U.S. Department of Labor

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

BRB No. 17-0640 BLA

RICKEY DAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AP COAL ENGINEERING	)	
	)	
and	)	
	)	
ACE/ESIS WORKERS' COMPENSATION CENTER	)	DATE ISSUED: 09/21/2018
	)	
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 William J. King, Administrative Law Judge, United States Department of Labor.

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

Walter E. Harding (Boehl Stopher & Graves, LLP), Louisville, Kentucky, 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 (2014-BLA-05655) of Administrative Law Judge William J. King, 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). Claimant filed this subsequent claim on September 4, 2013.[1]

The administrative law judge found that claimant established at least fifteen years of underground coal mine employment[2] and a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2).[3] He therefore determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] 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 underground coal mine employment and total disability and, therefore, erred in finding that claimant invoked the Section 411(c)(4)

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[1] Claimant filed three previous claims for benefits, all of which were finally denied. Director's Exhibits 1-3. Claimant's most recent previous claim, filed on October 26, 2010, was denied by the district director on September 20, 2011, because the evidence did not establish any element of entitlement. Director's Exhibit 3.

[2] Claimant's coal mine employment was in Kentucky. Decision and Order at 3 n.4; Director's Exhibit 1 at 97. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Because the new evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order at 13.

[4] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes 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), as implemented by 20 C.F.R. §718.305.

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 brief. Employer has filed a reply brief, reiterating its arguments.

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).

I. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTION

A. Underground Coal Mine Employment

The administrative law judge found that the evidence establishes nineteen years of coal mine employment. Decision and Order at 6-7. He also found that the documentary evidence of record, along with claimant's hearing testimony, establishes that ten of those years took place at underground coal mines. *Id.* He then noted that claimant testified that "[d]uring the other nine years of his employment" he worked as an engineer, where he "worked about two days a week underground in the mine" and three days a week on the surface. *Id.* The administrative law judge highlighted claimant's testimony that when he worked aboveground as an engineer, he was still exposed to dust. *Id.* Based on that testimony, the administrative law judge found that the engineering office where claimant worked aboveground "was located on land associated with the underground mining site." *Id.* Therefore, the administrative law judge found that claimant established at least fifteen years of underground coal mine employment. *Id.*

Employer argues that the administrative law judge erred in finding that the time claimant worked as an engineer was qualifying coal mine employment for purposes of invoking the presumption. Employer's Brief at 8-9. Specifically, employer asserts that there is "no objective evidence of a direct and heavy exposure to rock and coal dust" during claimant's work aboveground as an engineer. *Id.* Employer's argument lacks merit.

Initially, we note that employer does not challenge the administrative law judge's findings that claimant worked for at least ten years in underground coal mining, and that the engineering office where claimant worked aboveground for an additional nine years "was located on land associated with the underground mining site." Decision and Order at 7. Therefore, those findings are affirmed.[5] *See Skrack v. Island Creek Coal Co.*, 6 BLR

[5] Moreover, even if employer's brief could be read as having raised a specific argument, we would hold that substantial evidence supports the administrative law judge's finding that, based on claimant's description of his work, the engineering office was located

1-710, 1-711 (1983). Further, as the administrative law judge correctly noted, an aboveground worker at the site of an underground mine is not required to show comparability of environmental conditions in order to invoke the Section 411(c)(4) presumption.[6] *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-29 (2011). Therefore, contrary to employer's argument, claimant was not required to establish that the additional years that he worked in the engineering office exposed him to "direct and heavy" amounts of coal dust. Employer's Brief at 8-9. Because claimant worked for an additional nine years as an engineer at the site of an underground mine, we affirm the administrative law judge's determination that claimant established at least fifteen years of underground coal mine employment for purposes of invoking the Section 411(c)(4) presumption.

B. Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

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on the site of an underground coal mine. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993). On Form CM-911a, claimant stated that he worked from 1974 to 1983 with Southeast Coal, from 1983 to 1992 with Roxanna Coal, and from 1992 to 1994 with AP Coal Engineering. Director's Exhibit 6. He indicated that all of these sites were "deep mines." *Id*. Further, claimant testified that when he worked for Roxanna Coal, he "went underground almost daily." Hearing Transcript at 17. At Roxanna Coal he "shot on the solid[,] [d]rove a scoop, shoveled buck, whatever needed to be done, for approximately nine years." *Id*. According to claimant, before that job, he worked for ten years with Southeast Coal Company where he "did the same jobs." *Id*.

[6] It is the type of mine (underground or surface), rather than the location of the particular worker (below ground or aboveground), which determines whether a claimant is required to show comparability of conditions. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-29 (2011).

The administrative law judge found that claimant established total disability[7] based on the new pulmonary function studies and medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[8] Decision and Order at 7-13. Employer does not challenge these findings, but argues only that the administrative law judge erred in weighing the new arterial blood gas studies pursuant to 20 C.F.R. §718.204(b)(2)(ii). Employer's Brief at 10. The administrative law judge found, however, that the new arterial blood gas study evidence does not establish total disability because no study was qualifying.[9] Decision and Order at 8. Employer's brief raises no specific allegations of error with regard to the administrative law judge's basis for finding that claimant established total disability based on the pulmonary function studies and medical opinions. The Board must limit its review to contentions of error specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Therefore, we affirm the administrative law judge's finding that claimant established total disability based on the new pulmonary function study and medical opinion evidence at 20 C.F.R. §718.204(b)(2)(i), (iv). *Skrack*, 6 BLR at 1-711.

The administrative law judge weighed the medical opinion evidence with the pulmonary function and blood gas study evidence, and found that, when weighed together, the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order at 12-13. Because employer does not allege

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[7] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 3. Consequently, to obtain review of the merits of his claim, claimant had to establish one element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

[8] The administrative law judge found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 8.

[9] A "qualifying" blood gas study yields results that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

any error in the administrative law judge's weighing of the evidence together at 20 C.F.R. §718.204(b)(2), this finding is affirmed. *See Skrack*, 6 BLR at 1-711.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2),[10] we also affirm his findings that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

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

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[11] 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.

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[12] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v.*

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[10] The administrative law judge additionally considered the evidence from claimant's prior claims and found that it merited less weight due to its age. Decision and Order at 13. That finding is affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[11] "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).

[12] To the extent employer argues that the administrative law judge applied an improper rebuttal standard with respect to legal pneumoconiosis by requiring its doctors to rule out the possibility that coal mine dust contributed to claimant's obstructive lung disease, employer's argument lacks merit. Employer's Brief at 8. As an initial matter, the administrative law judge did not require employer's physicians to rule out coal dust exposure as a cause of claimant's impairment. Rather, he properly evaluated the

Keystone Coal Mining Corp., 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In determining that employer failed to rebut the presumption, the administrative law judge considered the medical opinions of Drs. Tuteur and Jarboe.[13] Decision and Order at 10-12, 16-19; Employer's Exhibits 1, 4. Dr. Tuteur diagnosed claimant with chronic obstructive pulmonary disease (COPD) caused by cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 4. Dr. Jarboe also diagnosed COPD, but opined that the disease was caused by cigarette smoking and by asthma unrelated to coal mine dust exposure. Employer's Exhibit 1.

The administrative law judge discredited Dr. Tuteur's opinion because he found that Dr. Tuteur's explanation for excluding a diagnosis of legal pneumoconiosis was inconsistent with the preamble to the 2001 revised regulations. Decision and Order at 18-19. The administrative law judge discredited Dr. Jarboe's opinion because he found that it was not adequately reasoned or documented. *Id*.

We reject employer's argument that the administrative law judge erred in discrediting the opinions of Drs. Tuteur and Jarboe. Employer's Brief at 12-14; Employer's Reply at 4-6. Dr. Tuteur attributed the reversible portion of claimant's COPD impairment to cigarette smoking because, in his opinion, a disease related to coal mine dust exposure does not respond to bronchodilators. Employer's Exhibit 4 at 3. With respect to the non-reversible portion of the COPD impairment, Dr. Tuteur stated that "one cannot

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physicians' opinions based on their explanations as to why *they* excluded coal dust exposure as a cause. Decision and Order at 16-19. Further, the administrative law judge correctly stated that in order to establish rebuttal via the first available method, employer must establish "that the miner does not, or did not, have: (A) Legal pneumoconiosis" as defined in 20 C.F.R. §718.201(a)(2). Decision and Order at 13. Under 20 C.F.R. §718.201(a)(2), legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." A disease "arising out of coal mine employment" 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). Because the administrative law judge set forth the correct rebuttal standard, and properly weighed the physicians' opinions according to that standard, we reject employer's argument. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

[13] The administrative law judge also considered Dr. Trice's opinion diagnosing claimant with legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure. Decision and Order at 9; Director's Exhibit 16. *Id*.

distinguish between coal mine dust inhalation and cigarette smoking" based on "history, physical examination findings, pulmonary function study results," and x-ray readings. Decision and Order at 12; Employer's Exhibit 4 at 3-4. Rather, Dr. Tuteur excluded a diagnosis of legal pneumoconiosis based on a relative "risk assessment" of claimant's cigarette smoke and coal mine dust exposures. Employer's Exhibit 4 at 3-5. Citing medical literature, Dr. Tuteur explained "that [twenty-percent] of [never-mining] cigarette smokers develop clinically meaningful airflow obstruction in contrast to [never-smoking] miners who [develop] this same clinical picture about 1% of the time." *Id*. at 4. Dr. Tuteur therefore opined that claimant's COPD was not significantly related to, or substantially aggravated by, coal mine dust exposure.[14] *Id*. at 5.

The administrative law judge accurately noted that the Department of Labor (DOL), in the preamble to the 2001 revised regulations, set forth that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis[,]" and that "[s]mokers who mine have an additive risk for developing significant obstruction." 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *see* Decision and Order at 18. As Dr. Tuteur opined that coal mine dust exposure alone rarely causes clinically meaningful obstruction, Employer's Exhibit 4 at 3-5, the administrative law judge permissibly found his opinion on the etiology of the miner's obstructive impairment was unpersuasive and inconsistent with the medical science credited by the DOL in the preamble. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 18.

With respect to Dr. Jarboe, the administrative law judge noted that the physician opined that claimant's COPD "is due to asthma and cigarette smoking." Decision and Order at 19. However, the administrative law judge found that claimant's "treatment records do not document any diagnosis of or treatment for asthma." Decision and Order at 19. The administrative law judge also recognized that Dr. Tuteur "notes no history of asthma in his report."[15] *Id*. Based on the absence of a documented history of asthma, the

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[14] Dr. Tuteur noted that it is "possible but highly unlikely, that coal mine dust influenced the COPD seen in" claimant. Employer's Exhibit 4 at 5.

[15] Based on his review of claimant's medical treatment records, Dr. Tuteur stated that "there is a history of seasonal allergies but no history of asthma." Employer's Exhibit 4 at 2.

administrative law judge discredited Dr. Jarboe's opinion. *Id*. As this credibility finding is not challenged on appeal, it is affirmed.[16] *See Skrack*, 6 BLR at 1-711.

In addition, the administrative law judge fully summarized Dr. Jarboe's rationale for concluding that claimant's COPD was caused by cigarette smoking and asthma, and not coal mine dust exposure. Decision and Order at 10-11, 19. Contrary to employer's argument, the administrative law judge permissibly found that "Dr. Jarboe does not adequately explain why [c]laimant's persistent obstructive impairment is not due to coal mine dust exposure as well as his ongoing habit of cigarette smoking."[17] Decision and Order at 19; *see* 20 C.F.R. §718.201(b); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *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).

The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to prove that claimant

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[16] Moreover, even if employer's brief could be read as having raised a specific argument, we would hold that substantial evidence supports the administrative law judge's credibility determination regarding Dr. Jarboe's opinion. Given the lack of evidence in the record of a history of asthma, the administrative law judge reasonably questioned Dr. Jarboe's opinion that claimant's COPD is due in part to asthma unrelated to coal mine employment. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

[17] Because we affirm the administrative law judge's decision to discount Dr. Jarboe's opinion for the reasons set forth above, we need not address employer's argument that the administrative law judge erred in finding that Dr. Jarboe underestimated the length of claimant's coal mine employment. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 13. Moreover, because it is employer's burden to establish rebuttal, and the administrative law judge permissibly discredited the opinions of employer's doctors, we need not address employer's arguments regarding Dr. Trice's opinion that claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 12.

does not have legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A) and, thus, did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).[18]

The administrative law judge next addressed whether employer established that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis.[19] 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 18-10. The administrative law judge rationally discounted the disability causation opinions of Drs. Tuteur and Jarboe because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Ramage*, 737 F.3d at 1058; Decision and Order at 20. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

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[18] Consequently, we need not address employer's arguments regarding the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 9-12.

[19] Employer contends that the administrative law judge erred in applying the "no part" standard when considering rebuttal of the presumed fact of disability causation. Employer's Brief at 8. Specifically, employer argues that the administrative law judge should have instead determined whether it established that pneumoconiosis was not a "substantially contributing cause" of claimant's disability. *Id*. The Sixth Circuit rejected that argument in *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013). For the reasons set forth in *Ogle*, employer's argument is rejected.

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