U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0401 BLA

OKEY L. MAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AERO ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
A.T. MASSEY, c/o WELLS FARGO	)	DATE ISSUED: 08/28/2015
	)	
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 – Award of Benefits on Second Remand of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Robert, Pikeville, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order – Award of Benefits on Second Remand (2007-BLA-5750) of Administrative Law Judge Larry S. Merck, rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944(2012) (the Act). This case is before the Board for the third time.

In the initial decision, Administrative Law Judge Thomas F. Phalen, Jr. credited claimant with at least seventeen years of coal mine employment, as stipulated by the parties, and found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] On review of the entire record, however, Judge Phalen found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

Following claimant's appeal, the Board vacated Judge Phalen's denial of benefits in light of an amendment to the Act, affecting claims filed after January 1, 2005, that was enacted subsequent to the issuance of Judge Phalen's decision. Relevant to this miner's claim, Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148, reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4). Noting that claimant

[1] Claimant's initial claim for benefits, filed on September 26, 2002, was denied by the district director on December 8, 2003, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] 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).

[3] Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not

filed his claim after January 1, 2005, and that Judge Phalen credited him with seventeen years of coal mine employment and found a total respiratory disability established, the Board remanded the case for consideration of whether claimant was entitled to the presumption at amended Section 411(c)(4). *May v. Aero Energy, Inc.*, BRB No. 09-0388 BLA (June 30, 2010) (unpub.).

On remand, due to Judge Phalen's retirement, the case was reassigned, without objection, to Judge Larry S. Merck (the administrative law judge). Applying amended Section 411(c)(4), the administrative law judge found that, while claimant's coal mine employment spanned at least seventeen years and included some above ground work, claimant worked in underground coal mine employment for a total of 15.76 years. The administrative law judge also found that the new medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer did not rebut the presumption. Accordingly, benefits were awarded.

Following employer's appeal, the Board affirmed the administrative law judge's finding of total respiratory disability, as unchallenged on appeal, but vacated the administrative law judge's finding of 15.76 years of qualifying coal mine employment, holding that the method of calculation was not reasonable. As the administrative law judge's finding of more than fifteen years of underground coal mine employment affected the applicability of amended Section 411(c)(4), the Board vacated his findings that invocation of the presumption thereunder was established and that employer failed to establish rebuttal, and remanded the case for further findings. The Board instructed the administrative law judge that if the evidence of record did not establish at least fifteen years of underground coal mine employment, he must consider whether claimant's employment with John L. Coleman Trucking (Coleman Trucking) constituted qualifying coal mine employment for the purpose of invoking the amended Section 411(c)(4) presumption. *May v. Aero Energy, Inc.*, BRB No. 11-0849 BLA (Sept. 17, 2012) (unpub.).

On remand, the administrative law judge credited claimant with 15.67 years of coal mine employment, of which at least fifteen years were spent underground or in surface mines under substantially similar conditions. As he previously found total respiratory disability established pursuant to Section 718.204(b), the administrative law

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have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

judge concluded that claimant was entitled to invocation of the amended Section 411(c)(4) presumption, and found that employer failed to establish rebuttal. Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's finding that claimant is entitled to invocation of the amended Section 411(c)(4) presumption, arguing that the evidence is insufficient to establish at least fifteen years of qualifying coal mine employment. Employer also challenges the administrative law judge's finding that employer failed to establish rebuttal of the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge permissibly discounted the opinions of Drs. Jarboe and Rosenberg on the issue of legal pneumoconiosis.

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.[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).

Employer challenges the administrative law judge's finding that claimant established invocation of the presumption at amended Section 411(c)(4), asserting that claimant failed to prove that his working conditions at Coleman Trucking were substantially similar to those at an underground mine. Employer specifically argues that claimant's testimony is insufficient to substantiate that his work as a truck driver occurred at surface mines and that the prevailing dust conditions during that employment were comparable to the conditions in an underground mine. Employer asserts, therefore, that the administrative law judge erred in finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer's Brief at 10-14.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. The administrative law judge accorded the greatest probative weight to claimant's Social Security Administration records, and credited

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 4, 6.

claimant with a total of 15.67 years of coal mine employment.[5] The administrative law judge determined that all of claimant's employment took place at underground coal mines, except for his employment as a contract driver with Coleman Trucking, which the administrative law judge found to have occurred at a coal preparation plant at a surface mine.[6] Decision and Order at 15 citing 2011 Decision and Order at 5. On his employment history form, for each named employer, claimant responded "yes" to the question "were you exposed to dust?" Further, at the hearing, claimant described the working conditions during his years of coal mine employment and testified that "[i]t's very, very dusty [] operating in the face," and that the "belt lines were very dusty, and about anywhere you work in the mines, there was dust." Hearing Transcript at 14. Claimant added that dust would get into his eyes, nose, and throat; that he would cough and spit coal dust after a day's work; and that his face, body, and clothing would be very dirty and black after a day's work. Hearing Transcript at 14. The administrative law judge found that claimant's description of his dust exposure history established that claimant was exposed to significant amounts of dust during his entire history of coal mine employment, including his period of employment with Coleman Trucking, and that based on claimant's uncontradicted description of his coal dust exposure, claimant established that the dust conditions at the surface mine were substantially similar to those at an underground mine.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). In this case, the administrative law judge rationally determined that claimant credibly testified, without contradiction, that all of his coal mine employment was very dusty. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); 20 C.F.R.

[5] We note that the administrative law judge's Decision and Order reflects a clerical error regarding the length of claimant's coal mine employment. The administrative law judge credited claimant as follows: 0.75 years for 1977; 0.62 years for 1978; 9 years for 1979-1987; 0.35 years for 1988; 0.34 years for 1989; 2 years for 1990-1991; 0.61 years for 1992; 2 years for 1993-1994; and 0.42 years for 1995. Decision and Order at 9-13. Thus, adding these findings, the administrative law judge credited claimant with 16.09 total years of coal mine employment.

[6] Claimant indicated that his surface coal mine work with John L. Coleman Trucking took place at the Branham & Baker Coal Preparation plant, where he "worked at the tipple, hauling gob, slate" and "haul[ed] coal and refu[s]e." Director's Exhibits 1-212, 1-213, 1-215, 4, 12; *see* 20 C.F.R. §725.101(a)(12).

§718.305(b)(2).[7] We affirm, therefore, the administrative law judge's finding of at least fifteen years of qualifying coal mine employment. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 25 BLR 2-633 (6th Cir. 2014). Consequently, we affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis afforded by amended Section 411(c)(4).

Employer next challenges the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. Specifically, employer challenges the administrative law judge's crediting of Dr. Baker's opinion over those of Drs. Jarboe and Rosenberg on the issues of legal pneumoconiosis[8] and disability causation. Employer argues that, in weighing the opinions of Drs. Jarboe and Rosenberg, the administrative law judge imposed medical principles not found in the preamble or the regulations, and failed to resolve the medical dispute on scientific grounds. Employer's Brief at 14-29.

The administrative law judge correctly acknowledged that rebuttal requires employer to affirmatively establish that claimant does not have pneumoconiosis, or that no part of his respiratory or pulmonary total disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. Decision and Order at 16; 20 C.F.R. §718.305(d)(1)(i), (ii). After finding that employer successfully rebutted the presumption of clinical pneumoconiosis,[9] the administrative law judge accurately summarized the conflicting medical opinions of record and the physicians' explanations for their conclusions, and determined that Dr. Baker diagnosed legal pneumoconiosis, whereas Drs. Jarboe and Rosenberg opined that there is insufficient evidence of legal pneumoconiosis and that no

[7] Section 718.305(b)(2) provides that "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).

[8] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[9] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *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).

part of claimant's obstructive impairment is due to coal dust exposure.[10] Decision and Order at 18, citing 2011 Decision and Order at 9-15, 21-27; Employer's Exhibits 1, 4, 7, 8, 9, 10, 11, 12; Claimant's Exhibits 3, 4, 5; Director's Exhibit 12. The administrative law judge found that Drs. Jarboe and Rosenberg failed to provide credible bases for their opinions that coal dust did not contribute to claimant's lung impairment. Decision and Order 18, citing 2011 Decision and Order at 9-15; Employer's Exhibits 1, 4, 7, 8, 9, 10, 12.

Specifically, the administrative law judge discounted Dr. Jarboe's opinion, that claimant does not have pneumoconiosis and that his obstructive impairment is due to smoking and bronchial asthma, on the ground that it was not adequately explained. Decision and Order at 18-19, citing 2011 Decision and Order at 24-26. The administrative law judge found that Dr. Jarboe's reasons as to why coal dust exposure was not a contributing factor to claimant's respiratory impairment, namely claimant's reduced FEV_1/FVC ratio and claimant's significantly elevated residual volume, were contrary to the findings of scientific studies found credible by the Department of Labor (DOL) in the preamble to the 2001 regulations. Similarly, the administrative law judge stated that he was not persuaded by Dr. Rosenberg's opinion, that claimant's obstructive impairment was due to smoking and hyperactive airways rather than pneumoconiosis, as Dr. Rosenberg's opinion was also based on claimant's reduced FEV_1/FVC ratio and the fact that claimant's "marked air trapping … is consistent with airways disease related to factors other than past coal mine dust exposure[,]" contrary to the scientific studies found credible by the DOL in the preamble to the 2001 regulations. Decision and Order at 18, citing 2011 Decision and Order at 27. Additionally, the administrative law judge discounted the opinions of Drs. Jarboe and Rosenberg, as contrary to law, because they relied on the fact that claimant's respiratory function improved after bronchodilation. Decision and Order at 18-19, citing 2011 Decision and Order at 25, 27.

The administrative law judge permissibly found that the reasons given by Drs. Jarboe and Rosenberg for finding that claimant did not have legal pneumoconiosis, were inconsistent with scientific studies found credible by the DOL in the preamble to the 2001 regulations. Decision and Order at 18, citing 2011 Decision and Order at 24, 27;

[10] The administrative law judge accorded little weight to Dr. Westerfield's diagnosis of legal pneumoconiosis because the doctor did not give a basis for his opinion that coal dust significantly contributed to claimant's obstructive pulmonary disease. Decision and Order at 18, citing 2011 Decision and Order at 20. Similarly, the administrative law judge determined that Dr. Sampao's opinion was "unclear" on the issue of legal pneumoconiosis because he failed to explain how he determined the etiology of claimant's impairment, and why he opined that smoking was only an aggravating factor. Decision and Order at 18, citing 2011 Decision and Order at 23-24.

see 65 Fed. Reg. 79,920, 79,939-43 (Dec. 20, 2000), and were contrary to law. *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Thus, the administrative law judge acted within his discretion in finding that the opinions of Drs. Jarboe and Rosenberg were not well-reasoned and were entitled to little weight. *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 25 BLR 2-633 (6th Cir. 2014); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Clark*, 12 BLR at 1-55. As the administrative law judge's credibility determinations are supported by substantial evidence, we affirm his finding that employer failed to establish rebuttal of the presumed fact of legal pneumoconiosis.

We decline to address employer's allegation that the administrative law judge erred in crediting the opinion of Dr. Baker that claimant has legal pneumoconiosis. Because employer bears the burden of rebutting the amended Section 411(c)(4) presumption, error, if any, in the administrative law judge's weighing of Dr. Baker's opinion is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); 30 U.S.C. §902(b).

Lastly, because the administrative law judge properly found that the opinions of Drs. Jarboe and Rosenberg on the issue of pneumoconiosis were not well-reasoned and well-documented, their opinions were insufficient to establish that no part of claimant's disability was caused by pneumoconiosis. Decision and Order at 19, citing 2011 Decision and Order at 30-31; *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grounds Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that the opinions of Drs. Jarboe and Rosenberg were insufficient to establish rebuttal of the presumed fact of disability causation, and that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii). Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the Decision and Order – Award of Benefits on Second Remand of the administrative law judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge