U.S. Department of Labor

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

BRB Nos. 19-0262 BLA
and 19-0263 BLA

ROSIE E. TURNER (o/b/o and Widow of JAMES TURNER) Claimant-Respondent v. CLINCHFIELD COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/15/2020 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits in Miner's Subsequent Claim - Awarding Benefits in Survivor's Claim of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in Miner's Subsequent Claim - Awarding Benefits in Survivor's Claim (2014-BLA-05619, 2015-BLA-05562) of Administrative Law Judge Carrie Bland issued 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 17, 2013,[1] and a survivor's claim filed on February 2, 2015.[2]

The administrative law judge found the miner had at least twenty-three years of qualifying coal mine employment and was totally disabled. She thus found claimant established a change in an applicable condition of entitlement and invoked the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.204(b)(2), 725.309. The administrative law judge further found employer did not rebut the presumption and awarded benefits in the miner's claim. Based on that award, the administrative law judge found claimant automatically entitled to benefits in her survivor's claim pursuant to Section 422(*l*) of the Act.[4] 30 U.S.C. §932(*l*) (2012).

On appeal, employer contends the administrative law judge erred in finding the Section 411(c)(4) presumption unrebutted.[5] Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

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[1] The miner filed two prior claims. Miner's Claim (MC) Director's Exhibits 1, 2. His most recent prior claim filed on December 13, 2007, was denied because he failed to establish any element of entitlement. MC Director's Exhibit 2. The miner died on January 11, 2015, while his current claim was pending.

[2] Claimant, the miner's widow, is pursuing the miner's claim on his behalf as well as her own survivor's claim.

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[4] Under Section 422(*l*) of the Act, the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that 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 findings that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-12.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits in Miner's Subsequent Claim - Awarding Benefits in Survivor's Claim must be affirmed if it is 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 – Section 411(c)(4) Rebuttal

Because claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis,[7] 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.

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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer contends the administrative law judge erred in finding the opinions of Drs. Rosenberg and Fino not well reasoned and therefore insufficient to disprove the miner had legal pneumoconiosis. Employer's Brief at 9-15. Employer asserts the administrative law judge applied the wrong legal standard, mischaracterized the evidence, and did not

[6] The miner's coal mine employment occurred in Virginia. MC Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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).

[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). 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).

adequately explain her credibility determinations in accordance with the Administrative Procedure Act. We disagree.

Employer initially alleges the administrative law judge applied the wrong legal standard by requiring its physicians to prove that coal dust exposure had "no effect" on the miner's impairment. Employer's Brief at 14-15. Contrary to employer's contention, the administrative law judge applied the correct standard by requiring employer to affirmatively establish that the miner's pulmonary impairment was not "significantly related to, or substantially aggravated by" coal mine dust exposure. 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting); Decision and Order at 12, 14-16. As we explain below, she permissibly rejected their opinions because they failed to adequately explain how they excluded a diagnosis of legal pneumoconiosis. Decision and Order at 15-16.

Both Dr. Rosenberg and Dr. Fino opined that the miner had chronic obstructive pulmonary disease (COPD) due solely to smoking. Miner's Claim (MC) Director's Exhibit 15; Employer's Exhibits 1, 2. As the administrative law judge accurately noted, Dr. Rosenberg eliminated coal mine dust exposure as a causative factor for the miner's COPD, in part, based on his view that the miner's markedly decreased FEV1 and significantly reduced FEV1/FVC ratio on his pulmonary function study results constituted a pattern of impairment that is not characteristic of obstruction related to coal mine dust exposure. Decision and Order at 17; MC Director's Exhibit 15 at 8-9, 13. The administrative law judge permissibly discounted his rationale as inconsistent with the Department of Labor's (DOL's) recognition in the preamble to the 2001 revised black lung regulations that coal miners have an increased risk of developing COPD, which may be shown by a reduced FEV1/FVC ratio.[8] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *see also Cent. Ohio Coal Co. v.*

[8] The Department of Labor states in the preamble:

> In addition to the risk of simple CWP [coal workers' pneumoconiosis] and PMF [progressive massive fibrosis], epidemiological studies have shown that coal miners have an increased risk of developing [chronic obstructive pulmonary disease (COPD)]. COPD may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC.

65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000), *quoting* National Institute for Occupational Safety and Health Criteria Document 4.2.3.2 (citations omitted).

Director, OWCP [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); Decision and Order at 15. The administrative law judge also permissibly found Dr. Rosenberg did not persuasively explain his reliance on the miner's significantly reduced diffusion capacity measurements obtained during pulmonary function testing to exclude a diagnosis of legal pneumoconiosis. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 15; MC Director's Exhibit 15 at 11-13.

Regarding Dr. Fino's opinion, the administrative law judge noted correctly that he eliminated a diagnosis of legal pneumoconiosis based on medical literature showing that "cigarette smoking is the leading cause of COPD in the world." Employer's Exhibit 1 at 16. He stated that "more recent" articles show "even higher levels of FEV1 loss on average in smokers" and opined the impact of cigarette smoking is far greater than what the DOL stated in the preamble to the 2001 revised black lung regulations. *Id*. at 13. Contrary to employer's contention, the administrative law judge permissibly found Dr. Fino's opinion generalized and not focused on the specifics of the miner's case.[9] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-313 (4th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 16. The administrative law judge acknowledged the miner had a significant smoking history but found, within her discretion, that Dr. Fino did not adequately address the miner's twenty-three years of coal mine employment in light of the DOL's position that "the injurious effects of the two exposures combined are additive." Decision and Order at 16, *citing* 65 Fed. Reg. at 79,940; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013). Even assuming the miner was at a greater risk for developing COPD from smoking, she permissibly found Dr. Fino did not adequately explain why the miner's pulmonary impairment was not also

[9] Additionally, the administrative law judge noted correctly that Dr. Fino cited coal dust exposure, cigarette smoking, age, and race as significant and additive predictors of emphysema, but then summarily stated the miner's COPD did not constitute legal pneumoconiosis. Decision and Order at 15; Employer's Exhibit 1 at 13. Dr. Fino stated, "[t]he number of years of coal mine employment, the location of the miner's work, and when a miner worked with respect to dust regulations are all tools used to assess coal content" and determine the cause of a miner's obstructive respiratory impairment. Employer's Exhibit 1 at 16. The administrative law judge permissibly found Dr. Fino's opinion not well-reasoned because he "laid the foundation for determining the correlation of coal mine dust inhalation with coal mine dust lung disease then failed to draw the conclusion." Decision and Order at 16; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

significantly related to, or substantially aggravated by, his coal mine employment. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 16.

We consider employer's arguments on legal pneumoconiosis to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).[10] Because the administrative law judge properly characterized the evidence and her rationale for discrediting Drs. Rosenberg's and Fino's opinions is supported by substantial evidence, we affirm her finding that employer failed to establish the miner did not have legal pneumoconiosis. Decision and Order at 17; *see* 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

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). She rationally discredited the opinions of Drs. Rosenberg and Fino on the cause of the miner's respiratory disability because neither physician diagnosed legal pneumoconiosis, contrary to her finding that employer failed to disprove the disease. Decision and Order at 18; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (physician who fails to diagnose legal pneumoconiosis, contrary to the administrative law judge's finding, cannot be credited on rebuttal of disability causation "absent specific and persuasive reasons").

Employer does not raise any additional disability causation arguments other than those raised, and rejected, with regard to legal pneumoconiosis. Thus, we affirm the administrative law judge's finding employer did not rebut the Section 411(c)(4) presumption by establishing no part of the miner's respiratory disability was due to legal

[10] Because the administrative law judge gave valid reasons for rejecting Drs. Rosenberg's and Fino's opinions, we need not address employer's remaining arguments regarding why their opinions should have been found credible on legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[11] Thus, we need not address employer's argument the administrative law judge erred in considering the x-ray evidence and in finding employer did not disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1284 (1983); Decision and Order at 13; Employer's Brief at 3-6.

pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Consequently, the administrative law judge's award of benefits in the miner's claim is affirmed.

Survivor's Claim

Because we have affirmed the administrative law judge's award of benefits in the miner's claim and employer raises no specific challenge to her award in the survivor's claim, we affirm the administrative law judge's 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); Decision and Order at 19-20.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Miner's Subsequent Claim - Awarding Benefits in Survivor's Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge