U.S. Department of Labor

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

BRB No. 17-0388 BLA

DEWEY R. RUNYON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 05/24/2018
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Sean P.S. Rukavina (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor, Maia Fisher, 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, BOGGS and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (2014-BLA-5672) of Administrative Law Judge Drew A. Swank awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on May 17, 2013.[1]

After crediting claimant with thirty-three years of underground coal mine employment,[2] the administrative law judge found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption[3] and established a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge further determined that employer failed to rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it is the responsible operator. Employer also argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation

[1] Claimant filed six previous claims for benefits, all of which were finally denied. Director's Exhibits 1-6. Claimant's most recent prior claim, filed on October 28, 2003, was finally denied on August 4, 2011, because the evidence did not establish that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 6.

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Decision and Order at 9; Hearing Transcript at 21. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Programs (the Director), responds in support of the administrative law judge's identification of employer as the responsible operator.[4]

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).

Responsible Operator

Employer initially challenges its designation as the responsible operator. The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for a cumulative period of at least one year. 20 C.F.R. §§725.494(c), 725.495(a)(1). Employer does not deny that it is the "potentially responsible operator" that most recently employed claimant for a cumulative period of at least one year. Employer instead asserts that it is not liable for the payment of benefits in this claim because another operator, Workman Construction, Incorporated (Workman), conceded in the adjudication of claimant's prior claim that it was the responsible operator.

Background Information

In claimant's prior 2003 claim, Workman accepted the district director's preliminary determination that it was the responsible operator. Director's Exhibit 6. Workman subsequently requested a hearing on the merits of entitlement, but did not contest the responsible operator issue. *Id.*

Workman obtained new counsel for the hearing, who attempted to contest its designation as the responsible operator. In a Decision and Order dated June 4, 2007, Administrative Law Judge Richard A. Morgan acknowledged that the evidence did not support Workman's designation as the responsible operator. 2007 Decision and Order at 4. However, Judge Morgan concluded that Workman waived its right to contest its designation as responsible operator by not doing so in a timely fashion before the district

[4] Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, or his finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

director, as required by 20 C.F.R. §725.412.[5] *Id.* at 7. The Board affirmed Judge Morgan's designation of Workman as the responsible operator.[6] *D.D.R.* [*Runyon*] *v. Workman Constr., Inc.*, BRB Nos. 07-0948 BLA/A, slip op. at 4-5 (Aug. 25, 2008) (unpub.).

Claimant filed this subsequent claim on May 17, 2013. Director's Exhibit 8. The district director issued a Notice of Claim on June 5, 2013, informing employer that it was identified as a "potentially liable operator." Director's Exhibit 17. In a Proposed Decision and Order dated March 24, 2014, the district director awarded benefits, and designated employer as the responsible operator. Director's Exhibit 30. The district director found that although employer was not the operator that most recently employed the miner, claimant's most recent coal mine employment with Workman was less than one full calendar year. *Id.* At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 31, 34.

The Administrative Law Judge's Decision

In a Decision and Order dated April 20, 2017, the administrative law judge designated employer as the responsible operator, rejecting employer's argument that

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[5] In an Order on Reconsideration dated July 19, 2007, Administrative Law Judge Richard A. Morgan reaffirmed his determination that Workman Construction, Incorporated (Workman) waived its right to contest its designation as the responsible operator. 2007 Order at 2. Judge Morgan also noted that the issue was "largely moot" in light of his denial of benefits. *Id.*

[6] The Board explained:

> [Judge Morgan's] disposition of this issue was proper. A change in counsel does not vitiate affirmative pleadings and concession of liability as transpired here. Moreover, claimant may not now urge a mistake on the part of the district director, whether of fact or law, in order to resurrect this issue. Claimant and employer were both represented by counsel, and could have ascertained information, and argued their positions regarding application of the statute and regulations. Moreover, [Workman] was not compelled to accept responsible operator status, rather than litigate the issue. Consequently, we affirm [Judge Morgan's] finding that [Workman] waived its right to contest its designation as the responsible operator herein.

D.D.R. [*Runyon*] *v. Workman Constr., Inc.*, BRB Nos. 07-0948 BLA/A, slip op. at 4-5 (Aug. 25, 2008) (unpub.).

Workman was the responsible operator because it failed to contest its designation as the responsible operator in the previous claim. Decision and Order at 5-8.

Discussion

Citing 20 C.F.R. §735.309(c)(5), employer contends that the administrative law judge erred in allowing the Director to relitigate the responsible operator issue. Employer argues that Workman's failure to contest its designation as the responsible operator in the prior claim precluded the Director from designating a different responsible operator in this claim. Employer's Brief at 8. The Director disagrees, contending that Workman's failure to contest its designation as the responsible operator in the prior claim precluded only Workman from contesting its designation as the responsible operator in a subsequent claim. We agree with the Director.

Section 725.309(c)(5), which controls the balance between promoting finality of claims and allowing the court to reconsider findings in subsequent claims such as this, provides:

> If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), will be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. §725.309(c)(5).

Section 725.309(c)(5) sets out an initial rule – findings made in a prior claim are not binding on any party in a future claim if the claimant establishes a change in an applicable condition of entitlement. However, the rule also sets out two exceptions: (1) findings based on a party's failure to contest an issue; and (2) stipulations made by a party in connection with the prior claim. As the Director accurately notes, the first sentence of Section 725.309(c)(5) is silent regarding which parties are bound by prior claim uncontested findings. Director's Brief at 6.

The second sentence of the regulation, which addresses stipulations, provides that "any stipulation made by any party in connection with the prior claim shall be binding on *that* party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(c)(5) (emphasis added). Given the first sentence's silence regarding who is bound by an uncontested issue, the Director asserts that "it is logical to conclude that the two exceptions are intended to be treated the same – only the conceding party is bound." Director's Brief

at 7. The Director notes that when the Department of Labor (DOL) proposed the regulation,[7] there was no intent to distinguish between uncontested and stipulated-to issues:

> Although the Department believes that parties must be allowed to relitigate issues decided against them in a prior claim as a matter of fairness, no such concerns underlie the treatment of uncontested issues (see §725.463) and other stipulations into which the parties entered during the adjudication of the prior claim. *Where a party's waiver of its right to litigate a particular issue represents a knowing relinquishment of that right, such waiver should be given the same force and effect in subsequent litigation of the same issue*.

62 Fed. Reg. 3337, 3353 (Jan. 22, 1997) (emphasis added).

Thus, where a party knowingly relinquishes its right to litigate an issue in a prior claim, the party's waiver is given "the same force and effect in subsequent litigation of the same issue." *Id*. There is no evidence that the proposed rule was intended to make a party's failure to contest an issue binding on all parties in all future claims.

Indeed, allowing the district director to relitigate the identity of the responsible operator in a subsequent claim is consistent with comments accompanying the DOL's 2001 regulations. The comments explain:

> To the extent that a denied claimant files a subsequent claim pursuant to 20 C.F.R. §725.309 . . . the Department's ability to identify another operator would be limited only by the principles of issue preclusion. For example, where the operator designated as the responsible operator by the district director in a prior claim is no longer financially capable of paying benefits, the district director may designate a different responsible operator. In such a case, where the claimant will have to relitigate his entitlement anyway, the district director should be permitted to reconsider his designation of the responsible operator liable for the payment of claimant's benefits.

65 Fed. Reg. 79,920, 79,990 (Dec. 20, 2000).

[7] The version of the regulation that the Department of Labor proposed, and eventually issued on January 19, 2001, was 20 C.F.R. §725.309(d)(4). The regulation has since been renumbered as 20 C.F.R. §725.309(c)(5), and the word "shall" was changed to "will," but the regulation's language otherwise remains the same. 78 Fed. Reg. 59,102, 59,108 (Sept. 25, 2013).

The Director further notes that employer has not advanced any basis for placing different consequences on a party's concession depending on whether it was made as a stipulation or was based upon a failure to contest an issue. Director's Brief at 7. Thus, we agree with the Director that the administrative law judge, in this case, properly recognized that Workman's failure to contest its designation as the responsible operator in the prior claim operated only to preclude Workman from contesting its designation as the responsible operator in future claims. Workman's stipulation with respect to the prior 2003 claim does not preclude the Director from designating a different responsible operator in the litigation of this claim.[8] *See Gall v. S. Branch Nat'l Bank of S.D.*, 783 F.2d 125, 128 (8th Cir. 1986) ("An admission in a stipulation, although perhaps admissible in a subsequent proceeding as a statement against interest, does not operate in favor of persons who were not parties to the stipulation."). Because employer raises no other contentions of error, we affirm the administrative law judge's designation of employer as the responsible operator. [9]

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[10] 20 C.F.R. §718.305(d)(1)(i), or that "no part of the miner's

[8] We reject employer's contention that the district director erred in not identifying Workman as a potentially liable operator in the present claim. As the Director notes, the district director is required to designate only those employers she believes qualify as potentially liable operators. 20 C.F.R. §§725.407, 725.494; Director's Brief at 8. In this case, the district director identified employer as the potentially liable operator. Director's Exhibit 17. Employer does not contend that Workman qualifies as a potentially liable operator.

[9] Since the Director is charged with administration of the Act, deference is generally granted to her position on issues involving the interpretation or application of the Act. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc).

[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 that is 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

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). The administrative law judge found that employer failed to establish rebuttal by either method.

The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis.[11] Decision and Order at 21-22. However, employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic dust disease or impairment that is "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 Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered the opinions of Drs. Zaldivar and Jarboe, both of whom opined that claimant does not have legal pneumoconiosis. Dr. Zaldivar opined that claimant suffers from chronic obstructive pulmonary disease (COPD)/emphysema due to cigarette smoking.[12] Employer's Exhibits 1, 3. Dr. Jarboe opined that claimant suffers from severe airflow obstruction due to cigarette smoking and reactive airways disease (asthma). Employer's Exhibit 9. The administrative law judge discounted the opinions of Drs. Zaldivar and Jarboe because he found that they were inconsistent with the regulations. Decision and Order at 19-21.

Employer argues that the administrative law judge failed to provide valid reasons for discounting the opinions of Drs. Zaldivar and Jarboe. Employer's Brief at 13-16. We disagree. The administrative law judge accurately found that Dr. Zaldivar relied on the absence of radiographic evidence of pneumoconiosis in opining that claimant's pulmonary

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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] Although employer contends that the administrative law judge erred in not considering a negative x-ray interpretation found in claimant's treatment records, Employer's Brief at 16-17, any error would be harmless in light of the administrative law judge's finding that employer established that claimant does not have clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[12] Dr. Zaldivar also identified an abnormality of claimant's diaphragm that would affect the inflation of claimant's lungs. Employer's Exhibits 1, 3.

condition was not related to his coal mine dust exposure.[13] Decision and Order at 19. The administrative law judge permissibly found this reasoning to be inconsistent with the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, 25 BLR 2-115, 2-125 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis).

The administrative law judge also permissibly discounted Dr. Zaldivar's opinion because he found that the physician did not provide a sufficient explanation for his exclusion of coal mine dust as a contributing factor in claimant's COPD/emphysema. *See* 20 C.F.R. §718.201(b); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 19-20. Although Dr. Zaldivar explained that claimant's pulmonary impairment was due to cigarette smoking, he did not provide a basis for excluding claimant's coal mine dust exposure as a contributing factor. Employer's Exhibit 1 at 5-6; 3 at 13. The administrative law judge therefore permissibly accorded less weight to Dr. Zaldivar's opinion.

In regard to Dr. Jarboe's opinion that claimant's obstructive pulmonary impairment was not due to his coal mine dust exposure, the administrative law judge accurately noted that the doctor relied, in part, on the fact that claimant's pulmonary impairment did not begin during "the working life of the miner." Decision and Order at 20; Employer's Exhibits 1 at 29, 13 at 20. The administrative law judge permissibly discredited that reasoning as inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40, 25 BLR 2-675, 2-685-87 (6th Cir. 2014); Decision and Order at 20.

As the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Jarboe,[14] the only opinions supportive of a finding that claimant does not

[13] The administrative law judge noted Dr. Zaldivar's observation that claimant "does not have radiographic pneumoconiosis which would trigger the investigation as to whether or not he had legal pneumoconiosis." Decision and Order at 19; Employer's Exhibit 1 at 5.

[14] Because the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Zaldivar and Jarboe, the administrative law judge's error, if

suffer from legal pneumoconiosis, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing 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). The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Jarboe that claimant's disability is not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). Therefore, we affirm the administrative law judge's determination that employer failed to prove that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

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any, in according less weight to the opinions for other reasons, is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Zaldivar and Jarboe.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I write separately to express my disagreement with the majority's acceptance of the Director's interpretation of 20 C.F.R. §735.309(c)(5). Specifically, I disagree with the Director's contention that "any party" is synonymous with "that party."

When interpreting a statute or regulation, an undefined term is construed in accordance with its ordinary and plain meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). Section 725.309(c)(5) provides that:

> If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), will be binding on *any party* in the adjudication of the subsequent claim. However,

> any stipulation made by any party in connection with the prior claim will be binding on *that party* in the adjudication of the subsequent claim.

20 C.F.R. §725.309(c)(5) (emphasis added).

Respectfully, the phrases "any party" and "that party" are phrases that are used every day in legal parlance and have understood meanings. While the term "any party" is broad in its scope, the term "that party" refers to a particular specified party. It is not unreasonable in this context to read the words as they appear. Thus, I disagree with the Director that these terms in the regulation are the same.

Based on the plain and ordinary language of the regulation, the administrative law judge considered whether collateral estoppel precluded the Department of Labor from identifying another responsible operator. Because benefits were denied in claimant's prior claim, he concluded that the doctrine of collateral estoppel was not applicable in this case, as determination of the responsible operator issue was not necessary to support the prior judgment. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-394, 2-401 (4th Cir. 2006); *Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 321 (6th Cir. 2014); Decision and Order at 7-8. Thus, the administrative law judge found that collateral estoppel did not preclude relitigation of the responsible operator issue in this case.

For the reasons set forth above, I concur with the majority that the administrative law judge properly designated employer as the responsible operator.

JUDITH S. BOGGS
Administrative Appeals Judge