U.S. Department of Labor

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

BRB No. 20-0298 BLA

LISA D. LEWIS (Widow of DAVID CHAD LEWIS)	)	
Claimant-Respondent	)	
v.	)	
DIXIE LABOR SERVICES, LLC.	)	
and	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 04/28/2021
Employer/Carrier-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 in a Survivor's Claim of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Scott R. Morris's Decision and Order Awarding Benefits in a Survivor's Claim (2018-BLA-06015) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This survivor's claim was filed on November 17, 2016.[1]

The administrative law judge credited the Miner with thirty-six years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts that the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption.[3] Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

The Benefit Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated

[1] Claimant is the widow of the Miner, who died on October 17, 2016. Director's Exhibit 2. Section 422(*l*) of the Act provides that a 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. 30 U.S.C. §932(*l*) (2018). Because the Miner's lifetime claim for benefits was denied, Claimant is not entitled to survivor's benefits pursuant to Section 422(*l*).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2-5, 15.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[5] or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found Employer failed to rebut the presumption by either method.

Employer argues the administrative law judge erred in finding it failed to rebut the presumption of legal pneumoconiosis.[6] Employer's Brief at 11-17. 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)(2)(i); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer relied on the opinions of Drs. Rosenberg and Broudy to disprove legal pneumoconiosis. Director's Exhibits 22, 23; Employer's Exhibits 5, 6. Both doctors diagnosed the Miner with chronic obstructive pulmonary disease (COPD) and emphysema. *Id*. Dr. Broudy also diagnosed chronic bronchitis. Employer's Exhibits 5 at 19. Both doctors concluded the Miner's cigarette smoking history, not coal mine dust exposure, caused the diseases they diagnosed. Employer's Exhibits 5 at 21-22, 19-20, 22, 6 at 24-25.

The administrative law judge found the opinions of Drs. Rosenberg and Broudy inadequately explained and inconsistent with the preamble to the 2001 regulatory revisions.

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[5] "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 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).

[6] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 20.

Decision and Order at 21-22. Employer argues the administrative law judge erred in discrediting their opinions. Employer's Brief at 11-17. Its arguments have no merit.

Dr. Rosenberg opined the Miner's markedly decreased FEV1 value and severely reduced FEV1/FVC ratio on pulmonary function testing constituted a pattern of impairment that is not characteristic of obstruction related to coal mine dust exposure. Employer's Exhibit 6 at 19-23. Thus he relied on this rationale to exclude coal mine dust exposure as a cause of the Miner's COPD. *Id*. Contrary to Employer's argument, the administrative law judge permissibly rejected this rationale as being inconsistent with the scientific evidence found credible by the Department of Labor that the development of COPD can be related to coal mine dust exposure and COPD may be shown by a reduced FEV1/FVC ratio. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 22; Employer's Brief at 16-17.

In addition, both Dr. Rosenberg and Dr. Broudy excluded a diagnosis of legal pneumoconiosis because they explained cigarette smoking damages the lungs far more severely than coal mine dust exposure. Employer's Exhibits 5, 6. Specifically, Dr. Rosenberg cited studies supporting the position that "smoking is much more detrimental to lung function than coal dust." Employer's Exhibit 6 at 17-24. Dr. Broudy indicated he could not say with "100%" certainty that "there was not some additive effect" between the Miner's history of cigarette smoking and coal mine dust exposure on his obstructive impairment. Employer's Exhibit 5 at 21-22. He nonetheless explained the Miner did not have legal pneumoconiosis because cigarette smoking is "far more injurious to the lungs than coal dust exposure," and thus it is "far more likely that smoking is the cause of the impairment." *Id*. The administrative law judge permissibly concluded "that while the physicians credibly explained that smoking was linked to [the] Miner's pulmonary impairment, they did not credibly explain why coal mine dust (perhaps in addition to [the] Miner's smoking) did not aggravate or was not substantially related to his pulmonary obstruction."[7] Decision and Order at 22; *see Stallard*, 876 F.3d at n.4 (administrative law judge permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); *Milburn Colliery Co. v. Hicks* 138 F.3d 524, 533 (4th Cir. 1998); *Sterling*

[7] Because the administrative law judge provided a valid reason for discrediting Dr. Broudy's opinion, we need not address Employer's remaining argument regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 15-17.

Smokeless Coal Co. v. Akers, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §718.201(a)(2), (b).

Employer generally argues the administrative law judge should have found the opinions of Drs. Rosenberg and Broudy well-reasoned. Employer's Brief at 11-17. We consider Employer's argument to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within his discretion in rejecting these opinions, we affirm his finding Employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

The administrative law judge next addressed whether Employer established that "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). Drs. Rosenberg and Broudy opined the Miner's death was purely cardiac in nature and unrelated to legal pneumoconiosis. Director's Exhibits 22, 23; Employer's Exhibits 5 at 25-27, 6 at 27-28. The administrative law judge permissibly discredited the doctors' opinions on death causation because neither doctor diagnosed legal pneumoconiosis, contrary to his determination that Employer failed to disprove the Miner had the disease.[8] *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (opinion that fails to diagnose pneumoconiosis may not be credited at all on causation absent specific and persuasive reasons for concluding the doctor's view is independent of his erroneous opinion on pneumoconiosis) (internal quotations omitted); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 26; Employer's Exhibit 5 at 24–25, 6 at 26; Employer's Brief at 17-23. We therefore affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(ii). Decision and Order at 26.

[8] Contrary to Employer's contention, the Fourth Circuit in *Epling* did not limit its holding to the issue of disability causation, or indicate this legal principle is inapplicable to death causation. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Employer's Brief at 22.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge