U.S. Department of Labor

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

BRB No. 19-0382 BLA

SHELBY WOLFORD (o/b/o RONNIE E. WOLFORD) Claimant-Respondent v. DUNN COAL & DOCK COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/31/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for Claimant.

Andrea L. Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Lystra A. Harris's Decision and Order Awarding Benefits on Modification (2017-BLA-05925) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves the Miner's request for modification of a denied claim filed on January 6, 2010.

In the initial decision, Administrative Law Judge Richard A. Morgan credited the Miner with at least thirty years of coal mine employment,[1] including fifteen or more years of underground employment. He also found the evidence established total disability and therefore found the Miner invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). However, Judge Morgan found that Employer rebutted the presumption by establishing that the Miner did not have clinical nor legal pneumoconiosis, and denied benefits. Judge Morgan subsequently denied the Miner's motion for reconsideration on August 28, 2012.

The Miner timely moved for modification.[3] Director's Exhibit 55. In a Decision and Order dated April 23, 2019, Administrative Law Judge Lystra A. Harris (the administrative law judge) credited the Miner with 31.92 years of coal mine employment, including at least fifteen years underground. She also found the Miner had a totally disabling respiratory or pulmonary impairment, and invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. She further found that Employer did not rebut the presumption, and that the Miner therefore established a mistake in a determination of fact. 20 C.F.R. §725.310. She thus awarded benefits.

[1] The Miner's coal mine employment occurred in West Virginia. Hearing Transcript at 16. 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).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a Miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] The Miner died on August 10, 2015. Director's Exhibit 58. Claimant, the Miner's widow, is pursuing the claim on his behalf. Director's Exhibit 61.

On appeal, Employer argues the administrative law judge erred in crediting the Miner with at least fifteen years of underground coal mine employment and in finding he invoked the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, Employer reiterates its previous contentions.

The Benefits Review 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. 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

To invoke the Section 411(c)(4) presumption, the Miner must establish he worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The Miner bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Employer contends the administrative law judge erred in crediting the Miner with at least fifteen years of underground coal mine employment with Carbon Fuel Company (Carbon Fuel) and Cannelton Industries, Incorporated (Cannelton) from 1967 to 1983 and from 1986 to 1988. Decision and Order at 4-5. Employer's Brief at 7. We disagree.

In calculating the Miner's pre-1978 coal mine employment, the administrative law judge relied on the Miner's Social Security Administration (SSA) earnings record and permissibly credited him for every quarter of a year in which his earnings exceeded $50.00.[4] *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd v. Incoal,*

[4] The Miner earned at least $463.98 during each quarter from 1967 to 1977. *See* Director's Exhibit 6. Additionally, the SSA records may actually *undercount* the Miner's earnings during certain years. In 1967, 1972, 1973, 1975, 1976, 1977, 1978, and 1979, the SSA records reflect income identical to the "maximum amount of yearly earnings on which employers and employees in all occupations are required to pay Social Security tax" as set forth in Exhibit 609 of the BLBA Procedural Manual. *See Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-203-04 (2016).

Inc., 915 F.3d 392, 405-06 (6th Cir. 2019) (administrative law judge may apply the *Tackett* method unless "the miner was not employed by a coal mining company for a full calendar quarter"). Using this method, she credited the Miner with eleven years (forty-four quarters) of underground coal mine employment with Carbon Fuel and Cannelton from 1967 to 1977.[5] Decision and Order at 4.

Employer argues the administrative law judge erred by not using the income-based calculation method set forth at 20 C.F.R. §725.101(a)(32)(iii) to determine the length of the Miner's pre-1978 coal mine employment. Employer's Brief at 7-8. Contrary to Employer's argument, however, that formula is not "mandatory;" it is one "the adjudication officer *may* use . . . ." 20 C.F.R. §725.101(a)(32)(iii) (emphasis added); *see Muncy*, 25 BLR at 1-27. Therefore, the administrative law judge did not err in declining to apply the formula at Section 725.101(a)(32)(iii). Because Employer does not otherwise challenge the administrative law judge's determination that the Miner established eleven years of underground coal mine employment from 1967 to 1977, we affirm this finding.

Employer also contends that the administrative law judge erred in calculating the Miner's post-1977 underground coal mine employment with Cannelton. In making her calculations for this time period, she divided the Miner's yearly income as reflected in his SSA earnings record by the Bureau of Labor Statistics-reported average yearly earnings for coal miners set forth in Exhibit 610 of the *Black Lung Benefits Act Procedure Manual*. Decision and Order at 5. Citing two unpublished decisions by the Board in *May v. Aero Energy, Inc.*, BRB No. 11-0849 BLA (Sept. 17, 2012) (unpub.) and *Hylton v. Itmann/Consolidation Coal Co.*, BRB No. 15-0321 BLA (Jan. 30, 1987) (unpub.), Employer argues the administrative law judge erred in crediting the Miner with full years of employment based on 125 working days without establishing whether he also had a full calendar-year employment relationship during those years. Employer's Brief at 8; but *see Shepherd*, 915 F.3d at 401-02 (holding that a miner need only establish 125 working days during a calendar year, regardless of the duration of his actual employment relationship). We need not address employer's argument, as any potential error the administrative law

[5] The Miner's SSA earnings record does not reflect coal mine employment with Carbon Fuel or Cannelton during the last two quarters of 1970 and during the first quarter of 1971. Director's Exhibit 6. However, it reveals the Miner earned at least $1,722.00 from Hawley Coal Mining Corporation (Hawley) during each of these quarters. *Id.* The record reflects that the Miner worked as a miner operator and a shuttle car operator for Hawley, the same underground jobs he had while employed by Carbon Fuel and Cannelton. Director's Exhibits 3-4. We therefore hold that the administrative law judge's misidentification of the employer during this period of time was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

judge may have committed is harmless, as Employer's own proposed calculation reveals the Miner had more than fifteen years of underground coal mine employment.

Specifically, Employer asserts the administrative law judge should have credited the Miner with one year of coal mine employment only if he had worked at least 260 days during each year.[6] Based on this calculation, Employer alleges the Miner had only 14.25 years of underground coal mine employment. Employer's Brief at 8-9. However, as discussed, *supra*, we have affirmed the administrative law judge's finding that the Miner established eleven years of underground coal mine employment from 1967 to 1977. Moreover, even if we calculate the Miner's post-1977 coal mine employment using Employer's formula, he is entitled to an additional 4.94 years of employment,[7] for a total of 15.94 years. Thus, we affirm the administrative law judge's finding that the Miner established at least fifteen years of underground coal mine employment.[8]

We also affirm, as unchallenged, the administrative law judge's finding the Miner had a totally disabling respiratory or pulmonary impairment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13. Thus, we affirm her finding that the Miner invoked the Section 411(c)(4) presumption. *Id.*

[6] Employer offers no statutory, regulatory, or case law support for its argument that a miner must work 260 days, i.e., five days per week, every week of the year, to be credited with a full year of coal mine employment.

[7] In 1978, if the Miner's yearly income from Cannelton ($17,700) is divided by the average daily earnings for that year as set forth in Exhibit 610 ($80.31), we arrive at a total of 220.39 days of coal mine employment. Assuming a 260 day work year advocated by Employer, the Miner is entitled to credit for 0.85 year of underground coal mine employment (220.39/260) for 1978. Using that same methodology for each of the remaining years, the Miner is entitled to credit for 1.0 year in 1979, 0.88 year in 1980, 0.68 year in 1981, 0.71 year in 1982, 0.01 year in 1983, 0.21 year in 1986, 0.59 year in 1987, and 0.01 year in 1988, for a total of 4.94 years of underground coal mine employment.

[8] In light of our affirmance of the administrative law judge's finding that the Miner worked at least fifteen years in underground coal mine employment, we need not address Employer's remaining argument that the administrative law judge erred in not determining whether the conditions in the Miner's surface coal mine employment were substantially similar to those in an underground mine. *See* Employer's Brief at 9.

Section 411(c)(4) Rebuttal

Because the Miner invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish that the Miner had neither legal nor clinical pneumoconiosis,[9] 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 that Employer failed to establish rebuttal by either method.

We affirm, as unchallenged, the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing that the Miner did not have clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 16. Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis, we will address rebuttal of legal pneumoconiosis because the administrative law judge relied on those findings in evaluating the second method of rebuttal, disability causation.

To disprove legal pneumoconiosis, Employer must establish the Miner did 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 opinions of Drs. Zaldivar and Oesterling,[10] who opined that the Miner did not have legal pneumoconiosis. Dr. Zaldivar diagnosed idiopathic pulmonary fibrosis unrelated to coal mine dust exposure, while Dr. Oesterling diagnosed usual interstitial pneumonia or pneumonitis unrelated to coal mine

[9] "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).

[10] The administrative law judge also considered the opinions of Drs. Rasmussen, Forehand, and Castle. Decision and Order at 17-18. She correctly noted that these opinions do not assist Employer in establishing the Miner did not have legal pneumoconiosis. *Id.* at 18.

dust exposure.[11] Employer's Exhibits 5 at 37-38; 6 at 34. The administrative law judge found their opinions not well-reasoned because they did not credibly explain how they determined that the Miner's thirty years of coal mine dust exposure did not contribute to his pulmonary disease. Decision and Order at 19-20.

We initially reject Employer's argument the administrative law judge applied an improper rebuttal standard by requiring Drs. Zaldivar and Oesterling to "rule out" any contribution by the Miner's coal mine dust exposure. Employer's Brief at 11-12. The administrative law judge correctly stated legal pneumoconiosis includes any chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 17; 20 C.F.R. §§718.201(a)(2), (b).

The administrative law judge did not reject the opinions of Drs. Zaldivar and Oesterling because they were not sufficient to meet a "rule out" standard. Rather, she found their opinions on legal pneumoconiosis not credible because they were not adequately explained. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (administrative law judge may accord less weight to physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure"); *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (administrative law judge permissibly rejected physician's opinion for failing to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments).

Substantial evidence supports the administrative law judge's determination. Dr. Zaldivar testified at his deposition he did not believe that it was possible for coal mine dust to "modify" pulmonary fibrosis, despite acknowledging medical literature to the contrary. Employer's Exhibit 5 at 38-39. The administrative law judge permissibly questioned Dr. Zaldivar's opinion because he failed to provide any explanation for his conclusion that coal mine dust exposure cannot aggravate or exacerbate pulmonary fibrosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 19.

Drs. Zaldivar and Oesterling also opined that the Miner's clinical presentation was not typical of fibrosis caused by coal mine dust exposure. Dr. Zaldivar testified that the

[11] Dr. Zaldivar testified that usual interstitial pneumonitis (UIP) and idiopathic pulmonary fibrosis (IPF) describe the same disease. Employer's Exhibit 5 at 24. Dr. Oesterling distinguished UIP from IPF by stating that UIP is peripheral fibrosis and IPF is a fibrosis that occurs throughout the lung. Employer's Exhibit 6 at 47-48.

Miner's low diffusing capacity accompanied with an integrity of the airways was more "typical" or "characteristic" of pulmonary fibrosis not related to coal mine dust exposure. Employer's Exhibit 5 at 15-16. Dr. Oesterling similarly opined that the Miner's pattern of fibrosis was not typical of that caused by coal mine dust exposure because it was not present in the upper lung zones. Employer's Exhibit 6 at 27. The administrative law judge permissibly accorded less weight to their opinions because she found that neither physician adequately explained why the Miner could not have been a miner with an atypical presentation of fibrosis due to coal mine dust exposure. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (administrative law judge may reject medical opinions that rely on generalities and not specifics of a miner's case); Decision and Order at 19-20.

Dr. Oesterling also classified the Miner's type of fibrosis, located in the periphery of the lung, as usual interstitial pneumonitis, a type of diffuse fibrosis. Employer's Exhibit 6 at 23. Although Dr. Oesterling characterized it as idiopathic, noting "we normally don't know why it happens," he still maintained it was not typically caused by coal mine dust exposure. *Id.* at 24, 27. He noted that pulmonary fibrosis due to coal mine dust exposure is "a global process, not the diffuse process that is seen with usual interstitial pneumonia." *Id.* at 34. The administrative law judge permissibly discounted Dr. Oesterling's reasoning, noting he did not offer any support for his assertion, or explain the difference between the "global process" of pulmonary fibrosis caused by coal mine dust and the "diffuse process" seen with usual interstitial pneumonia. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 20.

The administrative law judge thus permissibly found that neither Dr. Zaldivar nor Dr. Oesterling adequately explained how they eliminated the Miner's thirty years of coal mine dust exposure as a contributor, or aggravating factor, to his disabling idiopathic pulmonary fibrosis/usual interstitial pneumonitis. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (affirming an administrative law judge's discrediting of opinions which she determined provided inadequate and unconvincing reasons for eliminating coal mine dust exposure as a cause of a miner's interstitial fibrosis); *see also Looney*, 678 F.3d at 313-14; Decision and Order at 18-21. Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Oesterling,[12] we affirm her

[12] Because the administrative law judge provided valid bases for discrediting the opinions of Drs. Zaldivar and Oesterling, we need not address Employer's remaining arguments regarding the weight she accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

finding that Employer did not rebut the Section 411(c)(4) presumption by establishing that the Miner did not have legal pneumoconiosis.[13] See 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether Employer established that "no part of the miner'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 Drs. Zaldivar's and Oesterling's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 21. Therefore, we affirm the administrative law judge's determination that Employer failed to rebut legal pneumoconiosis as a cause of the Miner's total disability. *See* 20 C.F.R. §718.305(d)(1)(ii). We therefore affirm the administrative law judge's finding that the Miner established a mistake in a determination of fact and entitlement to benefits. 20 C.F.R. §725.310; Decision and Order at 22.

[13] Employer argues that the administrative law judge erred in not considering interpretations of a May 28, 2010 computed tomography (CT) scan. Employer's Brief at 22-24. We disagree. Dr. DePonte interpreted the CT scan as revealing fibrosis of uncertain etiology. Director's Exhibit 36 at 75. This interpretation does not assist Employer in establishing that the Miner's fibrosis was not significantly related to, or substantially aggravated by, his coal mine dust exposure. Dr. Meyer interpreted the CT scan as revealing basilar pulmonary fibrosis in a pattern consistent with early UIP. Director's Exhibit 37 at 60. Although Dr. Meyer acknowledged that there are many causes of basilar pulmonary fibrosis, he indicated that this pattern was not "typical of coal worker's pneumoconiosis," which he said characteristically begins as an upper zone process. *Id.* As previously discussed, the administrative law judge permissibly discounted similar explanations set forth by Drs. Zaldivar and Oesterling because the doctors did not explain why the Miner's fibrosis could not have been atypical. The administrative law judge's basis for discrediting the opinions of Drs. Zaldivar and Oesterling is also applicable to Dr. Meyer's CT scan interpretation. Therefore, the administrative law judge's error, if any, in not addressing the CT scan evidence was harmless. *See Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge