U.S. Department of Labor

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

BRB No. 17-0425 BLA

JOSEPH L. GILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 05/24/2018
	)	
Employer-Petitioner	)	
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

Jeffrey S. Goldberg (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 appeals the Decision and Order Awarding Benefits (2011-BLA-5904) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a claim filed on August 23, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with at least twenty-one years of underground coal mine employment[1] and determined that employer is the responsible operator. The administrative law judge found that claimant established a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2), and thus determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He further found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in identifying it as the responsible operator. Employer further asserts that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Additionally, employer argues that claimant is not entitled to benefits because he did not file a claim for Kentucky workers' compensation benefits before seeking Federal black lung benefits. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the determination that employer is the responsible operator. The Director also argues that the Act does not require claimant to seek Kentucky workers' compensation

[1] Claimant's coal mine employment was in Kentucky. Decision and Order at 7; Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

benefits in order to be entitled to Federal benefits. Employer has filed a reply brief, reiterating its contentions on appeal.[3]

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).

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). An operator is a "potentially liable operator" if the miner's disability or death arose at least in part out of employment with that operator and if the miner was employed by the operator, or any person with respect to which the operator may be considered a successor, for a cumulative period of not less than one year.[4] 20 C.F.R. §725.494(a), (c). 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 potentially liable operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The administrative law judge found that employer is the responsible operator because he determined that employer was the most recent potentially liable operator to employ claimant. Decision and Order at 3-5. In making this finding, the administrative law judge rejected employer's argument that the Commonwealth of Kentucky is a potentially liable operator and that it should be the responsible operator because claimant worked as a state mine inspector for nineteen years after he worked for employer. *Id*.

Employer argues that the administrative law judge erred in finding that the Commonwealth of Kentucky is not a potentially liable operator. Employer's Brief at 31-

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The regulation at 20 C.F.R §725.494 further requires that the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973, that the miner's employment included at least one working day after December 31, 1969, and that the operator is financially capable of assuming liability for the claim. 20 C.F.R §725.494(a)-(e).

34. Employer's argument lacks merit. The administrative law judge correctly found that the Commonwealth of Kentucky cannot be a potentially liable operator because the regulations specifically state that "[n]either the United States, nor any State, nor any instrumentality or agency of the United States or any State, shall be considered an operator." 20 C.F.R. §725.491(f). Furthermore, contrary to employer's argument, the administrative law judge correctly found that claimant's work as a state mine inspector does not constitute the work of a miner under the Act. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 645-47, 25 BLR 2-659, 2-670-73 (6th Cir. 2014); *Spatafore v. Consolidation Coal Co.*, 25 BLR 1-181, 1-188 (2016); Decision and Order at 5. Therefore, the Commonwealth of Kentucky cannot be a potentially liable operator for the additional reason that it did not employ claimant as a miner.[5] 20 C.F.R. §725.494. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer is the responsible operator.

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,[6] or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 26-29.

To establish that claimant does not suffer from legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is

[5] To the extent that employer argues that it is not the responsible operator because claimant's disability did not arise at least in part out of his employment with employer, this argument has no merit. Employer's Brief at 27-28, 35. Employer does not dispute that it is a potentially liable operator, and the regulation at 20 C.F.R. §725.494(a) provides a rebuttable presumption that the miner's disability arose in whole or in part out of his employment with the potentially liable operator. Employer has offered no evidence to rebut this presumption. Employer's argument is therefore rejected.

[6] "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). "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).

"significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[7] 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 determining this issue, the administrative law judge considered the medical opinions of Drs. Selby and Tuteur. Decision and Order at 26-29. Dr. Selby diagnosed a severe obstructive respiratory impairment and opined that claimant "probably has some degree of asthma as well." Employer's Exhibit 1 at 4. He concluded that claimant's obstructive respiratory impairment was unrelated to coal mine dust exposure and was caused by claimant's forty pack-year cigarette smoking history, childhood exposure to secondhand smoke, and asthma. *Id*. Dr. Tuteur diagnosed chronic obstructive pulmonary disease (COPD) "manifested both by emphysema and chronic bronchitis." Employer's Exhibit 3 at 3. He opined that the "cause of the COPD is chronic inhalation of tobacco smoke" and not coal mine dust exposure. *Id*.

The administrative law judge found that the opinions of Drs. Selby and Tuteur were inconsistent with the preamble to the 2001 revised regulations and were not well-reasoned. Decision and Order at 26-29. The administrative law judge thus found that employer failed to establish that claimant does not have legal pneumoconiosis. *Id*. Employer argues that the administrative law judge erred in weighing the opinions of Drs. Selby and Tuteur. Employer's Brief at 5-20. Employer's argument lacks merit.

The administrative law judge accurately noted that Dr. Selby excluded a diagnosis of legal pneumoconiosis because claimant had "more than enough" smoking and secondhand smoke exposures to explain his severe obstructive respiratory impairment. Decision and Order at 26, *quoting* Employer's Exhibit 7 at 19. Contrary to employer's argument, the administrative law judge permissibly found this explanation "unpersuasive" because Dr. Selby did not "explain why or how [claimant's] smoking history accounts for [claimant's] impairment any more than his coal [mine] dust exposure." *Id*. at 26-27; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14, 22 BLR 2-537, 2-552-53 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Dr. Selby also excluded legal pneumoconiosis because he indicated that pneumoconiosis is progressive only "for a few months" after a miner leaves mining, and then "stays at the same level." Employer's Exhibit 7 at 6. The administrative law judge permissibly found this statement to be "contrary to the regulations recognizing that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal

[7] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 29.

dust exposure." Decision and Order 27; *see* 20 C.F.R. §718.201(c); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40, 25 BLR 2-675, 685-87 (6th Cir. 2014).

Further, Dr. Selby opined that claimant's smoking-related obstructive respiratory impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure because, in his medical experience, it was "unusual" for non-smoking coal miners in the "tri-state area" with dust exposure equivalent to that of claimant to develop obstructive lung disease. Employer's Exhibit 7 at 20. The administrative law judge permissibly found Dr. Selby's reasoning to be "inadequately explained and documented" because "Dr. Selby point[ed] to no documented evidence to substantiate this claim outside of his own personal experience." *Id.*; *see Napier*, 301 F.3d at 712-14, 22 BLR at 2-552-53; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Moreover, the administrative law judge permissibly found that Dr. Selby did not adequately explain why he believed that claimant's coal mine dust exposure did not "exacerbate" claimant's smoking-related respiratory impairment.[8] Decision and Order at 27; *see* 20 C.F.R. §718.201(b); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-739-40 (6th Cir. 2015) (holding that the administrative law judge permissibly discredited a physician's opinion that failed to account for the possibility that the miner's COPD could have multiple causes—smoking and dust exposure).

With respect to Dr. Tuteur, the administrative law judge noted that the physician "admitted that he was unable to 'rigorously identify' the etiology of claimant's [COPD]

[8] Employer argues that the administrative law judge impermissibly required Drs. Selby and Tuteur to explain why forty-one years of coal mine dust exposure did not "exacerbate" claimant's obstructive respiratory impairment. Employer's Brief at 18-19, 28. Employer contends that the administrative law judge's finding is inconsistent with his findings that claimant had at least twenty-one years of coal mine employment and that claimant's time as a Kentucky mine inspector is not coal mine employment. *Id.* Contrary to employer's argument, the administrative law judge did not discredit the opinions of Drs. Selby and Tuteur based on a finding that they underestimated the length of claimant's coal mine employment. Decision and Order at 26-29. Rather, the administrative law judge correctly recognized that these physicians assumed a coal mine employment history of forty-one years, even though the administrative law judge found a history of only twenty-one years. *Id.* Furthermore, the administrative law judge did not err in requiring them to explain why the length of coal mine employment which they relied upon did not "exacerbate" claimant's obstructive impairment. 20 C.F.R. §718.201(b); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-739-40 (6th Cir. 2015).

based on [claimant's specific] history, physical examination, or objective testing." Decision and Order at 28-29, *quoting* Employer's Exhibit 10 at 30-31. Rather, Dr. Tuteur excluded a diagnosis of legal pneumoconiosis based on a relative "risk assessment" of claimant's cigarette smoke and coal mine dust exposures. Employer's Exhibit 10 at 15-16, 30-31. Citing medical literature, Dr. Tuteur explained that it is "very well documented that about [twenty-percent] of never-mining cigarette smokers develop a COPD phenotype with clinically significant airflow obstruction." *Id*. at 30-33. However, he explained that the medical literature indicates that "about [one-percent] or fewer never-cigarette-smoking coal miners develop clinically meaningful" airflow obstruction. *Id*. Dr. Tuteur therefore opined that claimant's COPD was not significantly related to, or substantially aggravated by, coal mine dust exposure based on this "risk assessment."[9] *Id*.

Contrary to employer's argument, the administrative law judge permissibly found that Dr. Tuteur's opinion was "based on generalities, rather than specifically focusing on the miner's condition" and, therefore, was unpersuasive. *See Napier*, 301 F.3d at 712-14, 22 BLR at 2-552-53; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312, 25 BLR 2-115, 2-126 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Further, the administrative law judge accurately noted that the Department of Labor (DOL), in the preamble to the 2001 revised regulations, set forth that "even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis." 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). As Dr. Tuteur opined that the rate of miners who never smoke and develop COPD is low, Employer's Exhibit 10 at 32-33, the administrative law judge permissibly found his opinion to be inconsistent with the medical science credited by the DOL in the preamble.[10] *See*

[9] Dr. Tuteur explained that while "it is not impossible for coal mine dust to have been responsible" for claimant's COPD, "cigarette smoking is much more likely" the cause. Employer's Exhibit 3 at 3.

[10] Employer argues that Dr. Tuteur cited medical studies that post-date the preamble to the 2001 revised regulations, and which, employer argues, establish the "infrequency with which coal mine dust produces COPD." Employer's Brief at 11-12. Contrary to employer's argument, the administrative law judge was not required to find that the studies cited by Dr. Tuteur negated the medical literature addressing the effects of coal mine dust exposure on lung function that was credited by the Department of Labor in the preamble. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91, 25 BLR 2-633, 2-644-45 (6th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (observing that neither of employer's medical experts

Cent. Ohio Coal Co. v. Director, OWCP [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-211 (6th Cir. 2012); Decision and Order at 28. The administrative law judge also permissibly found that Dr. Tuteur did not adequately explain why he believed that claimant's coal mine dust exposure did not "exacerbate" claimant's smoking-related respiratory impairment. Decision and Order at 29; *see* 20 C.F.R. §718.201(b); *Kennard*, 790 F.3d at 668, 25 BLR at 2-739-40.[11]

Substantial evidence supports the administrative law judge's credibility determinations regarding the opinions of Drs. Selby and Tuteur, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that employer failed to disprove legal pneumoconiosis[12] at 20 C.F.R. §718.305(d)(1)(i).

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29-30. The administrative law judge rationally discounted the disability causation opinions of Drs. Selby and Tuteur because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to

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"testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble").

[11] Because we affirm the administrative law judge's decision to discount the opinions of Drs. Selby and Tuteur for the reasons set forth above, we need not address employer's additional challenges to the administrative law judge's analysis of those opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 5-20.

[12] Employer contends that the administrative law judge erred in failing to consider the opinions of Drs. Chavda and Baker, diagnosing legal pneumoconiosis, Employer's Brief at 22-27, and that these physicians vastly overestimated the length of claimant's coal mine employment. *Id.* at 28-29. Contrary to employer's argument, these opinions do not assist employer in rebutting the presumption of legal pneumoconiosis. *See Kennard*, 790 F.3d at 668, 25 BLR at 2-739-40. Because it is employer's burden to establish rebuttal, and the administrative law judge permissibly discredited the opinions of employer's doctors, the administrative law judge was not required to weigh the opinions of Drs. Chavda and Baker. *Id.*

disprove the existence of the disease. *See 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); Decision and Order at 29-30. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the award of benefits.[13]

[13] Employer argues that the Act mandates that claimant first exhaust any state remedies in order to be entitled to Federal black lung benefits. Employer's Brief at 29-30. Therefore, employer asserts that claimant's failure to file a Kentucky workers' compensation claim for dust exposure he suffered based on his work as state mine inspector precludes an award of benefits in this case. *Id*. Contrary to employer's argument, the administrative law judge correctly found that the Act and the "regulations do not provide that a claimant must exhaust other potential remedies for exposure to coal mine dust before pursuing a claim under the" Act. Decision and Order at 4. As the Director, Office of Workers' Compensation Programs notes, Section 725.402 "states that if a claim for [F]ederal black lung benefits 'is one subject to adjudication under a workers' compensation law approved under [P]art 722,' then the district director will notify the claimant and dismiss the claim for lack of jurisdiction." Director's Brief at 3. Kentucky's workers' compensation law, however, has not been approved under Part 722. 20 C.F.R. §722.4. Employer further argues that claimant's "attempt to recover from [employer] while forgoing state benefits goes against the [Act's] requirement that benefits be reduced by other federal and state benefits." Employer's Brief at 29, *citing* 20 C.F.R. §725.535(b), (c). Although the offset provisions of the Act contemplate a reduction or offset of Federal black lung benefits by any other state or Federal award made on the basis of the miner's "death or partial or total disability due to pneumoconiosis," 20 C.F.R. §725.533(a)(1), (2), claimant did not obtain any such award. Employer's arguments are therefore rejected.

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