U.S. Department of Labor

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

BRB No. 18-0540 BLA

ELMER MADDEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEEMIKE COAL COMPANY	)	DATE ISSUED: 10/21/2019
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Elmer Madden, Hyden, Kentucky.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05960) of Administrative Law Judge Peter B. Silvain, Jr., 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 claim filed on June 19, 2015.

The administrative law judge found claimant established twenty-eight years of coal mine employment in an underground mine or in conditions substantially similar to those in an underground mine and a totally disabling respiratory impairment. He therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] The administrative law judge further found employer failed to rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding claimant's surface coal mine employment took place in conditions substantially similar to those in an underground mine. Employer also contends the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption.[2] Claimant and the Director, Office of Workers' Compensation Programs, did not file response briefs.[3]

[1] Under Section 411(c)(4) of the Act, claimant is presumed 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); *see* 20 C.F.R. §718.305.

[2] Employer filed a supplemental brief on April 23, 2019, objecting to the application of 30 U.S.C. §921(c)(4) and 30 U.S.C. §932(*l*) because the revived provisions violate Article II of the United States Constitution. Employer's Supplemental Brief at 2. As employer did not raise this contention in its Petition for Review and brief, the Board will not address it. 20 C.F.R. §§802.211, 802.215; *see 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). Moreover, employer's supplemental brief consists of a one sentence conclusion that these provisions violate Article II, with no analysis, case citations, or even identification of the section or clause purportedly violated. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.[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 Section 411(c)(4) Presumption

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish at least fifteen years of employment in underground coal mines or in surface mines "in conditions substantially similar to those in underground mines." 30 U.S.C. §921(c)(4); 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 the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich v. 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 administrative law judge found claimant established twenty-eight years of coal mine employment and noted that except for a couple of years at underground mines, claimant spent his entire coal mining career at surface mines. Decision and Order at 15, *quoting* Hearing Transcript at 12. Relying on claimant's uncontradicted testimony, the administrative law judge further determined he was regularly exposed to coal mine dust during his surface coal mine employment. *Id.* at 16. Thus, he determined claimant worked 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.

Contrary to employer's contention, it is well-established that a claimant's testimony alone can be sufficient to establish substantial similarity, i.e., that he was regularly exposed to coal mine dust. *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

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14; Director's Exhibit 3.

of Labor's position that "dust exposure evidence will be inherently anecdotal"); *Kennard*, 790 F.3d at 664 (claimant's "uncontested lay testimony" regarding his dust conditions "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).

Nor is there merit to employer's assertion that claimant was exposed to coal dust only "on occasion." Employer's Brief at 4. As the administrative law judge accurately observed, claimant testified he was exposed to more coal dust when working at surface mines than in underground coal mines. Hearing Transcript at 16-17. He also testified that most of his work was in an open cab "[t]earing up the mountains, rock, [and] rock dust." *Id*. at 17. He explained he had dust in his "underwear and [his] nose" and that he would "spit up black stuff." *Id*. Claimant stated that the heaviest dust exposure occurred when he was cleaning the coal, noting he had "to clean the coal if it was uncovered with one of them brooms. It just stirred up the dust, made it real bad." *Id*. at 18. When asked how often he was exposed to coal dust at the surface mine, he replied "[e]very day I worked." *Id*.; *see* Decision and Order at 16. Because it is supported by substantial evidence, and employer points to no evidence to the contrary, we affirm the administrative law judge's determination that claimant's "detailed and uncontested testimony" establishes that his coal mine work occurred in conditions substantially similar to those in an underground mine. *See Duncan*, 889 F.3d at 304; *Kennard*, 790 F.3d at 664-65; *Sterling*, 762 F.3d at 490; *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 & n.17 (10th Cir. 2014) (claimant's testimony that it was impossible to keep the dust out of the cabs of the vehicles he drove and that he was exposed to "pretty dusty" conditions "provided substantial evidence of regular exposure to coal mine dust"); Decision and Order at 16; Hearing Transcript at 15-18. Thus, we affirm the administrative law judge's findings that claimant has at least fifteen years of qualifying coal mine employment and invoked the Section 411(c)(4) presumption.

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,[5] or that "no part of

[5] "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,

[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 Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Dahhan and Rosenberg that claimant does not have legal pneumoconiosis.[6] Decision and Order at 25-28; Director's Exhibits 9, 19, 21; Employer's Exhibits 1, 3. Dr. Dahhan opined claimant "has no evidence of significant functional pulmonary impairment" and no impairment due to coal mine dust exposure. Director's Exhibit 19. Dr. Rosenberg opined claimant has a severe obstructive impairment related entirely to cigarette smoking. The administrative law judge found their opinions insufficiently reasoned to disprove legal pneumoconiosis. Decision and Order at 25-28.

Employer asserts the administrative law judge erred in discrediting Dr. Rosenberg's opinion.[7] Employer's Brief at 4-7. Contrary to employer's contention, the administrative law judge accurately noted Dr. Rosenberg concluded claimant does not have legal pneumoconiosis based, in part, on his view that claimant's reduced FEV1/FVC ratio is a pattern of impairment consistent with obstruction due cigarette smoking, not coal dust exposure. Decision and Order at 25-27; Employer's Exhibit 1 at 7. The administrative law judge permissibly discounted Dr. Rosenberg's opinion as inconsistent with the Department of Labor's recognition that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC.[8] *See* 20 C.F.R.

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anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

[6] The administrative law judge also considered Dr. Ajjarapu's opinion diagnosing legal pneumoconiosis. Decision and Order at 28.

[7] Because employer does not challenge the administrative law judge's discrediting of Dr. Dahhan's opinion, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[8] While employer generally asserts Dr. Rosenberg cited medical studies that post-date the preamble to the 2001 revised regulations, employer fails to identify how these more recent studies are more reliable than the studies the Department of Labor (DOL) found credible in promulgating its regulations. Employer's Brief at 5. Contrary to employer's argument, absent the type and quality of medical evidence that would invalidate

§718.204(b)(2)(i)(C); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Sterling*, 762 F.3d at 491-92; Decision and Order at 25-27.

The administrative law judge also observed that while Dr. Rosenberg acknowledged the risks associated with smoking and coal mine dust exposure are additive, Dr. Rosenberg stated they are not "equally additive" as studies indicate the average losses in FEV1 from cigarette smoking are far greater than those from coal mine dust exposure. Decision and Order at 26; Employer's Exhibit 1 at 7-9. The administrative law judge permissibly found that even if these premises were true, Dr. Rosenberg did not adequately explain why claimant's twenty-eight years of coal mine dust exposure did not contribute to, or aggravate, his obstructive impairment along with smoking. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (administrative law judge permissibly rejected medical opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); Decision and Order at 26-27, *citing* 65 Fed. Reg. at 79,940; *see also* 20 C.F.R. §§718.201(b); 718.203(b).

Further, the administrative law judge considered Dr. Rosenberg's opinion that claimant's pulmonary function studies demonstrated a "significant improvement in relationship to the administration of bronchodilators" which is not indicative of a coal dust induced-impairment. Decision and Order at 27; Employer's Exhibit 1 at 12. He permissibly found that, in relying on the partial reversibility of the miner's obstructive impairment to conclude it is due solely to smoking, Dr. Rosenberg did not credibly explain why the irreversible portion of his impairment was not due to coal mine dust exposure. *See* 20 C.F.R. §718.201(a)(2); *Barrett*, 478 F.3d at 356; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 (7th Cir. 2001); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 27. Because the administrative law judge's reasons for discrediting Dr. Rosenberg's opinion are rational and supported by substantial evidence, they are affirmed.[9] *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005).

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the scientific studies the DOL found credible in the preamble, a physician's opinion that is inconsistent with the preamble may be discredited. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014).

[9] Because the administrative law judge provided valid bases for discrediting Dr. Rosenberg's opinion, we need not address employer's remaining arguments regarding the weight he accorded to Dr. Rosenberg's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

As we have affirmed the administrative law judge's determinations to discredit the opinions of Drs. Rosenberg and Dahhan, the only opinions supportive of employer's burden,[10] we affirm his finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(i)(A). We therefore affirm his determination employer did not rebut the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer established that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). He permissibly discounted the disability causation opinions of Drs. Dahhan and Rosenberg because they did not diagnose legal pneumoconiosis, contrary to his finding that employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 28-29. We therefore affirm the administrative law judge's determination that employer failed to establish 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).

[10] Because employer bears the burden to disprove the existence of legal pneumoconiosis, we need not address employer's arguments regarding the credibility of Dr. Ajjarapu's opinion diagnosing legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 6-7.

[11] Employer also asserts the administrative law judge erred in finding claimant had a forty-five pack-year smoking history. Employer's Brief at 3. The dispute, however, is not whether smoking contributed to claimant's impairment, as Drs. Rosenberg and Ajjarapu opined, but whether coal mine dust was also a contributing factor. As we have affirmed the administrative law judge's discrediting of Dr. Rosenberg's opinion because he did not adequately explain why claimant's 28 years of coal mine dust exposure did not contribute along with smoking to his impairment, any error in the administrative law judge's smoking history finding is harmless. *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*, 6 BLR at 1-1278.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge