U.S. Department of Labor

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

BRB No. 17-0415 BLA

BILLY RAY SALYERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY PRINCE MINING COMPANY	)	DATE ISSUED: 05/16/2018
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY HARTFORD	)	
	)	
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 Jennifer Gee, Administrative Law Judge, United States Department of Labor.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

Rita Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Maia S. 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05603) of Administrative Law Judge Jennifer Gee, rendered on a subsequent claim filed on July 16, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with seventeen and one-half years of underground coal mine employment and accepted employer's concession that claimant has a totally disabling respiratory or pulmonary impairment. She thus found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and invoked the Section 411(c)(4) presumption that his total disability is due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in naming it as the responsible operator and in finding that it failed to rebut the Section 411(c)(4) presumption. Claimant has not filed a response to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging affirmance of the finding that employer is the responsible operator. Employer submitted a reply brief reiterating its arguments on appeal.[3]

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[1] Claimant's prior claims were denied by the district director because claimant did not establish the existence of pneumoconiosis or that he has a totally disabling respiratory or pulmonary impairment. Director's Exhibits 1, 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if he establishes 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. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

I. 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." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[5] Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. 20 C.F.R. §725.495(c).

Employer contends that the administrative law judge erred in discrediting claimant's statements concerning the length of his employment at Eric Mining Inc. (Eric Mining). Employer maintains that claimant's affirmative response to an interrogatory asking him whether he worked for Eric Mining for a calendar year conclusively establishes that he did so subsequent to his tenure with employer. We disagree.

Employer raised the same argument before the administrative law judge in its post-hearing brief. Employer's Post-Hearing Brief at 9. The administrative law judge stated:

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[4] Because claimant's last coal mine employment was in Kentucky, 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).

[5] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen at least in part out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, at least one day of the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e). Employer does not contest that it meets these requirements.

> The Employer points to the Claimant's positive response to an interrogatory question of whether he was employed by Eric Mining for a "calendar year." Not only is this question ambiguous, the answer must be considered in context. The Claimant completed two sets of interrogatories from the Employer in connection with his Kentucky Workers Compensation claim. His answers clearly reflect that he could not remember the starting and ending dates for his work for Eric Mining, but recalled that he worked for them for most of 1990 and the last part of 1989. He also indicated that his last day of employment was October 26, 1990.
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> The Claimant's answers to the Employer's interrogatories also indicate that he last worked for Kentucky Prince Mining Co. in 1990, but he did not know if his last day of employment with them was before the fall of 1989, or whether his last day of employment was before December 1, 1989.
>
> At his deposition in connection with this claim, the Claimant stated that he did not know when he started at Eric Mining and when he left. He did not remember if he worked at Eric Mining for a calendar year. He quit when the mine shut down, and went out of business.
>
> At the hearing, the Claimant agreed that he worked for Eric Mining most recently; he stated that he did not recall whether he worked there for a year or more, but it was not long.

Decision and Order at 8-9, *citing* Director's Exhibits 2, 10, 20 (at 6, 18), 22 (at 11, 21, 23); Hearing Transcript at 15.

The quoted passage demonstrates that the administrative law judge conducted a thorough review of the evidence,[6] and permissibly found that the "totality of the information provided by the [c]laimant clearly reflects that he does not know how long he worked for Eric Mining, or when he started working there." Decision and Order at 8-9; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985). The administrative law judge therefore reasonably concluded that because "there is not enough reliable information to pinpoint the date, or even the month, when [claimant] started working for Eric Mining," employer failed

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[6] The administrative law judge also noted that claimant's Social Security Administration earnings record establishes that he worked for employer from 1986 to 1989, and subsequently worked for Eric Mining Inc. in late 1989 and in 1990. Decision and Order at 7-8; Director's Exhibit 2.

to establish that Eric Mining was the operator who most recently employed claimant for at least one year. 20 C.F.R. §725.494(c); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). Accordingly, we affirm the administrative law judge's determination that employer is the properly designated responsible operator. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23, 25 BLR 2-521, 2-546-48 (6th Cir. 2014).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[7] or by establishing that "no part of [claimant'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). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 27-28.

A. Legal Pneumoconiosis

To establish that claimant does not have legal pneumoconiosis, employer must demonstrate that claimant does not have a chronic lung 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), *see* 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-555 n.8 (2015) (Boggs, J., concurring and dissenting). The record includes the opinions of Drs. Alam and Rosenberg relevant to whether claimant has legal pneumoconiosis. Dr. Alam opined that claimant has a respiratory impairment caused by smoking and coal dust exposure. Director's Exhibit 14. Dr. Rosenberg opined that claimant does not have legal pneumoconiosis because the physician attributes claimant's chronic obstructive pulmonary disease (COPD) entirely to cigarette smoking. Director's Exhibit 15; Employer's Exhibit 5. The administrative law

[7] 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 respiratory or pulmonary disease or 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).

judge discredited both opinions and concluded that employer failed to satisfy its burden to rebut the presumed existence of legal pneumoconiosis. Decision and Order at 25-28.

Employer contends that the administrative law judge erred by crediting Dr. Alam's diagnosis of legal pneumoconiosis over the contrary opinion of Dr. Rosenberg. We disagree. Contrary to employer's allegation, the administrative law judge did not engage in a relative weighing of the opinions of Drs. Alam and Rosenberg. Rather, the administrative law judge determined that the diagnosis of legal pneumoconiosis made by Dr. Alam was unexplained, and rationally concluded that it did not "assist [e]mployer in meeting its burden" on rebuttal. Decision and Order at 27; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). In addition, the administrative law judge permissibly discredited Dr. Rosenberg's opinion because he relied, in part, on his belief that coal dust-induced lung disease does not reduce a miner's FEV1/FVC ratio, which conflicts with DOL's recognition in the preamble to the 2001 regulations that coal dust exposure can lead to clinically significant obstructive disease as shown by a decline in that ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 26. Because the administrative law judge provided a valid reason for discrediting the opinion of Dr. Rosenberg, the only opinion supportive of employer's burden, we further affirm her finding that employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[8] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). We therefore affirm the administrative law judge's finding that employer failed to establish rebuttal under the first method.[9] 20 C.F.R. §718.305(d)(1)(ii).

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[8] The fact that claimant is presumed to have legal pneumoconiosis subsumes a determination that the disease arose out of coal mine employment. 20 C.F.R. §718.201(a)(2), (b); *see Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999). Accordingly, we reject employer's contention that the administrative law judge was required to make a separate finding on disease causation at 20 C.F.R. §718.203.

[9] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis. Because employer must disprove, however, both clinical and legal pneumoconiosis, rebuttal under 20 C.F.R. §718.305(d)(1)(i) is precluded.

B. Disability Causation

In considering the second method of rebuttal, the administrative law judge addressed whether employer could establish that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge reasonably found that the same reasons she provided for discrediting the opinion Dr. Rosenberg that claimant does not suffer from legal pneumoconiosis also undercut his opinion that claimant's disabling respiratory impairment was not caused by pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013) (administrative law judge permissibly discounted a doctor's opinion on disability causation because the doctor did not diagnose the miner with legal pneumoconiosis, where the presumed fact of legal pneumoconiosis was not rebutted); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013) (administrative law judge may discredit a doctor's opinion on disability causation because the doctor did not diagnose the miner with legal pneumoconiosis, contrary to the administrative law judge's finding that the evidence established the presence of the disease); Decision and Order at 27-28. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge