U.S. Department of Labor

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

BRB No. 20-0234 BLA
and 20-0235 BLA

GERALDINE BROCK (o/b/o and Widow of OSCAR BROCK) Claimant-Respondent v. CONSOL BUCHANAN MINING COMPANY, LLC c/o HEALTHSMART CASUALTY CLAIMS SOLUTIONS - TPA Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/26/2021 DECISION and ORDER

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

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee for Employer and its Carrier.

Olgamaris Fernandez (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry W. Price's Decision and Order Awarding Benefits (2018-BLA-05777 and 2018-BLA-05778) on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act). This case involves an initial miner's claim filed on April 11, 2016,[1] and a survivor's claim filed on October 4, 2016.[2]

The administrative law judge credited the Miner with 32.75 years of qualifying coal mine employment based on the parties' stipulation, and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits in the Miner's claim. Because the Miner was determined to be entitled to benefits, 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).[4]

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption as part of the Affordable Care Act (ACA). On the merits, Employer argues in the Miner's claim that the administrative law judge erred in finding it did not rebut the

[1] The Miner, Oscar Brock, died on August 7, 2016. Survivor's Claim Director's Exhibit 2.

[2] Claimant, who is the Miner's widow, is pursuing the Miner's claim, on behalf of his estate, and her survivor's claim.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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.

[4] Section 422(*l*) of the Act provides that the 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*) (2012).

Section 411(c)(4) presumption.[5] Employer further contends that because the Miner was not entitled to benefits, the Board must vacate the award in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging rejection of Employer's challenge to the constitutionality of the Section 411(c)(4) presumption. Claimant has not filed a response brief.

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 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).

Constitutionality of the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 6. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*.

Contrary to Employer's contention, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit held the ACA

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established 32.75 years of qualifying coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21-25.

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

amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

Miner's Claim – Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal 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.

We affirm, as unchallenged on appeal, the administrative law judge's finding that Employer did not disprove clinical pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Thus, the only issue is whether the administrative law judge erred in finding Employer failed to disprove the presumed causal relationship between the Miner's clinical pneumoconiosis and his total respiratory or pulmonary disability. *See* 20 C.F.R. §718.305(d)(1)(ii). Employer contends the administrative law judge erred in finding Drs. Basheda's and Fino's opinions insufficient to satisfy its burden of proof. Employer's Brief 7-11. We disagree.

Dr. Basheda opined the Miner did not have clinical pneumoconiosis and that his respiratory disability was due solely to lung cancer and the side effects of

[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).

chemotherapy/immunotherapy. Miner's Claim (MC) Director's Exhibit 20. Contrary to Employer's contention, the administrative law judge permissibly rejected Dr. Basheda's opinion on disability causation because he did not diagnose clinical pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 30.

Dr. Fino prepared a medical report based on his review of the Miner's treatment records and the examination report prepared in conjunction with the Department of Labor's complete pulmonary evaluation. MC Director's Exhibit 20. He opined that there was no " definitive evidence of a coal dust-related condition." *Id*. at 6. He further opined that the Miner's respiratory disability was due to Stage IV lung cancer caused by smoking. *Id*. at 3, 6. During his deposition, Dr. Fino reviewed the Miner's death certificate and autopsy report and acknowledged the pathology slides showed "microscopic coal worker's pneumoconiosis" in both lungs. MC Employer's Exhibit 2 at 13. He also noted the autopsy report described "near complete replacement of both lungs" by cancer and stated he would not be surprised "if all of the abnormality seen on the pulmonary function studies is directly related to the lung cancer." *Id*. at 15-16.

The administrative law judge permissibly found Dr. Fino's opinion unpersuasive because he did not adequately explain why clinical pneumoconiosis arising from the Miner's "lengthy" coal mine employment "did not materially worsen" the Miner's respiratory or pulmonary disability.[8] Decision and Order at 30; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *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). Moreover, Dr. Fino's general statement that there is no evidence clinical pneumoconiosis played a part in the Miner's total disability does not take into account the effect of the Section 411(c)(4) presumption, which establishes such a causal role unless it is affirmatively rebutted by a preponderance of the evidence. *See* 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305; MC Employer's Exhibit 2 at 15. The administrative law judge permissibly found Dr. Fino's opinion did not meet that burden, and although Employer maintains Dr. Fino credibly explained why the Miner's respiratory disability was caused

[8] Employer challenges the administrative law judge's additional finding that Dr. Fino's opinion was generalized and based on medical literature as opposed to the specifics of the Miner's condition. Decision and Order at 30; Employer's Brief at 9-11; MC Director's Exhibit 20 at 6-7. Because we affirm the administrative law judge's rejection of Dr. Fino's opinion on alternate grounds, we need not address Employer's contention of error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

solely by his lung cancer, we consider Employer's arguments to be a request that the Board reweigh the evidence which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's rejection of Dr. Fino's opinion. *See West Virginia CWP Fund v. Bender*, 782 F.3d 129, 144 (4th Cir. 2015); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

We therefore affirm, as supported by substantive evidence, the administrative law judge's finding that Employer failed to prove no part of the Miner's respiratory or pulmonary total disability was caused by clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Because Employer did not rebut the Section 411(c)(4) presumption, we affirm the award of benefits in the Miner's claim.

Survivor's Claim

The administrative law judge determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(*l*); Decision and Order at 31. Because we have affirmed the award of benefits in the Miner's claim and Employer raises no specific challenge to the award of benefits in the survivor's claim, we affirm it.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge