U.S. Department of Labor

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

BRB No. 20-0364 BLA

DONNIE E. HOLCOMB (Widow of JAMES E. HOLCOMB) Claimant-Respondent v. CARTER ROAG COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/31/2021 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk (Petsonk PLLC), Beckley, West Virginia, for Claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Patricia J. Daum's Decision and Order Awarding Benefits (2017-BLA-05744) rendered on a survivor's claim[1] filed on February 26, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited the Miner with twenty-three 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). She therefore found Claimant invoked the presumption that the Miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply brief reiterating its arguments.

The Benefits 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

[1] Claimant is the widow of the Miner, who died on September 4, 2014. Director's Exhibit 11. The Miner never successfully established a claim for benefits during his lifetime. Thus Claimant is not entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §932(*l*).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's death is due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018), 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 27-30.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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,[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 establish rebuttal by either method.

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)(A). The administrative law judge weighed the opinions of Drs. Spagnolo and Farney. Dr. Spagnolo opined the Miner had an obstructive respiratory impairment due to chronic bronchitis, asthma, and emphysema. Employer's Exhibit 6 at 37-39, 45-46. He opined all these conditions were caused by cigarette smoking and were unrelated to coal mine dust exposure. *Id*. Dr. Farney opined the Miner had "severe" chronic obstructive pulmonary disease (COPD) in the form of emphysema and asthmatic bronchitis. Employer's Exhibit 1 at 15-16. He explained cigarette smoking caused the COPD and gastroesophageal reflux "may have also contributed" to the disease, but he opined the COPD was unrelated to coal mine dust exposure. *Id*. The administrative law judge rejected their opinions as inadequately explained. Decision and Order at 44-47.

We first reject Employer's argument the administrative law judge erred in discrediting Dr. Spagnolo's opinion. Employer's Brief at 13-15. In excluding legal pneumoconiosis, Dr. Spagnolo noted a July 2003 pulmonary function study demonstrated significant improvement in the Miner's obstructive impairment after the administration of

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7.

[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). "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).

bronchodilators, but he conceded the impairment did not "completely go away." Employer's Exhibit 6 at 50-53. Nonetheless, he explained this response to bronchodilators "is a hallmark of some asthmatic component to the airway problem." *Id*. He excluded legal pneumoconiosis because coal mine dust exposure does not cause a reversible obstructive impairment. *Id*. He opined the irreversible portion of the impairment is explained by airway remodeling. *Id*. The administrative law judge permissibly found Dr. Spagnolo's reasoning unpersuasive because he failed to adequately explain why the irreversible portion of the Miner's obstructive impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 46.

Dr. Spagnolo also opined that coal mine dust exposure did not cause or contribute to the Miner's obstructive impairment because there is no "evidence of a pneumoconiosis on the radiograph." Employer's Exhibit 6 at 54-55. He stated it is "rare" for coal mine dust exposure to cause obstruction in the absence of a positive chest x-ray. *Id*. The administrative law judge permissibly found this reasoning unpersuasive because it "fails to recognize that legal pneumoconiosis captures chronic lung diseases where there are no radiographic findings" of clinical pneumoconiosis. Decision and Order at 46; *see* 20 C.F.R. §§718.201(a), 718.202(a)(4); *Looney*, 678 F.3d at 311-12 (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (explaining "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is present").

We also reject Employer's argument that the administrative law judge erred in discrediting Dr. Farney's opinion. Employer's Brief at 14-15; Reply Brief at 10-11. In excluding legal pneumoconiosis, Dr. Farney noted there is no "affirmative evidence" of "dust retention and possibly micronodular interstitial disease" in the Miner's lungs. Employer's Exhibit 1 at 15-16. He further noted the "pathophysiologic effects of tobacco smoke would have overwhelmed any effects of coal dust." *Id*. He concluded "there is no objective evidence that coal dust played a clinically significant role in the pathogenesis of this [M]iner's COPD." *Id*.

During his deposition, Dr. Farney testified the Miner's "clinical history with periods of wheezing, responsiveness to bronchodilators, [and] responsiveness to steroids" are all "far more consistent with the natural history and progression of COPD related to tobacco smoke" and not coal mine dust exposure. Employer's Exhibit 7 at 20. The administrative

law judge permissibly found Dr. Farney did not adequately explain why this clinical history is consistent with COPD due to cigarette smoking and not coal mine dust exposure. *Looney*, 678 F.3d at 310 (determination of whether a medical opinion is adequately reasoned and documented is committed to the discretion of the administrative law judge); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 47.

Further, as the administrative law judge noted, Dr. Farney cited medical studies indicating the "rapid progression of pulmonary disease is indicative of COPD secondary to tobacco smoke, especially with continued smoking." Decision and Order at 44; see Employer's Exhibits 1, 7. The administrative law judge found, however, that the study Dr. Farney cited "involved a comparison of smokers and never smokers, and there is no indication that the study considered the possible additive impact of occupational exposure to lung irritants such as coal and rock dust." *Id*. She permissibly found Dr. Farney's opinion unpersuasive because the study he relied on to exclude legal pneumoconiosis "does not clearly support his rationale" and, thus, he failed to adequately explain why the Miner's history of coal mine dust exposure did not significantly contribute, along with his cigarette smoking, to his COPD. Decision and Order at 44, 47; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017) (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"); *Owens*, 724 F.3d at 558; 20 C.F.R. §718.201(b); 65 Fed. Reg. at 79,940.

Employer's only argument for challenging the administrative law judge's rejection of Dr. Farney's opinion is that his "explanations of why smoking and not pneumoconiosis caused [the Miner's] respiratory condition were supported and well-explained." Employer's Brief at 15; *see also* Reply Brief at 10-11. Employer's argument amounts to a request to reweigh the evidence, which the Board cannot do. *Looney*, 678 F.3d at 310; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *see also, Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (if a reviewing court can discern what the administrative law judge did and why he or she did it, the duty of explanation under the Administrative Procedure Act is satisfied).

Finally, we note the administrative law judge weighed Dr. Go's opinion that the Miner had legal pneumoconiosis because coal mine dust exposure substantially aggravated his COPD. Claimant's Exhibit 6. The administrative law judge found his opinion well-reasoned and documented, and entitled to "great weight." Decision and Order at 48. Employer does not challenge this finding, and therefore we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Thus we affirm the administrative law judge's determination that Employer did not disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A).

Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[6] 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). She permissibly discredited the opinions of Drs. Spagnolo and Farney because neither doctor diagnosed legal pneumoconiosis,[7] contrary to her determination that Employer failed to disprove the Miner had the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 49-50. We therefore affirm the administrative law judge's findings that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of the Miner's death was caused by pneumoconiosis.[8] 20 C.F.R. §718.305(d)(2)(ii).

[6] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, and thus we need not address Employer's arguments on clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.305(d)(2)(i); Employer's Brief at 7-15.

[7] Because the administrative law judge provided a valid reason for discrediting the opinions of Drs. Spagnolo and Farney, we need not address Employer's remaining argument regarding the additional reasons the administrative law judge gave for rejecting their opinions on death causation. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 49-50; Employer's Brief at 16-19.

[8] The administrative law judge found Dr. Go "opined that the Miner's occupationally related pneumoconiosis was a contributory factor in the Miner's death." Decision and Order at 49. We agree with Employer's argument that she mischaracterized the doctor's opinion on death causation, as he limited his opinion to whether the Miner was totally disabled due to pneumoconiosis and did not address the cause of death. Employer's Brief at 16; Claimant's Exhibit 6. However, because Dr. Go's opinion would not assist Employer in satisfying its burden on rebuttal, we conclude this error is harmless. 20 C.F.R. §718.305(d)(2)(ii); *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge