U.S. Department of Labor

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

BRB No. 19-0476 BLA

BETTY CAROL CLEPPER (Widow of PAUL TILMAN CLEPPER) Claimant-Respondent v. A & S COAL COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/21/2020 DECISION and ORDER

Appeal of the Decision and Order Granting Request for Modification of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

McKinnley Morgan and Gerald Vanover (Morgan, Collins, Yeast & Salyer), London, Kentucky, for Claimant.

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

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Christopher Larsen's Decision and Order Granting Request for Modification (2014-BLA-05098) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on May 20, 2010.[1]

In a June 29, 2012 Decision and Order Denying Benefits, Administrative Law Judge Lystra A. Harris credited the Miner with twenty years of surface coal mine employment. Director's Exhibit 37. She found Claimant did not establish at least fifteen of those years took place in conditions substantially similar to those in an underground mine. *Id*. Thus Judge Harris found Claimant could not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012); Director's Exhibit 37. She also found Claimant did not establish the Miner had pneumoconiosis. 20 C.F.R. §718.202; Director's Exhibit 37. Because Claimant failed to establish an essential element of entitlement, Judge Harris denied benefits. Director's Exhibit 37.

Claimant requested modification. Director's Exhibit 39. In his July 28, 2019 Decision and Order that is the subject of this appeal, Judge Larsen (the administrative law judge) found Claimant established all twenty years of the Miner's surface coal mine employment took place in conditions substantially similar to those in an underground mine. Thus he found Claimant established a mistake in a determination of fact. 20 C.F.R. §725.310. He also found Claimant established a totally disabling pulmonary or respiratory impairment, 20 C.F.R. §718.204(b)(2), and invoked the presumption of death due to pneumoconiosis at Section 411(c)(4). He further found Employer did not rebut the

[1] The Miner died on April 10, 2010. Director's Exhibit 2. Section 422(*l*) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2012). Because the Miner's lifetime claim for benefits was denied, Claimant is not entitled to survivor's benefits pursuant to Section 422(*l*).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was 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.

presumption. After determining granting modification would render justice under the Act, he awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the administrative law judge improperly invoked the presumption based on erroneously finding the Miner had at least fifteen years of qualifying coal mine employment.[3] Employer also argues he 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 (the Director), has filed a limited response urging the Board to reject Employer's contention that the Section 411(c)(4) presumption is unconstitutional and affirm the administrative law judge's finding of at least fifteen years of qualifying coal mine employment.

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.[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).

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

Employer summarily "objects to the application of 30 U.S.C. §921(c)(4) and 30 U.S.C. §932(*l*)[5] because section 1556 of the Affordable Care Act, Pub. Law 111-148, §1556 (2010), reviving these provisions, violates Article II of the United States Constitution." Employer's Brief at 3. We agree with the Director's argument that Employer has failed to adequately brief its challenge to the constitutionality of the Section

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding the Miner was totally disabled. *See* 20 C.F.R. §718.204(b)(2); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-10.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1 at 918.

[5] Although Employer also challenges the constitutionality of Section 422(*l*), as discussed above, the administrative law judge did not award survivor's benefits based on the automatic entitlement provision. 30 U.S.C. §932(*l*); Employer's Brief at 3.

411(c)(4) presumption. *See* 20 C.F.R. §802.211(b); *Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57 (1994); Director's Brief at 2.

The Board's procedural rules impose threshold requirements for alleging specific error before it will consider the merits of an issue. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). Although Employer states application of the Section 411(c)(4) presumption violates Article II of the Constitution, it fails to identify the provision of Article II upon which it relies, provide any argument, or cite any authority for its constitutional objection.[6] Employer's Brief at 3; Director's Brief at 2. We therefore decline to further address Employer's constitutional challenge to the Section 411(c)(4) presumption as Employer has not complied with the regulation requiring it to provide argument and authority concerning each issue raised. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Barnes*, 18 BLR at 1-57 (Board will decline to address issues that are not raised with specificity).

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

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. 20 C.F.R. §718.305(b)(1)(i). 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).

Employer argues that the regulation at 20 C.F.R. §718.305(b)(2) is invalid because it is contrary to the Act. Employer's Brief at 3-4. We reject this contention for the reasons

[6] Employer generally cites *Texas v. United States*, 340 F.Supp.3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), but does not explain how that case relates to its Article II challenge. The district court's decision in *Texas* concerns the Affordable Care Act and was subsequently affirmed in part, vacated in part, and remanded for further consideration by the United States Court of Appeals for the Fifth Circuit. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), cert. granted, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020).

the United States Courts of Appeals for the Sixth and Tenth Circuits articulated in rejecting similar arguments and upholding the regulation's validity. *See Zurich*, 889 F.3d at 301-03; *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018).

Claimant submitted the Miner's testimony provided in conjunction with his lifetime claim for benefits. Director's Exhibit 1 at 68-72. The administrative law judge found the Miner's testimony with respect to the dust conditions of his coal mine employment was credible and established he was regularly exposed to coal mine dust for all twenty years he worked in surface coal mining.[7] Decision and Order at 5-7. As Employer alleges no specific error in the administrative law judge's finding, we affirm it. *Zurich*, 889 F.3d at 304; *Cox*, 791 F.2d at 446-47; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we also affirm the administrative law judge's determinations that Claimant established a mistake in a determination of fact and invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. 20 C.F.R. §§718.305(b)(1), (c)(2), 725.310.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[8] or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.

The administrative law judge found the record contains no x-ray, pathology, or CT scan evidence relevant to clinical pneumoconiosis. Decision and Order at 11-13. He

[7] The Miner testified his work involved operating a grader, cleaning coal, loading shot holes, driving a rock truck, helping mechanics, and doing other miscellaneous tasks. Director's Exhibit 1 at 68-72. He stated he was exposed to coal dust when cleaning the grader because he ran a broom along the coal. *Id*. If the doors to his truck were open, the dust got "pretty bad." *Id*. Even if the truck doors were closed, the dust got through cracks in the windows and doors, and through the floors. *Id*. The Miner stated that at the end of a day, he looked like he had been in an underground mine. *Id*.

[8] "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).

discredited the opinions of Drs. Jarboe and Castle[9] that the Miner did not have clinical or legal pneumoconiosis because both doctors "relied on medical evidence that is not in the record in this claim" to reach their conclusions, which "adversely affects the reliability of their opinions." *Id*. at 12, 14. He also found their opinions not well-reasoned and documented. *Id*. at 12-16. As Employer does not challenge these findings, we affirm them. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *Skrack*, 6 BLR at 1-711. Although Employer argues Dr. Alam's opinion diagnosing pneumoconiosis is not well-reasoned or documented, Employer's Brief at 4-5, the administrative law judge correctly found his opinion does not aid Employer in establishing rebuttal. Decision and Order at 11, 14. Thus we affirm the administrative law judge's finding that Employer did not rebut the presumption of pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

The administrative law judge next addressed whether Employer established that "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). He again permissibly discredited the opinions of Drs. Jarboe and Castle because neither doctor diagnosed legal pneumoconiosis, contrary to his determination that Employer failed to disprove the Miner had the disease.[10] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order 17. Although Employer generally argues that the administrative law judge "failed to properly weigh the evidence regarding the cause of the Miner's death," Employer's Brief at 6, it identifies no specific error in the administrative law judge's weighing of the opinions of Drs. Jarboe and Castle. *Cox*, 791 F.2d at 446-47. We therefore affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(ii). We also affirm, as unchallenged, the administrative law judge's finding that granting modification would render justice under the Act. *Skrack*, 6 BLR at 1-711; Decision and Order at 4.

[9] Both physicians opined that the Miner did not have clinical pneumoconiosis. Director's Exhibits 13, 14. They also opined that he had an obstructive respiratory impairment due to cigarette smoking and unrelated to coal mine dust exposure. *Id*.

[10] Neither doctor offered an opinion as to death causation that did not depend upon his prior exclusion of the existence of legal pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order Granting Request for Modification is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge