U.S. Department of Labor

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

BRB No. 20-0117 BLA

REGINA M. WERZBICKE (Widow of JACK WERZBICKE)	)	
Claimant-Respondent	)	
v.	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 02/24/2021
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: ROLFE, GRESH, JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05091) rendered on a

survivor's claim filed on November 21, 2017,[1] 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 30.51 years of underground coal mine employment, based on the parties' stipulation, and found Claimant established complicated pneumoconiosis and therefore invoked the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge further found the Miner's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203.

On appeal, Employer argues the administrative law judge erred in finding Claimant established complicated pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief.[2]

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.[3] 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).

Benefits are payable on a survivor's claim when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner's death was due to pneumoconiosis if he was suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one

[1] Claimant is the widow of the Miner, who died on August 15, 2017. Director's Exhibit 12; Hearing Transcript at 11. The Miner was not found eligible for benefits during his lifetime. *See* Director's Exhibit 3. Thus, Claimant is not eligible for automatic survivor's benefits pursuant to Section 411(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the Miner had 30.51 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit because the Miner's last coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 7.

centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the administrative law judge must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980); *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The parties did not designate x-ray evidence. Decision and Order at 9; *see* 20 C.F.R. §718.304(a). Dr. Nine conducted the Miner's autopsy on August 15, 2017, and diagnosed simple clinical pneumoconiosis. Director's Exhibit 13. The administrative law judge found the record did not contain Dr. Nine's resume or otherwise list his qualifications and that Dr. Nine did not give the dimensions for the macules or nodules he observed. Decision and Order at 9. The administrative law judge also observed the Miner's death certificate did not list coal workers' pneumoconiosis as a cause of death.[4] *Id.*; *see* Director's Exhibit 12 (listing cause of death as "complications of neutropenic fever" and "acute myelogenous leukemia," with hypertension and hyperlipidemia as other significant conditions). The administrative law judge further found the Miner's treatment records did not mention coal worker's pneumoconiosis. Decision and Order at 12.

He thus found the existence of the disease turned on the medical opinions, weighing the opinions of Drs. Perper, Swedarsky, and Rosenberg. Drs. Perper and Swedarsky reviewed the Miner's medical records and autopsy slides. They concurred the slides show a chain of conglomerate nodules measuring at least 1.1 centimeter in length, but not diameter, but disagreed as to whether it constituted complicated pneumoconiosis. Decision and Order at 10-12; Claimant's Exhibit 1; Employer's Exhibits 1, 6. Dr. Perper opined the lesion was consistent with complicated pneumoconiosis and would appear on x-ray as greater than one centimeter. Claimant's Exhibit 1. Dr. Swedarsky excluded a diagnosis because the nodules were greater than one centimeter in only one dimension. Employer's Exhibit 6 at 42-45.

[4] Thus, we reject Employer's assertion that "[t]he [a]dministrative [l]aw [j]udge fails to note that the Death Certificate does not indicate pneumoconiosis at all." Employer's Brief at 6; *see* Decision and Order at 9.

Dr. Rosenberg conducted a review of medical records only and determined the Miner had simple clinical coal workers' pneumoconiosis.[5] Employer's Exhibit 2. But he conceded if the Miner had "a conglomerate mass of [coal workers' pneumoconiosis] that's greater than a centimeter, then [] it would meet the criteria [for complicated pneumoconiosis] pathologically." Employer's Exhibit 5 at 33.

Rejecting Dr. Swedarsky's rationale that a lesion must exceed one centimeter in all dimensions to qualify for the disease, the administrative law judge found the opinions, and the totality of the evidence, established the Miner had complicated pneumoconiosis. Decision and Order at 13. Thus, he found Claimant invoked the irrebuttable presumption. *Id*.

On appeal, Employer argues the administrative law judge should have credited Dr. Swedarsky's opinion that the large nodule did not meet the definition of complicated pneumoconiosis because of what Dr. Swedarsky termed "the separation in nodules of lung tissue." Employer's Brief at 7. Employer's argument lacks merit.

Dr. Perper described a "[c]hain of close aggregate of anthracosilicotic nodule[s]" in slide "N" which is "too large to be included in a single microscopic field" and stated the "maximal length of the chain" is 1.3 centimeters. Claimant's Exhibit 1 at 23. He therefore diagnosed complicated pneumoconiosis based on the "macronodular aggregate of pneumoconiotic nodules measure[ing] 1.3 cm," adding "the macronodular aggregate was even larger than 1.3 cm because its lower end was truncated, as it was a straight line not bordered by alveolar tissue." *Id.* at 26.

Dr. Swedarsky testified that the same slide contained a "chain of conglomerate nodules measuring 1.1 centimeter in length and 0.2 centimeters in width[,]" which he did not believe qualified for the disease.[6] Employer's Exhibit 6 at 41. He admitted on cross-examination, however, that the chain could be classified as an opacity exceeding 1.1 centimeters in at least one dimension, satisfying the statutory and regulatory definition of

[5] Dr. Rosenberg reviewed Dr. Nine's autopsy report and Dr. Swedarsky's medical report but did not review Dr. Swedarsky's deposition testimony or Dr. Perper's medical opinion. *See* Employer's Exhibits 2, 5 at 15-16.

[6] In his deposition, Dr. Swedarsky states he reviewed Dr. Nine's report and discussed the findings contained in that report. Employer's Exhibit 6 at 40-46. However, the information he discusses is actually contained in Dr. Perper's report. *See id*.; Claimant's Exhibit 1.

the disease.[7] 20 C.F.R. §718.304; Employer's Exhibit 6 at 54-55. The administrative law judge thus permissibly rejected Dr. Swedarsky's opinion, and any error in his failure to address Dr. Swedarsky's further testimony that the nodules resembled a "chain of pearls" sometimes "near each other," and sometimes "separated by a millimeter or two," is harmless. Employer's Brief at 7;[8] *see generally* 20 C.F.R. §718.304; *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 11; *see also Eastern Assoc. Coal Corp. v. Director,* OWCP [*Scarbro*], 220 F.3d 250, 259 (4th Cir. 2000).

Employer has not otherwise challenged the administrative law judge's weighing of the evidence concerning complicated pneumoconiosis, and we further affirm, as unchallenged, the administrative law judge's finding the Miner's complicated pneumoconiosis arose out of his coal mine employment. *See Skrack*, 6 BLR at 1-

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[7] Dr. Swedarsky testified:

> Q. … And this opacity was greater than one centimeter in one measurement?
>
> A. It was 1.1 centimeters in one dimension only.
>
> *****
>
> Q. … But you do agree that at least in one dimension it was greater than a centimeter and would show up on an x-ray as greater than one centimeter in one dimension?
>
> A. … I don't know how a radiologist would review it, but it might show up as one centimeter in --- one centimeter or slightly more on a radiograph.

Employer's Exhibit 6 at 54-55.

[8] Dr. Perper's opinion that "[a] pathological lesion of 1.0 cm. is *equivalent* to a radiological lesion of 1.0 cm. or larger" comports with the approach the United States Court of Appeals for the Third Circuit adopted for demonstrating radiological equivalency. *See* 20 C.F.R. §718.304(b); *Clites v. Jones & Laughlin Steel Corp*., 663 F.2d 14, 16 (3d Cir. 1981); *Lohr v. Rochester and Pittsburgh Coal Co*., 6 BLR 1-1264 (1984); Claimant's Exhibit 1 at 29. Moreover, Employer has not challenged this assertion and we therefore affirm it. *Skrack*, 6 BLR at 1-711.

711. Thus, we affirm that Claimant invoked the irrebuttable presumption that the miner's death was due to pneumoconiosis.[9]

[9] Employer also argues Claimant did not establish the Miner was totally disabled due to a pulmonary or respiratory disability when he died, and therefore could not invoke the rebuttable presumption at Section 411(c)(4) of the Act that his death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018); Employer's Brief at 8-14. Because we have affirmed that Claimant invoked the irrebuttable presumption at 20 C.F.R. §718.304 that the Miner's death was due to pneumoconiosis, we need not address this assertion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge