U.S. Department of Labor

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

BRB Nos. 20-0067 BLA
and 20-0068 BLA

WILMA PARSONS (o/b/o and Widow of FRED PARSONS) Claimant-Respondent v. STONEY GAP COAL COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/29/2021 DECISION and ORDER

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

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer.

Edward Waldman (Stanley E. Keen, Deputy Solicitor for National Operations; 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, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Larry W. Price's Decision and Order on Remand - Awarding Benefits (2016-BLA-05023, 2016-BLA-05024) rendered on a miner's and a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] Both claims are before the Benefits Review Board for the second time.

In a Decision and Order - Awarding Benefits dated May 22, 2017, Administrative Law Judge Alan L. Bergstrom found Claimant established 19.57 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, he determined Claimant invoked the rebuttable 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] He further found Employer failed to rebut the presumption and awarded benefits in the Miner's claim. Because the Miner was entitled to benefits at the time of his death, Judge Bergstrom found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act.[3]

[1] The Miner filed a claim on April 22, 2014, but died on May 23, 2015, while his claim was pending. Miner's Claim (MC) Director's Exhibits 2, 5. Claimant, the Miner's widow, is pursuing her husband's claim on his behalf. MC Director's Exhibit 5. She also filed a survivor's claim on June 12, 2015. Survivor's Claim (SC) Director's Exhibit 2. By order issued on May 11, 2016, the administrative law judge consolidated the claims. On its own motion, the Board consolidated the miner's and survivor's claims for purposes of decision only. *Parsons v. Stoney Gap Coal Co*., BRB Nos. 17-0493 BLA and 17-0494 BLA (December 4, 2019) (Order) (unpub.).

[2] Section 411(c)(4) 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) (2018); *see* 20 C.F.R. §718.305.

[3] Section 422(*l*) provides that the 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 without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

Pursuant to Employer's appeal, the Board affirmed Judge Bergstrom's findings that Claimant established the Miner was totally disabled at 20 C.F.R. §718.204(b)(2) and therefore also invoked the rebuttable presumption of total disability due to pneumoconiosis. Additionally, the Board affirmed Judge Bergstrom's determination Employer failed to establish rebuttal under the first prong, by disproving the presumed existence of clinical pneumoconiosis. However, the Board vacated the administrative law judge's finding that Employer failed to establish rebuttal under the second prong by disproving disability causation and remanded the case. Based on its decision to vacate the award of benefits in the Miner's claim, the Board also vacated Judge Bergstrom's determination that Claimant is derivatively entitled to survivor's benefits. *Parsons v. Stoney Gap Coal Co*., BRB Nos. 17-0493 BLA and 17-0494 BLA (July 31, 2018) (unpub.).

On remand, Judge Price (the administrative law judge) considered the medical opinion evidence and determined Employer failed to establish rebuttal by showing no part of the Miner's disability was due to pneumoconiosis. He therefore awarded benefits in the Miner's claim and found Claimant derivatively entitled to survivor's benefits.

On appeal, Employer challenges the constitutionality of the Affordable Care Act (ACA), and therefore the constitutionality and applicability of the Section 411(c)(4) and 422(*l*) presumptions, enacted as part of the ACA. It also argues the administrative law judge erroneously found it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Board to reject Employer's arguments concerning the constitutionality of the ACA.

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.[4] 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) and 422(*l*) Presumptions

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 generally contends the ACA, Pub. L. No. 111-148, §1556 (2010), which reinstated the Section 411(c)(4) presumption and Section 422(*l*) of the Act, violates Article II of the Constitution. Employer's Brief at

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-201 (1989) (en banc); MC Director's Exhibit 3.

3. The Director responds that Employer's argument is insufficiently raised on appeal, and, moreover, is meritless. We agree.

The United States Court of Appeals for the Fifth Circuit held one aspect of the ACA (the individual requirement to maintain health insurance) is unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down as inseverable from that requirement. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , 2020 WL 981805 (Mar. 2, 2020) (No. 19-101). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held the ACA 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. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). Therefore, even assuming Employer's argument was sufficiently briefed,[5] we reject it.

The 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,[6] or "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 noted that, because the Board affirmed Judge Bergstrom's finding Employer did not rebut the presumed existence of clinical pneumoconiosis, Employer did not establish rebuttal at

[5] The Board's procedural rules require the brief accompanying a petition for review to contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result that the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." 20 C.F.R. §802.211(b). Aside from its general assertion that the ACA is unconstitutional, Employer did not provide any additional information.

[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). "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).

20 C.F.R. §718.305(d)(1)(i) and, therefore, "[t]he issue before this Court is whether Employer's evidence was sufficient to establish that no part of the Miner's respiratory disability was due to pneumoconiosis." Decision and Order on Remand at 7.

Thus, the administrative law judge 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); *see* Decision and Order on Remand at 6-7. He found Dr. Dahhan's opinion concerning the cause of radiological abnormalities he observed to be "confusing and inconsistent" because he attributed them to pneumoconiosis but also stated they were not typical for a coal dust induced lung disease. Decision and Order on Remand at 7-8; *see* MC Director's Exhibit 15.[7] In contrast, the administrative law judge gave more weight to Dr. Ajjarapu's opinion diagnosing a totally disabling respiratory impairment due to both legal and clinical pneumoconiosis because he found it more persuasive, and consistent with the objective medical evidence and the preamble to the 2001 revised regulations. Decision and Order on Remand at 8; *see* MC Director's Exhibit 13. He therefore determined Employer did not establish the Miner's respiratory disability was unrelated to pneumoconiosis. Decision and Order on Remand at 8.

Employer contends the administrative law judge erred in his consideration of the opinions of Drs. Dahhan and Ajjarapu concerning total disability causation. Employer's Brief at 3-5. We disagree.

As an initial matter, Employer misstates that it can disprove disability causation by establishing Claimant "did not have a chronic lung disease or impairment that was 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" Employer's Brief at 5, *quoting* 20 C.F.R. §718.201(b). Employer conflates the standard for disproving legal pneumoconiosis with its burden to rebut disability causation by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii).

[7] Employer also cites MC Employer's Exhibit 4 in reference to Dr. Dahhan's opinion. *See* Employer's Brief at 3. As Judge Bergstrom noted in his original Decision and Order, although Employer identified a March 27, 2015 supplemental medical report from Dr. Dahhan and identified it as MC Employer's Exhibit 4, it did not submit the document into evidence. 2017 Decision and Order at 11 n.15. Employer has not challenged this finding or argued that the administrative law judge failed to properly consider this exhibit, and we therefore affirm that it was not submitted into evidence. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

We also reject Employer's arguments that the administrative law judge erred in his weighing of the medical opinions. On his interpretation of the January 19, 2015 x-ray, Dr. Dahhan checked "yes" in response to the question of whether there were "[a]ny parenchymal abnormalities consistent with pneumoconiosis" and identified opacities in the middle zone of the left lung and lower zone of both lungs. MC Director's Exhibit 15. In his January 19, 2015 report, however, Dr. Dahhan concluded the Miner "has radiological findings that are not typical for coal dust induced lung disease, i.e. irregular medium sized opacities in the lower zones that are highly suspicious for asbestos related disease." *Id*. As these statements are inconsistent and Dr. Dahhan "did not further elaborate" on the opacities identified in the middle lobe or his identification of clinical pneumoconiosis on the ILO form,[8] the administrative law judge permissibly discredited Dr. Dahhan's opinion concerning whether the Miner had clinical pneumoconiosis and thus whether the Miner's totally disabling respiratory or pulmonary impairment was due to clinical pneumoconiosis. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision and Order on Remand at 7-8; *see* Employer's Brief at 4-5.

Further, the administrative law judge noted Dr. Dahhan's later statement that Claimant's pattern of obstruction is "not usually" due to "the amount" of clinical pneumoconiosis seen on his x-ray. Decision and Order at 8; MC Director's Exhibit 15. The administrative law judge permissibly found this statement unpersuasive and insufficient to rebut disability causation because Dr. Dahhan did not explain "the amount" of clinical pneumoconiosis to which he referred or why that amount could not have played a part in Claimant's disabling respiratory impairment. Decision and Order on Remand at 8; *Looney*, 678 F.3d at 316-17; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993). Moreover, Employer does not challenge this credibility determination. *See Skrack*, 6 BLR at 1-711.

Because we have affirmed the administrative law judge's discrediting of Dr. Dahhan's opinion, we need not address Employer's arguments concerning his weighing of Dr. Ajjarapu's opinion. *See* Employer's Brief at 3-4.[9] Dr. Ajjarapu diagnosed a totally

[8] In the prior Decision and Order, Judge Bergstrom noted this discrepancy, but found "[t]he internal conflict in Dr. Dahhan's report does not rise to the level of contradicting the existence of clinical pneumoconiosis based on the January 19, 2015 chest x-ray." 2017 Decision and Order at 26.

[9] Since the administrative law judge permissibly discredited the opinion of Dr. Dahhan, Employer has not explained how acceptance of its critique of Dr. Ajjarapu's opinion would enable it to establish rebuttal.

disabling respiratory or pulmonary impairment due to clinical and legal pneumoconiosis and therefore her opinion does not support Employer's burden to rebut disability causation. *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"). Consequently, we affirm the administrative law judge's finding that Employer failed to establish "that no part of the Miner's totally disabling respiratory impairment was caused, in whole or in part, by pneumoconiosis," i.e., clinical pneumoconiosis.[10] Decision and Order on Remand at 8.

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and Employer did not rebut the presumption, we affirm the award of benefits in the Miner's claim.

The Survivor's Claim

Having awarded benefits in the Miner's claim, the administrative law judge found Claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. Decision and Order on Remand at 9-10; *see* 30 U.S.C. §932(*l*). Employer's general challenge to the award of survivor's benefits relies on its arguments regarding entitlement in the Miner's claim, which we have rejected. Employer's Brief at 5. Hence, as the administrative law judge's findings are supported by substantial evidence, we affirm his determination that Claimant is derivatively entitled to receive survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[10] Employer's brief does not clearly delineate between rebuttal of disability causation due to clinical as opposed to legal pneumoconiosis. Because we affirm the administrative law judge's determinations that Employer did not rebut the existence of clinical pneumoconiosis or total disability due to clinical pneumoconiosis, however, we need not address any contentions asserting error in the administrative law judge's weighing of the evidence as to whether the Miner's totally disabling respiratory impairment was due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Parsons*, slip op. at 6; Employer's Brief at 7-8.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge