U.S. Department of Labor

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

BRB No. 16-0662 BLA

HERSHEL WILLIAMS Claimant-Respondent v. BIG ELK COAL COMPANY, INCORPORATED and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/28/2017 DECISION and ORDER

Appeal of the Decision and Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Matthew J. Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-05312) of Administrative Law Judge Jennifer Gee, awarding benefits on a claim filed on March 22, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with twenty-two years of coal mine employment[1] in conditions substantially similar to those in underground mines, and found that claimant has a totally disabling respiratory 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 set forth at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting claimant with at least fifteen years of qualifying coal mine employment, and thus erred in finding that he invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it failed to rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[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

[1] Claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established that he has 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).

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 determining that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. To invoke the presumption, claimant must establish that he had at least fifteen years of coal mine employment in one or more underground mines, or at surface mines in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). Conditions at a surface mine will be considered "substantially similar" to those in an underground mine if claimant demonstrates that he was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65, 25 BLR 2-725, 2-734-36 (6th Cir. 2015).

In determining the length of claimant's coal mine employment, the administrative law judge accepted the parties' stipulation that claimant had twenty-two years of coal mine employment. Decision and Order at 3; Hearing Transcript at 6. We affirm that finding, which is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer also concedes that claimant's testimony established that his work for employer, from December 1989 to August 1999, occurred in conditions substantially similar to those in an underground mine, and that claimant therefore can be credited with nine and two-thirds years[4] of qualifying coal mine employment. Employer's Brief at 6-7. However, employer contends that there is no evidence regarding the conditions in which claimant worked during the other twelve and one-third years of his coal mine employment, and that the administrative law judge therefore erred in determining that all of it occurred in conditions substantially similar to those in an underground mine.[5] *Id*. at 5-7. Employer's argument has merit.

[4] Although employer concedes that claimant established nine and two-thirds years of qualifying surface coal mine employment with employer, we note that if claimant worked for employer from the beginning of December 1989 through the end of August 1999, a total of 117 months, he should be credited with nine and three-fourths years of qualifying coal mine employment during that period.

[5] In addition to his work for employer, claimant's employment history form indicates that he worked for A & A Coal Company for two months in 1976, and for Ray Coal Company from August 1977 to July 1999. Director's Exhibit 3. Presumably,

The administrative law judge found that "[t]he only evidence of the Claimant's working conditions comes from his testimony" at the formal hearing, and that claimant testified that "he performed several jobs in his most recent mining employment with Employer." Decision and Order at 4. The administrative law judge found that claimant worked for employer as a truck driver and an operator of bulldozers, end loaders, road graders, and coal sweepers. Hearing Transcript at 13-18. She further noted that "[o]perating all of these machines exposed Claimant to coal dust," and cited portions of claimant's testimony about the conditions of the various jobs he performed for employer. Decision and Order at 4. The administrative law judge then concluded:

> I find that the Claimant's credible testimony establishes that he was regularly exposed to dust during the entirety of his coal mine employment. Because the parties stipulated to 22 years of coal mine employment, I find that the Claimant has established 22 years of coal mine employment in conditions substantially similar to those in underground mines.

Id.

It was reasonable for the administrative law judge to find, based on claimant's testimony, that he was regularly exposed to coal dust during his surface coal mine employment with employer. The administrative law judge erred, however, in setting forth her finding that claimant's testimony established that he was regularly exposed to coal dust during the *entirety* of his 22 years of coal mine employment. The administrative law judge cited no evidence and made no specific findings about the conditions of claimant's work for other employers, but instead appears to have relied solely on claimant's testimony about his work for employer. Decision and Order at 4. Therefore, we must vacate the administrative law judge's finding that claimant established twenty-two years of surface coal mine employment in conditions substantially similar to those in underground mines, and her determination that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

On remand, the administrative law judge must reconsider the evidence regarding claimant's work history and determine whether it establishes that claimant was regularly

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claimant worked concurrently at Ray Coal Company during almost all of his tenure with employer, which lasted from December 1989 to August 1999. *Id*.

exposed to coal mine dust during his time working for his other two coal mine employers, to the extent it does not overlap with his work for employer.[6]

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

In the interest of judicial economy, we will address employer's arguments that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. Once the presumption has been invoked, the burden of proof shifts to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[7] 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); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069-71, 25 BLR 2-431, 2-443-47 (6th Cir. 2013). The administrative law judge found that employer failed to rebut the presumption by either method. Decision and Order at 22-23.

Employer argues that the administrative law judge erred in finding that the medical opinion evidence did not establish that claimant does not have legal pneumoconiosis.[8] Employer's Brief at 8-11. The administrative law judge considered the opinions of Drs. Habre, Rosenberg, and Sargent. Decision and Order at 19-22. Dr. Habre opined that claimant has legal pneumoconiosis in the form of chronic bronchitis and obstructive lung disease due to cigarette smoking and coal mine dust exposure. Director's Exhibit 11 at 33-35. Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, diagnosing a moderate airflow obstruction with hypoventilation due to

[6] The record contains other evidence, beyond claimant's hearing testimony, of claimant's working conditions. For instance, claimant's employment history form lists the specific jobs claimant performed for his employers, and the opinions of Drs. Habre, Rosenberg, and Sargent refer to the conditions of claimant's employment. Director's Exhibits 3, 11, 14; Employer's Exhibit 1.

[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).

[8] The administrative law judge found, based on the x-ray, biopsy, and medical opinion evidence, that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 14-22.

cigarette smoking and obesity. Director's Exhibit 14 at 5-7; Employer's Exhibit 15 at 3. Dr. Sargent opined that claimant does not have legal pneumoconiosis, but suffers from a partially reversible obstructive ventilatory impairment due to cigarette smoking. Employer's Exhibit 1 at 3. The administrative law judge gave probative weight to Dr. Habre's opinion, discredited the opinions of Drs. Rosenberg and Sargent, and thus found that employer failed to establish that claimant does not have legal pneumoconiosis. Decision and Order at 19-22.

Employer argues that the administrative law judge erred in weighing the opinions of Drs. Rosenberg and Sargent. We disagree. In concluding that claimant does not have legal pneumoconiosis, both physicians relied on the view that an obstructive impairment due to smoking results in a reduced FEV1/FVC ratio, as seen in claimant's pulmonary function testing, but that the ratio is preserved when an obstructive impairment is due to coal mine dust exposure. Director's Exhibit 14 at 5-7; Employer's Exhibit 15 at 3; Employer's Exhibit 1 at 3. The administrative law judge permissibly discredited these opinions as inconsistent with the Department of Labor's position, set forth in the preamble to the 2001 regulatory revisions, that coal mine dust exposure can cause an obstructive impairment and a reduced FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); Decision and Order at 21. The administrative law judge also permissibly discredited Dr. Sargent for not adequately explaining why claimant's partial response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 21.

Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Sargent, we affirm her finding that employer failed to disprove the existence of legal pneumoconiosis,[9] and thus failed to rebut the Section 411(c)(4)

[9] Because employer has the burden of disproving the existence of legal pneumoconiosis, we need not address employer's argument that the administrative law judge erred in crediting Dr. Habre's opinion that claimant has legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 19; Employer's Brief at 8-10. Because we have affirmed the administrative law judge's decision to discount the opinions of Drs. Rosenberg and Sargent for the reasons discussed above, we also need not consider employer's argument that the administrative law judge erred by not making a finding as to the length of claimant's smoking history. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 10-11.

presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). *See Ogle*, 737 F.3d at 1069-70, 25 BLR at 2-443-44.

Finally, because Drs. Rosenberg and Sargent did not diagnose legal pneumoconiosis, contrary to her finding that employer failed to disprove its existence, the administrative law judge permissibly discounted their opinions on the cause of claimant's totally disabling respiratory or pulmonary impairment. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-452; Decision and Order at 22. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that "no part" of claimant's totally disabling respiratory impairment was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 22.

On remand, if the administrative law judge determines that claimant has at least fifteen years of qualifying coal mine employment, claimant will have invoked the Section 411(c)(4) presumption. In that case, in light of our affirmance of the finding that employer failed to rebut the presumption, the administrative law judge may reinstate the award of benefits. If the administrative law judge determines that claimant does not have at least fifteen years of qualifying coal mine employment, she must consider whether claimant can establish entitlement to benefits under 20 C.F.R. Part 718, without the benefit of the Section 411(c)(4) presumption.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge