U.S. Department of Labor

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

BRB Nos. 20-0196 BLA
and 20-0197 BLA

ELIZABETH D. ROSE (o/b/o and Widow of JOEY ROSE) Claimant-Respondent v. PARAMONT COAL COMPANY VIRGINIA, LLC Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/24/2021 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals Administrative Law Judge Theodore W. Annos's Decision and Order Awarding Benefits (2013-BLA-05847, 2013-BLA-05848) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

This case involves a miner's claim filed on July 19, 2012[1] and a survivor's claim filed on March 11, 2013.

The administrative law judge credited the Miner with 23.14 years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. Thus he found Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] The administrative law judge further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the administrative law judge found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[3]

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

The 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.[5] 33 U.S.C. §921(b)(3), as incorporated

[1] Claimant is the widow of the Miner, who died on January 11, 2013. Director's Exhibit 7. She is pursuing the miner's claim as well as her survivor's claim. The Board consolidated the appeals in the miner's and survivor's claims for purposes of decision only.

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the Miner was totally disabled 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. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Under Section 422(*l*) of the Act, a survivor of a miner who was 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*) (2018).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 14-15.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment occurred in Virginia. *See*

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

Miner's Claim

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal[6] nor clinical pneumoconiosis,[7] or that "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.

Employer does not challenge the administrative law judge's determination that it did not disprove clinical pneumoconiosis. Employer's Brief at p.6 (unpaginated). Thus we affirm this finding. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 15. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

The administrative law judge next considered whether Employer established "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). He weighed Dr. Fino's opinion on this issue. In his initial report, Dr. Fino diagnosed the Miner with a disabling respiratory impairment due to cigarette smoking. Director's Exhibit 15. He opined the Miner did not have clinical pneumoconiosis, but if he were to assume the Miner did have the disease, it would not have contributed to the Miner's disability. *Id*. During his deposition, Dr. Fino conceded the Miner's pathology findings were consistent with "mild

---

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim Director's Exhibit 3.

[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). 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).

[7] "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).

at most" pneumoconiosis. Employer's Exhibit 5 at 19-20. However, he reiterated his opinion that no part of the Miner's disability was caused by the disease. *Id*. at 27.

The administrative law judge permissibly rejected Dr. Fino's initial opinion because he did not diagnose pneumoconiosis, contrary to the administrative law judge's finding 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 17. Further, contrary to Employer's argument, the administrative law judge permissibly found Dr. Fino's deposition testimony inadequately explained, notwithstanding the doctor's "belated concession" that the Miner had pneumoconiosis. Decision and Order at 17; *see Epling*, 783 F.3d at 506 (doctor's initial failure to diagnose pneumoconiosis was cured neither by his hypothetical assumption of pneumoconiosis nor by his subsequent embrace of that diagnosis); *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); Employer's Brief at 5-12 (unpaginated). We therefore affirm the administrative law judge's finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii),[8] and the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to 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*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[8] Dr. Habre diagnosed total disability due to clinical pneumoconiosis. Director's Exhibit 14. His opinion does not aid Employer on rebuttal. Thus we need not address Employer's argument that the administrative law judge erred in finding his opinion reasoned and documented. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 12-14 (unpaginated).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge