U.S. Department of Labor

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

BRB No. 19-0075 BLA

EARL S. DARNELL Claimant-Respondent v. DARNELL & SONS TRUCKING and ACE/USA/ESIS WORKERS COMPENSATION CENTER Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/03/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

G. Phillip Wheeler, Jr., (Kirk Law Firm), Pikeville, Kentucky, for claimant.

Walter E. Harding (Boehl Stopher & Graves, LLP), Louisville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05590) of Administrative Law Judge Steven D. Bell pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on May 24, 2013.[1]

The administrative law judge determined claimant established more than fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. Decision and Order at 14-15. Thus, he found claimant established a change in the applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found employer did not rebut the presumption. He therefore awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant's truck driving employment occurred in conditions substantially similar to those in an underground mine and that employer 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.[3]

---

[1] This is claimant's fourth claim for benefits. On July 18, 2008, Administrative Law Judge Donald W. Mosser denied claimant's most recent prior claim filed on January 22, 2001. When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must deny the subsequent claim unless he finds "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). In this case, because Judge Mosser denied claimant's last claim for failure to establish a totally disabling respiratory or pulmonary impairment, Director's Exhibit 1, claimant was required to establish this element of entitlement to obtain review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[2] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary 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 a change in an applicable condition of entitlement and invoked the

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits 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).

Qualifying Coal Mine Employment

Employer argues the administrative law judge erred in finding claimant's truck driving employment occurred in conditions substantially similar to those in an underground mine. To invoke the presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). 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).

Finding claimant reliably stated that the level of coal dust exposure while driving a coal truck was worse than his exposure during underground employment, the administrative law judge rationally concluded that the conditions of claimant's coal truck driving work were substantially similar to underground coal mine employment. Decision and Order at 20; Hearing Transcript at 13. Employer concedes that the administrative law judge "is allowed latitude to assess the validity of testimony," and acknowledges that the administrative law judge "accepted [claimant's] testimony that his truck driving was as dusty as underground mining." *See* Employer's Brief at 12 (unpaginated). Nevertheless, employer generally asserts that the administrative law judge's crediting of claimant's testimony "is a stretch," given claimant's purported inability to remember his past smoking history and the asserted lack of any evidence that he ever worked in an underground mine. *Id*.

Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 9; Director's Exhibits 1, 10.

But employer does not allege with specificity any error of fact in the administrative law judge's finding regarding claimant's smoking history, *see* Decision and Order at 8 n. 45, or his crediting of claimant's testimony regarding his work exposures to coal dust including testimony that his dust exposure as a coal truck driver was worse than his underground exposure. *See* 20 C.F.R. §802.211; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); Decision and Order at 20. Moreover, it is well-established that a claimant's testimony alone can be sufficient to establish substantial similarity, i.e., that he was regularly exposed to coal mine dust. *See Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (citing with approval the Department of Labor's position that "dust exposure evidence will be inherently anecdotal"); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015) (claimant's "uncontested lay testimony" regarding his dust conditions "easily supports a finding" of regular dust exposure). Therefore, we affirm the administrative law judge's finding that claimant's testimony establishes he has at least fifteen years of coal mine employment in conditions substantially similar to those in an underground mine. 20 C.F.R. §718.305(b)(1)(i).

Rebuttal of Section 411(c)(4)

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither clinical nor legal pneumoconiosis[5] or "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 employer did not rebut the presumption by either method.

Legal Pneumoconiosis

After finding employer disproved clinical pneumoconiosis, 20 C.F.R. §§718.201(a)(1), 718.305(d)(1)(i)(B), the administrative law judge addressed legal pneumoconiosis. Decision and Order at 19-20. To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment

[5] Clinical pneumoconiosis is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

"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 Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the medical opinion of Dr. Jarboe. Dr. Jarboe ultimately opined claimant does not have legal pneumoconiosis but has a disabling pulmonary impairment due to bronchial asthma and cigarette smoking. Employer's Exhibit 3. The administrative law judge found Dr. Jarboe's opinion not well-reasoned and documented and therefore insufficient to disprove legal pneumoconiosis. Decision and Order at 19-20.

We reject employer's assertion the administrative law judge erred by discrediting the opinion of Dr. Jarboe. Employer's Brief at 7-11. The administrative law judge permissibly found Dr. Jarboe did not adequately explain why claimant's coal mine dust exposure did not significantly contribute, along with the other factors, to his obstructive pulmonary disease. *See Kennard*, 790 F.3d at 668; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 20. The administrative law judge also permissibly found Dr. Jarboe's determination that surface mining and claimant's truck driving employment had insufficient dust exposure to have caused pneumoconiosis contrary to claimant's credible testimony that the level of coal dust exposure in his coal truck driving work was worse than underground coal mine employment and the underlying premises of the regulations. 20 C.F.R. §725.202; *McGinnis v. Freeman United Coal Mining*, 10 BLR 1-4, 1-6-7 (1987); Decision and Order at 20.

Contrary to employer's contentions, the administrative law judge did not err. Employer's Brief at 9-12. The administrative law judge considered that Dr. Jarboe diagnosed claimant with a "restrictive ventilatory defect" caused at least in part by his bronchial asthma, Employer's Exhibit at 2, but excluded coal mine dust exposure as a cause, in large part, because "[t]he inhalation of coal mine dust does not cause bronchial asthma." Employer's Exhibit 3 at 9; *see* Decision and Order at 19-20. However, the administrative law judge noted that chronic obstructive pulmonary disease (COPD) "includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma, and COPD may be caused by coal dust exposure." Decision and Order at 20, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (recognizing "[t]he term 'chronic obstructive pulmonary disease' (COPD) includes . . . chronic bronchitis, emphysema and asthma"). In light of the medical literature the Department of Labor relied on in the preamble to the 2001 regulations,[6] the administrative law judge permissibly found

[6] Employer alleges that "Dr. Jarboe is not attacking any regulation." Employer's Brief at 9. However, a basis for Dr. Jarboe's conclusion that coal mine dust is not a substantial contributing factor to claimant's pulmonary impairment is contrary to the

Dr. Jarboe's statement that coal mine dust does not cause asthma to be an unpersuasive explanation for why claimant's asthma is not related to his coal mine dust exposure.[7] *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 20.

Consequently, as the administrative law judge permissibly determined that the foundation for Dr. Jarboe's opinion is flawed, he rationally found the physician's conclusion that claimant does not have legal pneumoconiosis was not well-reasoned or documented. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); Decision and Order at 19-20. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A).[8] We therefore affirm the administrative law judge's determination that employer did not rebut the presumption. 20 C.F.R. §718.305(d)(1)(i); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S.

---

medical literature the Department of Labor (DOL) relied on, as cited above. Employer's Exhibit 3 at 9 (stating "it is important to emphasize that the inhalation of coal mine dust does not cause bronchial asthma"). Employer's contention in this regard is thus without merit.

[7] Because claimant invoked the Section 411(c)(4) presumption, employer bore the burden to prove that claimant's asthma was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting); 20 C.F.R. §718.201(b). Given the DOL's recognition in the preamble to the 2001 regulations that coal mine dust exposure may cause or contribute to COPD, which, in turn, may include asthma, the administrative law judge assessed whether Dr. Jarboe sufficiently explained his opinion that claimant's asthma was not related to coal mine dust exposure.

[8] The administrative law judge also considered Dr. Alam's medical reports diagnosing clinical and legal pneumoconiosis. Decision and Order at 20; Director's Exhibit 15. Contrary to employer's argument, whether Dr. Alam's opinion is "unusable as substantial evidence" to support a diagnosis of legal pneumoconiosis is immaterial; even a flawed opinion diagnosing pneumoconiosis cannot assist employer in meeting its burden to disprove the existence of the disease. Employer's Brief at 8. We therefore affirm the administrative law judge's finding that Dr. Alam's opinion is insufficient to rebut the Section 411(c)(4) presumption.

1147 (2003); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 20.

Total Disability Causation

The administrative law judge next addressed whether employer rebutted the Section 411(c)(4) presumption by proving "no part" of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 21-22. The administrative law judge rationally found the same reasons that undercut Dr. Jarboe's opinion on legal pneumoconiosis also undercut his opinion on disability causation. *Kennard*, 790 F.3d at 668; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 22. Moreover, employer does not challenge this determination on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving disability causation. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge