U.S. Department of Labor

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

BRB Nos. 23-0135 BLA
and 23-0136 BLA

JUDITH E. JARVIS (o/b/o and Widow of WILLIAM E. JARVIS) Claimant-Respondent v. WEST KEN COAL CORPORATION c/o ANDALEX RESOURCES and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/14/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits (2020-BLA-05523 and 2020-BLA-05801) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on January 19, 2017,[1] and a survivor's claim filed on February 27, 2020.[2]

The ALJ accepted the parties' stipulations that the Miner had nineteen years of surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Further, the ALJ found that at least fifteen years of the Miner's surface coal mine employment was qualifying for purposes of invoking the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Thus, she found Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.[4] She further found Employer failed to rebut the presumption and awarded

[1] This is the Miner's second claim for benefits. He filed a prior claim on July 16, 2013, which the district director denied for failure to establish a totally disabling pulmonary or respiratory impairment. Miner's Claim (MC) Director's Exhibit 1.

[2] Claimant is the widow of the Miner, who died on April 14, 2018, while his claim was pending. Survivor's Claim (SC) Director's Exhibit 6. She is pursuing the miner's claim on behalf of his estate. MC Director's Exhibit 49. Claimant separately filed a survivor's claim on February 27, 2020. SC Director's Exhibit 8. The ALJ consolidated the two claims for the purposes of the hearing and decision. Order Granting Motion to Substitute Party and Consolidating Claims.

[3] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she

benefits. Based on the award of benefits in the miner's claim, the ALJ determined Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[5]

On appeal, Employer asserts the ALJ erred in finding the Miner had at least fifteen years of qualifying coal mine employment and in finding it did not rebut the Section 411(c)(4) presumption.[6] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Qualifying Coal Mine Employment

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 the Miner did not establish total disability in his prior claim, Claimant had to establish this element of entitlement to obtain review of the merits of the Miner's current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); MC Director's Exhibit 1.

[5] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[6] We affirm the ALJ's determinations that the Miner had nineteen years of coal mine employment and was totally disabled from a respiratory or pulmonary impairment as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 8.

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16.

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [the Miner] 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); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015).

The ALJ considered the Miner's deposition testimony, Claimant's hearing testimony, and the Miner's CM-911a form to determine whether the Miner was regularly exposed to coal mine dust during his surface employment. Decision and Order at 6-7. The Miner testified he worked as a dozer operator at surface mines for White Brothers Equipment Company, Inc. (White Brothers), Venture Coal Corporation (Venture Coal), Chevron Mining, Inc. (Chevron Mining), and Employer. MC Director's Exhibits 4, 31. He indicated the dozers he operated for Venture Coal did not have an enclosed cab, and those he operated for Employer did not have an enclosed cab until later in his time working for Employer.[8] MC Director's Exhibit 31 at 9. Claimant testified that while the Miner was working as a dozer operator for Employer, he was exposed to a "lot of coal dust because he would come home black covered with coal dust, all [over] his body." Hearing Transcript at 17. Further, she testified the Miner's clothes were sent to a special laundromat for coal miners because "his clothes were so black" and "there was a black outline on his side of the bed from where he sweated [out] coal dust at night." *Id.* at 18-19. She recalled that although the Miner left for work in clean clothing, he would return covered in dust "every day." *Id.* The ALJ also noted the Miner's CM-911a statement that all his coal mine employment between 1969 and 1989 as a dozer operator exposed him to dust. MC Director's Exhibit 4.

Based on this evidence, the ALJ found Claimant established that the Miner was regularly exposed to coal mine dust during his work as a dozer operator with Employer. Decision and Order at 7. She further found Claimant's testimony sufficient to support a finding that the Miner's work as a dozer operator with White Brothers, Venture Coal, and Chevron Mining also regularly exposed him to coal mine dust. *Id.* at 8. Thus, she found

[8] The Miner was not asked whether he had an enclosed cab for his other coal mine employment. Director's Exhibit 31. Claimant testified that when she visited the coal mine, she noticed the dozer the Miner operated for Employer did not have an enclosed cab until the "end of the [nineteen] eighties." Hearing Transcript at 20.

the evidence sufficient to establish more than fifteen years of qualifying coal mine employment. *Id.*

Initially, Employer does not challenge the ALJ's finding that the Miner's coal mine employment as a dozer operator for Employer constituted qualifying coal mine employment; thus, we affirm it.[9] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7; Director's Exhibits 6, 9, 10. However, it contends the ALJ erred in finding Claimant established the Miner was regularly exposed to coal mine dust in the years he worked for White Brothers, Venture Coal, and Chevron Mining simply because he was also a dozer operator for those employers.[10] Employer's Brief at 3. We note that Employer only argued before the ALJ that the Miner's work with Employer in an enclosed cab did not constitute qualifying coal mine employment, but it did not specifically contend that the Miner's other coal mine employment was not qualifying. Employer's Brief to the ALJ at 12; *see Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (issues must be raised before the ALJ to preserve review before the Board). However, even assuming Employer adequately raised the issue below, we find its argument unpersuasive.

The ALJ acknowledged Claimant's and the Miner's testimony that he worked in both open and enclosed cabs during his work with Employer; however, Claimant did not indicate any change in the Miner's appearance based on this change from working in open to enclosed cabs; rather, she indicated the Miner was covered in coal dust "every day." Decision and Order at 7. Thus, the ALJ concluded that all the Miner's work with Employer was qualifying, which is unchallenged by Employer. *Id.* Further, because the Miner performed the same work at White Brothers, Venture Coal, and Chevron Mining and his application also indicated exposure to "dust, gases, or fumes" during his work for these employers, the ALJ permissibly attributed Claimant's unrefuted testimony regarding the Miner's appearance when he worked for Employer to these other employers. *Id.* at 8; MC Director's Exhibit 4; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012) (it is the ALJ's function to weigh the evidence, draw appropriate inferences, and

[9] The ALJ noted the Miner's employment for Employer from 1980 through 1989. Decision and Order at 6; Director's Exhibits 4, 6. However, the Miner's Social Security Earnings Statement record also indicates earnings from West Ken Coal Corporation from 1975 to 1977. Director's Exhibit 10.

[10] The ALJ found Claimant did not establish that the Miner's remaining coal mine employment with Wright Coal Company, Derek Mining, Inc., or Addwest Mining, Inc. constituted qualifying coal mine employment. Decision and Order at 8. She found the Miner's employment with those companies totaled less than three years. *Id.*

determine credibility); *Bonner v. Apex Coal Corp.*, 25 BLR 1-277, 1-282-83 (2022) (credible testimony regarding a miner's appearance and the dust on his clothes when he returned home from work may be sufficient to establish the miner was regularly exposed to coal mine dust).[11]

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established the Miner had at least fifteen years of qualifying coal mine employment and thus that she invoked the Section 411(c)(4) presumption. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 8.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[12] 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 ALJ found Employer failed to establish rebuttal by either method.

Employer argues the ALJ erred in finding it failed to rebut the presence of legal pneumoconiosis. Employer's Brief at 4-5. However, Employer does not challenge the ALJ's finding that it failed to disprove clinical pneumoconiosis; thus, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 20. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[13]

[11] We note Claimant also testified that the Miner worked with an open cab for Venture Coal and he did not have an enclosed cab until the late 1980s. Hearing Transcript at 20.

[12] "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).

[13] Because we affirm the ALJ's finding that Employer failed to rebut clinical pneumoconiosis, we need not address its arguments that the ALJ erred in also finding it

20 C.F.R. §718.305(d)(1)(i). Further, Employer's argument regarding disability causation is based solely on its argument that the ALJ erred in finding it failed to rebut legal pneumoconiosis. Employer's Brief at 5. As Employer has not argued the ALJ erred in finding Employer failed to rebut the presumption by establishing no part of the Miner's total disability was caused by clinical pneumoconiosis,[14] this finding is also affirmed. *See* 20 C.F.R. §718.305(d)(1)(ii); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Skrack*, 6 BLR at 1-711; Decision and Order at 22. We thus affirm her finding that Employer did not rebut the Section 411(c)(4) presumption and affirm the award of benefits in the miner's claim. Decision and Order at 23.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award in the survivor's claim beyond the issues raised in the underlying miner's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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did not rebut legal pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 4-5.

[14] Employer relied on the opinions of Drs. Selby and Rosenberg to rebut disability causation. Both doctors opined that the Miner had neither legal nor clinical pneumoconiosis. MC Director's Exhibit 24; Employer's Exhibits 2, 3, 5. The ALJ discredited their disability causation opinions because neither diagnosed pneumoconiosis, contrary to her finding that Employer failed to disprove the Miner had the disease. Decision and Order at 22.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge