U.S. Department of Labor

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

BRB Nos. 19-0241 BLA
and 20-0265 BLA

MARY LOUISE SCOTT (Widow of and o/b/o of RANDALL W. SCOTT)	)	
Claimant-Respondent	)	
v.	)	
MILLER BROTHERS COAL LLC	)	
and	)	
	)	DATE ISSUED: 05/15/2020
NATIONAL UNION FIRE INSURANCE/CHARTIS	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest		

Appeal of Decision and Order Awarding Benefits and Decision and Order Awarding Survivor's Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Kyle Johnson and John W. Beauchamp (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2015-BLA-05739) and the Decision and Order Awarding Survivor's Benefits (2015-BLA-05738) of Administrative Law Judge Joseph E. Kane rendered on claims filed 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 June 9, 2014,[1] and a survivor's claim filed on April 28, 2015.[2]

In his decision regarding the miner's claim, the administrative law judge accepted the parties' stipulation the miner had twenty-three years of surface coal mine employment. He found the miner worked in conditions substantially similar to those in an underground mine and was totally disabled. 20 C.F.R. §718.204(b)(2). Thus, he found claimant invoked the rebuttable presumption the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act[3] and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309. The administrative law judge further found employer did not rebut the presumption and awarded benefits in the miner's claim.

[1]The miner filed an initial claim on October 18, 2007, which the district director denied on July 1, 2008, for failure to establish total disability. Director's Exhibit 1. The miner filed his subsequent claim on June 9, 2014, and later died on March 9, 2015. Director's Exhibits 2, 25. Claimant is pursuing the miner's claim on his behalf and as well as her survivor's claim.

[2] Employer's appeal in the miner's claim was assigned BRB No. 19-0241 BLA, and its appeal in the survivor's claim was assigned BRB No. 20-0265 BLA. The Board has consolidated these appeals of the awards of the miner's and survivor's claims for purposes of decision only.

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption the miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or substantially similar surface coal mine employment, and a totally disabling respiratory impairment. 30 U.S. C. §921(c)(4) (2012); 20 C.F.R. §718.305.

In a separate decision, the administrative law judge found claimant derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[4]

On appeal, employer challenges the administrative law judge's finding the miner worked in substantially similar surface coal mine employment and claimant established total disability necessary to invoke the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding the presumption unrebutted.[5] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging affirmance of the administrative law judge's finding on substantial similarity.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decisions and orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

Miner's Claim – 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 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

[4] Under Section 422(*l*) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[5] We affirm, as unchallenged, the administrative law judge's finding the miner was totally disabled and claimant established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 21, 31.

[6] The miner's most recent coal mine employment occurred in Kentucky. Director's Exhibit 1. Accordingly, the Board will apply the law 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).

while working there." 20 C.F.R. §718.305(b)(2); *see Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (Kethledge, J., concurring); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

At a deposition on October 30, 2014, the miner discussed where he worked but not his dust exposure. Director's Exhibit 11. The administrative law judge relied on claimant's hearing testimony that when she visited the miner's work sites they were dusty and that he often returned home covered in coal mine dust to find the miner worked in conditions substantially similar to those at underground mines.[7] Decision and Order at 18. He concluded claimant established the miner worked "at least fifteen years" in qualifying surface coal mine employment. *Id*.

Employer contends the administrative law judge could not reasonably rely on claimant's testimony to prove substantial similarity because she did not have first-hand knowledge of the dust conditions in each of the miner's jobs. Employer's Brief at 14. Employer argues the administrative law judge was unclear whether he found all of the miner's coal mine jobs to be substantially similar or only some of those jobs. *Id*. Although employer does not discount the miner was exposed to coal mine dust when he was on the mine site performing his job duties, it argues the administrative law judge did not adequately explain his findings in light of the miner's testimony that he often worked in an

[7] Claimant described that the miner frequently worked around coal tipples. Hearing Transcript at 14. She testified she infrequently took the miner's lunch to an "Addington mine," noting it was a very dusty environment. *Id*. at 15-16, 22. She stated he worked at that job site "on and off" for approximately three years. *Id*. at 22. She described the job site as having "a lot of heavy traffic. The dust from the roads and the coal dust coming from where they were running coal out." *Id*. at 16. She testified that when she visited the work site, the miner was usually working outside and his face and body would be "[c]overed in coal dust." *Id*. at 16-17. She stated the miner was clean when he left the house in the morning, but he would remove his shoes and clothing on the porch sometimes when he returned home in the evening before he went to shower. *Id*. at 17. She testified the miner generally removed his clothing once he was in the bathroom and she would have to clean coal dust from the bathroom floor afterward. *Id*. at 18. She stated that the miner's appearance after working at other job sites was similar to what she previously described. *Id*. at 19. She testified that when the miner worked in an office for employer "he didn't get as nasty, but he would still go back, he would still go out on the job sites." *Id.* She stated that he occasionally came home covered in coal mine dust from that job as well. *Id.*

office located away from the mine site and would only spend portions of his day at the mine. *Id*. at 15. Thus, employer contends the administrative law judge failed to adequately explain his finding the miner was regularly exposed to coal mine dust in his surface coal mine employment. *Id.* We disagree.

Contrary to employer's contention, 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). 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).

The administrative law judge noted the miner testified he worked on equipment at both underground and surface mines. Decision and Order at 4. He also noted the miner last worked as a maintenance supervisor where he "[took] care of all the equipment, every bit of equipment [employer] had," and split his time evenly between the office and working on equipment on or around an active mining site. *Id.*, *quoting* Director's Exhibit 11 at 21, 22. Although the administrative law judge did not specifically discuss each job the miner held in coal mining, the miner's testimony supports the administrative law judge's finding claimant established at least fifteen years of qualifying coal mine employment. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference.").

The miner testified that his first coal mine employment job was working underground for Cheyenne Coal for five months. Director's Exhibit 11 at 10; *see* Director's Exhibit 4. He then worked for Wayne Supply as a mechanic from 1978 to 1990, working on the surface ("[C]oal mine prep plants, tipples, and service is what I worked in."). Director's Exhibit 11 at 9. The miner explained he "worked on heavy equipment," "[u]sually outside" but "I worked in the shop too, . . . some of that before I went out in the field." *Id.* at 9-10. He indicated he worked in a machine shop located away from the mine site from 1978 to 1984, although his work took him "out in the field" at least "half of the time." *Id*. at 12-13. It is unclear whether the miner meant that half of his work day was spent at a mine site or whether half of his work days were spent at mine sites from 1978 to 1984. However, even assuming the latter, the miner spent at least three years working at an active mine site from 1978 to 1984.

The miner next described working at active mine sites exclusively from 1985 through 1993 for a total of eight years. Director's Exhibit 11 at 14-15. From 1994 to 1995, he worked as a Field Service Foreman and testified he spent ninety percent of his time on that job in an office away from the mine site or approximately two and one-half months of

work at a mine site. *Id*. at 15. The miner again worked exclusively at active mines sites for two years in 1996 and 1997. *Id*. at 16. From 1998 to 2001, he worked as a technical communicator/product support account representative and spent seventy percent of his time on that job working at active mine sites or approximately two years and one month. *Id*. at 19. Finally, the miner worked for Knott Floyd, which was purchased by employer, from 2001 until June 15, 2007, as a maintenance supervisor. *Id*. at 20-21. He testified that he spent half of his time on that job working at active mine sites, for a total of at least three years. *Id*. Based on the miner's detailed accounting of his coal mine employment, we agree with the Director that "all told, the miner's on-site work totals eighteen years and seven months of work at mine sites, including five months at an underground mine." Director's Brief at 8.

Additionally, the miner indicated on his employment history form that he was exposed to dust, gases, or fumes during his entire coal mine employment.[8] Director's Exhibit 3. This statement corroborates claimant's testimony that the mine sites she visited were dusty and that the miner was often covered in coal mine dust when he returned home from work. Hearing Transcript at 16-17. We see no error in the administrative law judge's reliance on claimant's testimony to find the miner was regularly exposed to coal mine dust. *See Kennard*, 790 F.3d at 664 (6th Cir. 2015) (claimant's "uncontested lay testimony" regarding the miner's dust conditions "easily supports a finding" of regular dust exposure); *Sterling*, 762 F.3d at 490 (claimant's testimony that the conditions of his employment were "very dusty" was sufficient to establish regular exposure); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (the administrative law judge has discretion to assess witness credibility and the Board will not disturb his or her findings unless they are inherently unreasonable).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the miner had at least fifteen years of qualifying coal mine employment. *See Zurich*, 889 F.3d at 304; *Kennard*, 790 F.3d at 663; *Sterling*, 762 F.3d at 489-90. We therefore affirm the administrative law judge's finding claimant invoked the Section 411(c)(4) presumption.

[8] The miner also indicated he worked aboveground fixing machinery at both underground and surfaces mines. Director's Exhibit 11 at 22. A miner who worked aboveground at an underground mine need not otherwise establish the conditions were substantially similar to those in an underground mine. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058-59 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

Miner's Claim - Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis[9] 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 failed to establish rebuttal by either method.[10]

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)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer relies on the opinions of Drs. Rosenberg and Broudy to disprove legal pneumoconiosis. They opined the miner's respiratory impairment was related to smoking and lung cancer with no contribution from coal mine dust exposure. We reject employer's contentions that the administrative law judge erred in finding their opinions inadequately reasoned.

As the administrative law judge accurately noted, Dr. Rosenberg excluded legal pneumoconiosis, in part, because the miner's pulmonary function studies showed reversibility of his impairment after use of a bronchodilator. Employer's Exhibit 1 at 5. Contrary to employer's contention, the administrative law judge permissibly found Dr. Rosenberg's opinion unpersuasive because he did not explain why the miner's coal mine

[9] 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). This definition encompasses 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).

[10] The administrative law judge determined employer disproved clinical pneumoconiosis, but did not disprove legal pneumoconiosis. Decision and Order at 24-25, 29.

dust exposure did not cause the fixed portion of his respiratory impairment. *See Cumberland River Coal Co. v. Director, OWCP* [*Banks*], 690 F.3d 477 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 26.

The administrative law judge also accurately noted that Dr. Rosenberg indicated the miner's marked deterioration over time, from 2007 to 2014, also would not be expected from an impairment related to coal mine dust exposure. Employer's Exhibit 3 at 21. Dr. Rosenberg explained "there's no science [showing] that the [pulmonary function] studies are going to profoundly deteriorate in this fashion, particularly in the absence of clinical [coal worker's pneumoconiosis]." *Id*. at 17. Dr. Broudy similarly excluded coal mine dust exposure as the cause of the miner's respiratory impairment, stating his "fairly drastic change" in pulmonary function between his first and second claims is "very unusual" because there is no evidence the miner had complicated pneumoconiosis. Employer's Exhibit 5 at 16. The administrative law judge permissibly rejected Drs. Rosenberg's and Broudy's opinions because neither physician adequately explained why the miner's respiratory disease "was not the exception to [their] generalization[s] that pneumoconiosis, particularly legal pneumoconiosis, would not cause a marked deterioration in pulmonary function within a 'relatively short timeframe.'" Decision and Order at 26, 27; *see Barrett*, 478 F.3d at 356; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (an administrative law judge may reject medical opinions that rely on generalities and not specifics of a miner's case).

Furthermore, even accepting Drs. Rosenberg's and Broudy's explanations that the miner's smoking history was sufficient to cause his chronic obstructive pulmonary disease and lung cancer, the administrative law judge permissibly found they did not adequately explain why the miner's coal mine dust exposure did not significantly contribute to, or substantially aggravate, his respiratory condition. *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer's arguments on legal pneumoconiosis amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Broudy, we affirm his finding that employer did not disprove legal pneumoconiosis.[11] *See Jericol Mining, Inc. v. Napier*,

[11] Because employer bears the burden of proof on rebuttal and we have affirmed the administrative law judge's discrediting of Drs. Rosenberg's and Broudy's opinions, we need not address employer's arguments regarding the weight accorded Dr. Ammisetty's

301 F.3d 703, 713-14 (6th Cir. 2002); *Rowe*, 710 F.2d at 255. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding the miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether employer established that "no part of the miner's 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)(ii). He rejected Drs. Rosenberg's and Broudy's causation opinions because neither physician diagnosed legal pneumoconiosis, contrary to his finding employer did not disprove the disease. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 30. Employer does not allege any specific error on disability causation other than its same arguments on legal pneumoconiosis which we have rejected. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing no part of the miner's respiratory disability was due to legal pneumoconiosis.

Survivor's Claim

The administrative law judge found claimant satisfied her burden to establish each element necessary to demonstrate entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S. C. §932(*l*) (2012); Decision and Order Awarding Survivor's Benefits at 3-4. Because we have affirmed the award of benefits in the miner's claim, we affirm his determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

opinion that the miner had legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 17-18.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge