U.S. Department of Labor

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

BRB No. 16-0122 BLA

SYLVESTER J. LINTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE GROUP	)	DATE ISSUED: 10/26/2016
	)	
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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/carrier (employer) appeals the Decision and Order (11-BLA-5284) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on October 27, 2009.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with seventeen years of qualifying coal mine employment,[2] and found that the 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 set forth at Section 411(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer contends that the administrative law judge erred in finding that claimant either worked in underground coal mines or that claimant's surface coal mine employment was substantially similar to underground coal mine employment. Employer specifically argues that the administrative law judge erred in relying upon 20 C.F.R. §718.305(b)(2), which employer

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

alleges is invalid, to find that claimant's surface coal mine employment was substantially similar to underground coal mine employment. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contention that 20 C.F.R. §718.305(b)(2) is invalid. In separate reply briefs, employer reiterates its previous contentions.[3]

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. 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

Employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically challenges the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. Section 411(c)(4) requires at least fifteen years of employment either in "underground coal mines," or in "a coal mine other than an underground mine" in "substantially similar" conditions. 30 U.S.C. §921(c)(4). Section 411(c)(4) does not define the term "substantially similar." Section 718.305(b)(2) provides that "[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." 20 C.F.R. §718.305(b)(2).

Employer concedes that claimant's employment of fourteen months with Southern Appalachian Coal Company as a jack setter (August 1975 to October 1976) constitutes qualifying coal mine employment because it was either underground or involved "enclosed mining." Employer's Brief at 7. Employer also concedes that claimant's employment of one and one-half years with Central Appalachian Coal Company as a shuttle car operator (October 1976 to April 1977 and November 1981 to October 1982)

[3] Because it is not challenged on appeal, we affirm the administrative law judge's finding that the evidence established that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

constitutes qualifying coal mine employment because it occurred in conditions "substantially similar" to those in an underground mine. *Id.* at 7-8; Employer's Post-Hearing Brief at 41. Employer, however, argues that the administrative law judge erred in determining that claimant's additional fourteen years of coal mine employment as a shuttle coal operator for employer, Cannelton Industries, Incorporated (Cannelton), and for Hawks Nest Mining Company (Hawks Nest), constitute qualifying coal mine employment. We disagree.

Claimant indicated that he worked as a shuttle car operator for Cannelton from April 1977 to October 1980, for Hawks Nest from October 1980 to November 1981, and again for Cannelton from August 1994 to September 2004. Director's Exhibit 3. Although claimant did not specifically testify that his work as a shuttle car operator took place at an underground coal mine, the administrative law judge found that the title of the position itself "most likely indicate[s] employment at an underground coal mining site." Decision and Order at 7. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Employer does not directly challenge the reasonableness of the administrative law judge's inference that claimant's work as a shuttle car operator necessarily took place in an underground coal mine.[4] Because the administrative law judge's inference is reasonable and based on substantial evidence,[5] we affirm the administrative law judge's determination that

[4] Employer, Cannelton Industries, Incorporated (Cannelton), does not assert that claimant, while working at its mine sites, did not work underground. In fact, employer references "dust conditions *in the* Cannelton mine," further supporting the administrative law judge's inference of underground coal mine employment. Employer's Brief at 9 (emphasis added).

[5] Claimant indicated that while working as a shuttle car operator from 1994 to 2004, he hauled coal from the miner to the belt. Director's Exhibit 4. Claimant further explained that, while working as a shuttle car operator, a "curtain [was] down most of the time," and that he worked with a "ribbing machine." *Id.* Claimant's references to curtains and a ribbing machine support the administrative law judge's inference in this case, since curtains and ribbing machines are used exclusively in underground coal mine employment. A "check curtain" is defined as a "sheet of brattice cloth hung across an airway to control passage of air current," while a "rib" is defined as "the solid coal on the side of any *underground* passage." *See* Judges' Benchbook of the Black Lung Benefits Act (emphasis added). Moreover, claimant accurately notes that the Bureau of Labor Statistics defines a "Mine Shuttle Car Operator" as one who "operates [a] diesel or electric-powered shuttle car in [an] *underground mine* to transport materials from [the]

claimant's work as a shuttle car operator took place in an underground coal mine. Consequently, we affirm the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment.[6]

In light of our affirmance of the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment, and her unchallenged finding that claimant suffers from a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[7] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as

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working face to mine cars or conveyor." Claimant's Brief at 9, *citing* http://www.bls.gov/oes/current/oes537111.htm (emphasis added). In this case, the administrative law judge made the reasonable inference that some positions, by their very nature, are necessarily performed underground (e.g., shuttle car operator, roof bolter, continuous miner operator).

[6] In light of our affirmance of the administrative law judge's determination that claimant's work as a shuttle car operator took place in an underground coal mine, we need not address employer's challenge to the administrative law judge's alternative finding that, even if claimant's work as a shuttle car operator took place aboveground, it occurred in conditions considered "substantially similar"' to those in an underground mine. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 7-8.

[7] "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).

defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.[8] In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Zaldivar and Westerfield. Dr. Zaldivar diagnosed emphysema due to cigarette smoking, Employer's Exhibit 4, while Dr. Westerfield diagnosed chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Employer's Exhibit 9. Drs. Zaldivar and Westerfield each opined that claimant does not suffer from legal pneumoconiosis. Employer's Exhibits 5 at 29-30, 9. The administrative law judge discredited the opinions of Drs. Zaldivar and Westerfield because she found that the doctors failed to adequately explain how they eliminated claimant's seventeen years of coal mine dust exposure as a contributor to his disabling obstructive pulmonary impairment. Decision and Order at 23-24.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Zaldivar and Westerfield. We disagree. The administrative law judge noted that Drs. Zaldivar and Westerfield relied in part on the absence of radiographic evidence of pneumoconiosis in opining that claimant's emphysema/COPD is not related to coal mine dust exposure. Decision and Order at 23-24; Employer's Exhibits 5 at 30, 10 at 30. The administrative law judge appropriately found the reasoning to be inconsistent with the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, 25 BLR 2-115, 2-125 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis). The administrative law judge, therefore, permissibly accorded less weight to the opinions of Drs. Zaldivar and Westerfield.

Further, the administrative law judge permissibly questioned the opinions of Drs. Zaldivar and Westerfield because she found that the physicians failed to adequately explain how they eliminated claimant's seventeen years of coal mine dust exposure as a source of his disabling obstructive pulmonary impairment. *See Looney*, 678 F.3d at 313-14, 25 BLR at 2-128; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order at 20-21.

[8] The administrative law judge found that employer established that claimant does not suffer from clinical pneumoconiosis. Decision and Order at 26.

Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Westerfield,[9] the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm her finding that employer failed to establish that claimant does not have legal pneumoconiosis.[10] Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(i).

Employer contends that the administrative law judge did not adequately address whether employer was able to rebut the presumed fact of total disability causation, by establishing that no part of claimant's totally disabling pulmonary impairment was caused by pneumoconiosis. Employer's Brief at 20-21. We disagree.

As previously discussed, in addressing the issue of legal pneumoconiosis, the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Westerfield that claimant's disabling obstructive pulmonary impairment was due solely to cigarette smoking. Given this finding, the administrative law judge could only conclude that employer also failed to establish that no part of claimant's pulmonary total disability was caused by pneumoconiosis. Drs. Zaldivar and Westerfield agreed that claimant's totally disabling obstructive pulmonary impairment was due to his smoking-induced emphysema/COPD. Employer's Exhibits 4, 9. Therefore, their opinions

[9] Because the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Zaldivar and Westerfield, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Zaldivar and Westerfield.

[10] We reject employer's contention that the administrative law judge erred in her consideration of claimant's medical treatment records. The administrative law judge found that claimant's treatment records did not assist employer in establishing that claimant does not suffer from legal pneumoconiosis. Decision and Order at 24-26. Although employer asserts that none of the physicians who prepared treatment notes attributed claimant's pulmonary conditions to coal mine dust exposure, employer fails to explain how their opinions support its burden to establish that claimant's coal mine dust exposure did not contribute to those conditions.

[11] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

regarding the cause of claimant's disability reiterated their opinions regarding the presence of legal pneumoconiosis. Thus, the failure of Drs. Zaldivar and Westerfield to credibly disprove legal pneumoconiosis (that claimant's disabling obstructive pulmonary impairment was not attributable to his coal mine dust exposure) necessarily rendered their opinions inadequate to disprove disability causation (that claimant's pulmonary disability was not caused by pneumoconiosis as defined in 20 C.F.R. §718.201).[12] Under the facts of this case, there was no need for the administrative law judge to analyze their opinions a second time. *See Kennard*, 790 F.3d at 668; *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-446 (6th Cir. 2013).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

[12] Because Drs. Zaldivar and Westerfield failed to diagnose legal pneumoconiosis, and the administrative law judge found the existence of legal pneumoconiosis, the doctors' opinions as to causation could not have been credited at all unless there were "specific and persuasive reasons" for concluding that the doctors' views on causation were independent of their mistaken belief that claimant did not have legal pneumoconiosis, in which case they could be assigned, at most, "little weight." *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. Apr. 17, 2015), *quoting Scott v. Mason Coal Co.*, 289 F.3d 262, 269-70, 22 BLR 2-373, 2-384 (4th Cir. 2002); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995) (recognizing that a doctor's judgment as to whether pneumoconiosis is a cause of a miner's disability is necessarily influenced by the accuracy of his underlying diagnosis).

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