U.S. Department of Labor

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

BRB No. 18-0050 BLA

LLOYD R. ALTMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRED KUZEMCHAK	)	DATE ISSUED: 12/04/2018
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Kristy L. Rizzo (Mears, Smith, Houser & Boyle, P.C.), Greensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Gordon, Alfano, Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-06064) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on June 9, 2015.

The administrative law judge found that claimant established 15.42 years of underground coal mine employment,[1] or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2). Thus claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant 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. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.[2]

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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] The record reflects that claimant's most recent coal mine employment was in West Virginia. Director's Exhibit 43 at 8. Accordingly, the Board will apply the law 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] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26.

I. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTION — COAL MINE EMPLOYMENT

Because claimant established total disability, which is unchallenged on appeal, he is entitled to the Section 411(c)(4) presumption if he had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Conditions in an underground mine will be considered "substantially similar" if claimant was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). Claimant bears the burden of proof 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). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge considered claimant's employment history forms, Social Security Administration (SSA) earnings statement, hearing testimony, and sworn affidavits. Decision and Order at 4-19. He also considered the hearing testimony of claimant's wife and the sworn affidavits of claimant's former coworker, James Shawley, and supervisor, Albert Kutsch. *Id*. The administrative law judge noted that claimant worked for numerous coal mine operators between 1962 and 1996. *Id*. He found that claimant's testimony and sworn affidavits, along with the sworn affidavits of his former coworker and supervisor, were "the most credible, direct evidence" and established the following coal mine employment: two years with Carr Coal Company, four and one-half months with K.H. Liquidating Corp., a combined two and one-half years with Winchester Corp. and Earth Resources, Inc., six months with Kutsch Coal Company, two years and ten months with National Coal Company, two months with Oren Smith Jr. & Son, two and one-half months with Walter Green, one and one-half years with Fred Kuzemchak Mining, and a combined five years with Walter Overly, Creighton Hills Coal Company, Neft Services, Maylan Yackovich, and Z & F Development. Decision and Order at 15-18. The administrative law judge thus found 15 years and one month of coal mine employment with these fourteen operators. *Id*.

The administrative law judge found that claimant's testimony and the sworn affidavits of record were not sufficient to establish the length of claimant's employment with Homer M. Tack, Pacoma, Inc., and Ira Woods, however. Decision and Order at 15-18. Because he could not determine the beginning and ending dates of claimant's employment for these operators based on the direct evidence, the administrative law judge

applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[3] to calculate the number of days that claimant worked in coal mine employment for these entities. *Id*. Using this method, the administrative law judge credited claimant with an additional six and one-half months of coal mine employment: one month with Homer M. Tack, three and one-half months with Pacoma, Inc., and two months with Ira Woods. *Id*. He thus found that claimant established a total of 15 years and seven and one-half months of coal mine employment, or 15.63 years. *Id*. at 18. The administrative law judge further found that, with the exception of two and one-half months, all of claimant's employment was either underground or in conditions substantially similar to those underground and, therefore, claimant established 15.42 years of qualifying coal mine employment, sufficient to invoke the Section 411(c)(4) presumption. Decision and Order at 19.

Employer does not contest that claimant established a total of 6.43 years of coal mine employment with K.H. Liquidating Corp., Winchester Corp., Earth Resources, Inc., National Coal Company, Oren Smith Jr. & Son, Homer M. Tack, Pacoma, Inc., and Ira Woods. Decision and Order at 15-18. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer argues, however, that the administrative law judge erred in crediting claimant with a total of 9.2 years of coal mine employment with Carr Coal Company, Kutsch Coal Company, Walter Green, Fred Kuzemchak Mining, Walter Overly, Creighton Hills Coal Company, Neft Services, Maylan Yackovich, and Z & F Development. Employer's Brief at 3-8. Employer also argues that the administrative law judge improperly determined that 1.79 years of claimant's surface coal mine employment with Pacoma, Inc. and Fred Kuzemchak Mining were in conditions substantially similar to those in an underground mine. For the following reasons, we disagree.

Employer first asserts that claimant's testimony does not establish two years of employment with Carr Coal Company because claimant testified that there were times "when [the] work was slow" or the workers went on strike. Employer's Brief at 6; *see* Hearing Transcript at 60. Insofar as employer suggests that the administrative law judge did not account for this testimony, employer's argument has no merit. The administrative

[3] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*.

law judge noted that claimant and his supervisor, Albert Kutsch, stated that claimant was employed by Carr Coal Company for three years. Decision and Order at 4-5, 15. The administrative law judge "subtracted one year" of coal mine employment based on claimant's "own statements that the work he did was at times 'slow,' and that he only worked for four hours on some days." *Id*. at 15; *see* Hearing Transcript at 60. Because the administrative law judge accounted for claimant's testimony by subtracting a full year of the alleged employment with Carr Coal Company, and employer does not identify any other error in the administrative law judge's decision to credit him with the remaining two years based on claimant's credible testimony and the credible affidavit of Albert Kutsch, we affirm that finding. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order at 15.

Employer next argues that the administrative law judge erred in finding that claimant's testimony establishes six months of coal mine employment for Kutsch Coal Company because claimant testified that he worked there for four to six months. Employer's Brief at 9. To the extent employer argues that claimant's testimony establishes only four months of coal mine employment with Kutsch Coal Company, employer's argument has no merit. The administrative law judge acknowledged that claimant's testimony varied as to whether he worked for this operator for four months or six months. Decision and Order at 16-17. The administrative law judge noted, however, that Albert Kutsch provided a sworn affidavit stating that he employed claimant for six months.[4] *Id*. The administrative law judge permissibly found that the credible affidavit of Albert Kutsch, in conjunction with claimant's testimony, establishes that claimant was employed by Kutsch Coal Company for sixth months. *See Underwood*, 105 F.3d at 949; *Clark*, 12 BLR at 1-155.

Finally, employer generally argues that the administrative law judge erred in crediting claimant with two and one-half months of employment with Walter Green, one and one-half years with Fred Kuzemchak Mining, and a combined five years with Walter Overly, Creighton Hills Coal Company, Neft Services, Maylan Yackovich, and Z & F Development. Employer's Brief at 5-6. The Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Because employer does not identify any specific error with regard to the administrative law judge's length of coal mine analysis

[4] Mr. Kutsch stated in his affidavit that claimant worked with him at Kutsch Coal Company for six months in 1976. Director's Exhibit 19, 30.

for these operators, we affirm his findings.[5] As employer raises no other allegations of error with respect to the number of years that claimant worked as a coal miner, we affirm the administrative law judge's finding that claimant established a total of 15.63 years of coal mine employment.

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[5] Even if employer's brief could be read as having raised a specific argument, substantial evidence supports the administrative law judge's length of coal mine employment determinations for these operators. The administrative law judge noted that claimant "consistently stated that he worked for Walter Green for two to three months," which averages out to two and one-half months. Decision and Order at 18. The administrative law judge also noted that claimant stated that he worked for Fred Kuzemchak Mining from October 1994 to January 1996, and from March 1996 to May 1996, totaling nineteen months. *Id*. For these two operators, the administrative law judge permissibly found that claimant's testimony was credible and entitled to more weight than his Social Security Administration (SSA) earnings statement. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order at 18.

The administrative law judge further noted that from 1980 to 1984, claimant alleged six months of coal mine employment with Walter Overly in 1980, six months with Creighton Hills Coal Company between 1980 and 1981, one and one-half year with Neft Services between 1980 and 1981, two years with Maylan Yackovich in 1981 and 1982, and three years with Z & F Development from 1982 to 1984. Decision and Order at 17. Although the administrative law judge found less than the alleged six months of employment with Creighton Hills Coal Company in 1980, he permissibly found the evidence of record nevertheless establishes that claimant was "consistently working as a coal miner for five years from 1980 to 1984." *See Underwood*, 105 F.3d at 949; *Clark*, 12 BLR at 1-155; *Lafferty*, 12 BLR at 1-192; *Mabe*, 9 BLR at 1-68; Decision and Order at 17-18. Specifically, the administrative law judge found that claimant credibly testified that he "worked for more than one employer at a time, often working at one coal mine during the week and another on the weekend," which explains "why many of his alleged coal mine employment during this time period overlap," such as claimant's alleged work for three separate employers for up to six months each in 1980. Decision and Order at 17-18. The administrative law judge also found that claimant's testimony and a finding of five years of employment during this time period is supported by the affidavit of his former coworker, James Shawley, "who confirmed that he worked with [c]laimant for six months for Walter Overly, a year and a half for Neft Services, two years for Maylan Yackovich, and three years for Z & F Development." Decision and Order at 17-18.

With respect to the finding that 15.42 years of this coal mine employment were qualifying for the purpose of invoking the Section 411(c)(4) presumption, we reject employer's argument that the administrative law judge erred in finding that claimant's 0.29 years of surface coal mine employment with Pacoma, Inc. and 1.5 years with Fred Kuzemchak Mining[6] were in conditions substantially similar to those underground. Employer's Brief at 4-6. In his affidavit, claimant stated that, while working for Pacoma, Inc., he used a dozer to move waste piles of coal and slate to the wash plant, where the waste mixture was separated to reclaim old coal. Director's Exhibit 43. Claimant stated that he was continuously exposed to coal mine dust and fumes from burning coal in the waste piles. *Id*. He testified that his job leveling off the boney dump would "not really" create coal dust, but he was exposed "mostly [to] the fumes" from the burning coal. Hearing Transcript at 21-22. Claimant further testified that when he worked for Fred Kuzemchak Mining, he "ran his bulldozers." *Id*. at 44-45. Although the 9L bulldozer had "[n]o dust, [and was] air conditioned," the 9G bulldozer "[h]ad no air conditioning, no nothing." *Id*. He had to operate this machine "with the doors open" and that it "was the dirtiest machine [he] ever ran in [his] life." *Id*. At times he also had to help the foreman "clean the coal, load the coal, and take it up to the stockpile," amongst other duties. *Id*. With this operator, he was exposed "mostly to rock dust" and was also exposed to coal dust when using the 9G. *Id*. In his affidavit, claimant stated that his work with Fred Kuzemchak Mining involved operating heavy equipment, which "created clouds of coal dust," and that he was continuously exposed to coal dust at that job. Director's Exhibit 43.

Contrary to employer's general argument that claimant's work was not dusty, the administrative law judge permissibly determined that claimant's credible testimony and affidavit establish that he was regularly exposed to coal mine dust while working for Pacoma, Inc. and Fred Kuzemchak Mining, totaling 1.79 years. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 (10th Cir. 2014); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001); *Lafferty*, 12 BLR at 1-192; *Mabe*, 9 BLR at 1-68; Decision and Order at 19. We further affirm, as unchallenged on appeal, the administrative law judge's finding that 13.63 years of claimant's remaining coal mine employment were underground or in conditions substantially similar to those underground. *See Skrack*, 6 BLR at 1-711; Decision and

[6] Employer also argues that the administrative law judge erred in crediting claimant with "as much as" four and one-half months of coal mine employment with K.H. Liquidating Corp. Employer's Brief at 4. Contrary to employer's argument, the administrative law judge credited claimant with only two months of qualifying coal mine employment with this operator, after subtracting the two and one-half months during which claimant testified he was not exposed to coal mine dust. Decision and Order at 19.

Order at 19. We therefore affirm the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment and thus invoked the Section 411(c)(4) presumption.

II. REBUTTAL OF THE SECTION 411(c)(4) PRESUMPTION

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[7] 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). Employer contends that the administrative law judge should have found "that claimant failed to establish that he has pneumoconiosis and that the disease was caused, at least in part, by his coal mine work." Employer's Brief at 6-7. This argument is without merit, however, as it is employer's burden to disprove that claimant has pneumoconiosis or that it caused his total disability. Employer's additional general assertion that its medical experts, Drs. Fino and Basheda, credibly explained why claimant does not have clinical pneumoconiosis, is also unavailing. Employer has neither attempted to address legal pneumoconiosis or disability causation nor identified any error in the administrative law judge's discrediting of the opinions of Drs. Fino and Basheda on those issues. *See Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21. The Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it, and must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a). Because employer provides the Board with no basis upon which to review the administrative law judge's findings, we affirm his determinations that employer failed to rebut the Section 411(c)(4) presumption and that claimant is entitled to benefits. Decision and Order at 27-32; *see* 20 C.F.R. §718.305(d)(1)(i), (ii).

[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).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge