U.S. Department of Labor

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

BRB No. 19-0483 BLA

BONITA GAY CLARK (Widow of GEORGE NICK CLARK) Claimant-Respondent v. MILLER BROTHERS COAL LLC and NATIONAL UNION FIRE/CHARTIS Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/29/2021 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits on Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Cameron Blair[1] and John W. Beauchamp (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

[1] On March 24, 2021, Timothy J. Walker of Fogle Keller Walker, PLLC, filed a Notice of Substitution of Counsel averring that he now represents Employer and its Carrier and that Cameron Blair should be removed as counsel of record for Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits on Modification[2] (2016-BLA-05344) rendered on a survivor's claim filed on February 24, 2014,[3] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with thirty years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(iii). He therefore found Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also argues he erred in finding the Miner's coal mine

[2] This case involves a request for modification of a district director's denial of benefits. Director's Exhibit 22. In cases involving a request for modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

[3] Claimant is the widow of the Miner, who died on May 21, 2011. Director's Exhibit 11. Because the Miner was never deemed eligible to receive benefits during his lifetime, Claimant is not eligible for automatic entitlement under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

[4] Section 411(c)(4) 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 or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

employment was qualifying for purposes of invoking the Section 411(c)(4) presumption. Furthermore, it contends he erred in finding it did not rebut the presumption.[6] Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the award of benefits.

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 Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

On September 10, 2019, Employer filed a Motion to Remand requesting the Board vacate the award and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] The Board denied

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> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner was totally disabled at the time of his death. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(iii); Decision and Order at 6-7.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 7.

[8] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)). The Department of Labor

Employer's request on October 17, 2019, holding Employer forfeited this argument by failing to raise it before the ALJ as *Lucia* had been decided approximately one year before the ALJ issued his Decision and Order. *Clark v. Miller Bros. Coal, LLC*, BRB No. 19-0483 BLA (Oct. 17, 2019) (Order) (unpub.). Thereafter Employer moved for reconsideration, which the Board denied. *Clark v. Miller Bros. Coal, LLC*, BRB No. 19-0483 BLA (Jun. 25, 2020) (Order on Motion for Recon.) (unpub.).

Employer now maintains it adequately preserved its Appointments Clause argument by raising it for the first time to the Board. Employer's Brief at 14. For the reasons set forth by the United States Court of Appeals for the Sixth Circuit in *Forrester Trucking v. Director, OWCP* [*Mabe*], 987 F.3d 581, 588 (6th Cir. 2021), we again conclude Employer forfeited its Appointment Clause argument by failing to raise it before the ALJ. *See also Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted).

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 surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich American Insurance Group 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); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

Employer does not challenge the ALJ's finding that the Miner worked for thirty years in surface coal mine employment. Decision and Order at 5. We therefore affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues Claimant's testimony is insufficient to establish the Miner was regularly exposed to coal mine dust during his surface coal mine employment. Employer's Brief at 17-23. Its arguments have no merit.

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has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

Claimant testified the Miner worked as a diesel mechanic and when he returned home from work he would be "nasty" because he was covered in oil and dust. Hearing Tr. at 16-17. She further testified she had to wash all of his clothes separately from other clothes because of the dust. *Id.* at 17. She stated the Miner also worked as a dozer operator and although "[h]e would [not] be as bad" as when he worked as a mechanic, his clothes still needed to be washed separately because of the dust. *Id.* Moreover, even when working as a dozer operator, he still at times had to do the work of a mechanic. *Id.*

Contrary to Employer's argument, the ALJ permissibly found Claimant's testimony credible and establishes the Miner was regularly exposed to coal mine dust.[9] *See Duncan*, 889 F.3d at 304 (widow's testimony that miner's face and clothes were very dirty when he returned from work, in conjunction with statement that he was exposed to dust, gases, and fumes for his entire coal mine employment, establish regular coal mine dust exposure); *Kennard*, 790 F.3d at 663; *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 (10th Cir. 2014); *United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001); 78 Fed. Reg. 59,102, 59,103-05 (Sept. 25, 2013) (lay evidence addressing the individual miner's experiences satisfies the regular dust exposure standard); Decision and Order at 5-6.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee 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). The Board cannot substitute its inferences for those of the ALJ. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We affirm, as supported by substantial evidence, the ALJ's finding that the Miner's employment as both a diesel mechanic and a dozer operator constitutes qualifying coal mine employment because he was regularly exposed to coal mine dust. 20 C.F.R. §718.305(b)(2); *see Duncan*, 889 F.3d at 304; *Sterling*, 762 F.3d at 490-91. As Claimant had more than fifteen years of qualifying coal mine employment, we

[9] Employer argues the ALJ erred by failing to compare the conditions of the Miner's surface coal mine employment to those known to prevail in underground mines. Employer's Brief at 17-23. It further asserts he did not adequately apportion the Miner's coal mine employment by considering which of his individual job duties occurred in substantially similar conditions. *Id.* We disagree. Claimant is not required to prove the dust conditions aboveground were identical to those underground, *see* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013), nor does she have to prove the Miner "was around surface coal dust for a full eight hours on any given day for that day to count." *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481 (7th Cir. 2001). Rather, Claimant need only establish the Miner was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).

affirm the ALJ's finding that she invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b); Decision and Order at 5.

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

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[10] or that "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 ALJ found Employer did not establish rebuttal by either method.[11]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "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)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds this standard requires Employer must show the Miner's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

The ALJ weighed the opinions of Drs. Broudy and Rosenberg, both of whom opined the Miner suffered from a restrictive ventilatory defect as a result of lung surgery to treat lung cancer. Employer's Exhibits 3, 5, 6. They both opined the restrictive defect was not significantly related to, or substantially aggravated by, coal mine dust exposure. *Id*. Dr.

[10] "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).

[11] The ALJ found Employer disproved the existence of clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i)(B); Decision and Order at 11.

Rosenberg also opined the Miner had emphysema due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 5, 6.

Employer argues the ALJ did not identify any reasons for discrediting the opinions of Drs. Broudy or Rosenberg on the issue of legal pneumoconiosis. Employer's Brief at 26. Contrary to Employer's argument, the ALJ adequately set forth his rationale, finding Dr. Broudy's opinion not credible because he failed to discuss the various diagnoses of chronic obstructive pulmonary disease in the Miner's treatment records, or explain if this disease was significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order at 12. The ALJ also found Dr. Rosenberg's rationales for excluding coal mine dust exposure as a cause of the Miner's restrictive lung defect and emphysema to be speculative and inconsistent with the regulations and scientific evidence cited in the preamble to the 2001 revised regulations. *Id*. at 12-14. Employer does not specifically challenge any of these credibility findings. Thus we affirm them. *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); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Skrack*, 6 BLR at 1-711; Decision and Order at 12-14.

Because the ALJ permissibly discredited the opinions of Drs. Broudy and Rosenberg, the only opinions supportive of Employer's burden on rebuttal, we affirm his finding that Employer did not disprove legal pneumoconiosis.[12] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Death Causation

The ALJ next addressed whether Employer established "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). Employer argues the ALJ erred in finding the opinions of Drs. Broudy and Rosenberg that the Miner's death was caused by lung cancer insufficient to satisfy its burden. Employer's Brief at 23-26.

Contrary to Employer's assertion, the ALJ permissibly discredited their death causation opinions because neither doctor diagnosed legal pneumoconiosis, contrary to his determination that Employer failed to disprove the Miner had the disease. *See Big Branch*

[12] Employer also generally argues the ALJ erred by failing to consider Claimant's evidence on the issue of rebuttal. Employer Brief at 26. Employer does not identify any of Claimant's evidence the ALJ failed to weigh that would support its burden to rebut the Section 411(c)(4) presumption. *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986).

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 14-15. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(ii).

Accordingly, the ALJ's Decision and Order Granting Benefits on Modification is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge