours a day for about six months or so." *Id*. at 36.

[13] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary 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).

smoking.[14] Decision and Order at 14-16, 23-25; Director's Exhibit 19; Employer's Exhibits 3, 5. He found their opinions neither persuasive nor well-reasoned and, therefore, entitled to little weight. Decision and Order at 23-25. Thus, he determined that employer did not rebut the Section 411(c)(4) presumption by disproving legal pneumoconiosis. *Id*.

We reject employer's contention the administrative law judge erred in discrediting Dr. Jarboe's opinion. The administrative law judge accurately observed Dr. Jarboe excluded a diagnosis of legal pneumoconiosis based in part on claimant's response to bronchodilators on pulmonary function testing, stating "[t]he inhalation of coal dust does not cause reversible airway disease." Decision and Order at 24; Director's Exhibit 19. Noting claimant's obstruction was only partially reversible, he permissibly determined Dr. Jarboe did not credibly explain why the irreversible portion of claimant's pulmonary impairment is not due, in part, to coal mine dust exposure. *See* 20 C.F.R. §718.201(a)(2); *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 24; Director's Exhibits 15, 19. The administrative law judge further noted Dr. Jarboe based his opinion on recent literature indicating "cigarette smoking is much more harmful and likely to cause airflow obstruction than the inhalation of coal mine dust." Decision and Order at 23, *quoting* Director's Exhibit 19. The administrative law judge permissibly found that even if claimant had a greater chance of developing an obstruction from smoking, Dr. Jarboe did not explain how claimant's coal dust exposure would thereby be eliminated as a significantly related or substantially aggravating factor in his obstruction. *Barrett*, 478 F.3d at 356; Decision and Order at 24-25. Consequently, the administrative law judge permissibly determined Dr. Jarboe's opinion is insufficiently reasoned and entitled to diminished weight. *See Adams*, 694 F.3d at 801-02; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002).

Nor is there merit to employer's contention the administrative law judge erred in finding Dr. Dahhan's opinion insufficient to rebut the presumption. Dr. Dahhan acknowledged claimant "has a sufficient history of exposure to coal dust to be injurious to

[14] The administrative law judge also considered Dr. Ajjarapu's opinion diagnosing legal pneumoconiosis, and correctly noted it does not assist employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 13-14, 25; Director's Exhibits 15, 21. The administrative law judge further considered the evidence from claimant's prior claim and permissibly found it merited less weight due to its age. *See* 20 C.F.R. §725.309(c)(2); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); Decision and Order at 19. Consequently, we find no merit to employer's contention that the administrative law judge failed to consider Dr. Hussain's opinion from claimant's prior claim. Employer's Brief at 12.

the respiratory system and cause adverse lung disease in a susceptible host." Employer's Exhibit 3. He then cited general statistics concerning the FEV1 loss due to coal dust and smoking, discussed the types of emphysema associated with coal dust and smoking, and concluded that claimant's impairment is unrelated to his coal mine dust exposure. *Id*. The administrative law judge permissibly found Dr. Dahhan did not adequately explain how he excluded claimant's coal mine dust exposure as a causative factor in claimant's impairment along with smoking. *See Kennard*, 790 F.3d at 668; *Barrett*, 478 F.3d at 356; *Rowe*, 710 F.2d at 255; Decision and Order at 25; Employer's Exhibit 3. Thus, the administrative law judge rationally found Dr. Dahhan's opinion entitled to little probative weight. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 25. We therefore affirm his finding that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Total Disability Causation

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing 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). Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Jarboe and Dahhan that claimant's disability is not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to his finding.[15] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 25-26. Therefore, we affirm the administrative law judge's determination 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).

[15] Neither doctor expressed an opinion on disability causation independent of his belief that the miner did not have legal pneumoconiosis. *See* Director's Exhibit 19; Employer's Exhibits 3, 5.

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