U.S. Department of Labor

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

BRB No. 20-0247 BLA

BROWNIE COMPTON (Widow of CHARLES C. COMPTON) Claimant-Respondent v. CLINCHFIELD COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/19/2021 DECISION and ORDER

Appeal of the Decision and Order Awarding Survivor's Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals Administrative Law Judge Francine L. Applewhite's Decision and Order Awarding Survivor's Benefits (2016-BLA-5509) rendered on a claim filed

pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on May 28, 2014.[1]

The administrative law judge credited the Miner with at least sixteen years of underground coal mine employment based on the parties' stipulation, and found he was totally disabled at the time of his death. She therefore found Claimant invoked the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §9211(c)(4) (2018).[2] The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding the Miner was totally disabled and Claimant invoked the Section 411(c)(4) presumption. Employer further argues she erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated

[1] Claimant is the widow of the Miner, who died on February 12, 2013. Director's Exhibit 12. The record does not reflect the Miner was found eligible for benefits during his lifetime. Thus, Claimant is not eligible for automatic survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018). *See* Administrative Law Judge Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if the miner 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) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established the Miner had sixteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 6.

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

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if a pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The administrative law judge found Claimant established total disability based on the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i) and the record as a whole.[5] 20 C.F.R. §718.204(b)(2); Decision and Order at 6-8.

The record contains one pulmonary function study, dated May 21, 2010, which Dr. Robinette administered in the course of treating the Miner for obstructive lung disease. Director's Exhibit 16. The administrative law judge found the study yielded qualifying

[5] The administrative law judge found no evidence indicating the Miner suffered from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 7. She further found Dr. Sargent's opinion, the only medical opinion of record, did not directly address total disability or the Miner's ability to perform his past coal mine employment. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 7; Employer's Exhibits 2, 9. Additionally, the administrative law judge noted the parties did not designate blood gas study evidence. Decision and Order at 6. Employer alleges she failed to properly consider a non-qualifying blood gas study contained in the treatment records. Employer's Brief at 5; Director's Exhibit 16. However, we consider the administrative law judge's error, if any, harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Because blood gas studies measure a different type of impairment than pulmonary function studies, her failure to consider a non-qualifying blood gas study does not call into question her finding of total disability based on the pulmonary function study evidence. *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

values before and after bronchodilation.[6] Decision and Order at 6. She noted generally that when a study lacks tracings it is not in substantial compliance with the quality standards at 20 C.F.R. §718.103(c). *Id*. However, she also noted that in the case of a deceased miner, a non-conforming study may support a total disability finding if it demonstrates "technically valid results obtained with good cooperation." *Id.* (quoting 20 C.F.R. §718.103(c)). The administrative law judge concluded, without elaboration, that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 6.

Employer argues the May 21, 2010 study is invalid and cannot support a finding of total disability because it does not have three tracings to assess the Miner's cooperation. Employer contends that while the applicable quality standards indicate a non-conforming pulmonary function study may be used in a deceased miner's case to prove disability if, in the opinion of the adjudication officer, the test in question "demonstrated technically valid results with good cooperation of the miner," the administrative law judge failed to address the issue. Employer's Brief at 5-6 (unpaginated) (citing 20 C.F.R. §718.103(a)-(c)). Employer also contends the administrative law judge did not properly address Dr. Sargent's opinion that the study is "invalid." *Id.* at 7, 5-8 (unpaginated). Employer's arguments lack merit.

Contrary to Employer's contention, the May 21, 2010 pulmonary function study is not subject to the quality standards as it was conducted as part of the Miner's treatment and not in anticipation of litigation. *See J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment); 20 C.F.R. §718.103; 65 Fed. Reg. 79,920, 79,927 (Dec. 20, 2000) (quality standards do not apply to treatment records as "[20 C.F.R.] §718.101 is clear that it applies quality standards only to evidence developed 'in connection with a claim' for black lung benefits"); Director's Exhibit 16 at 15-16.

Moreover, although Employer correctly asserts the administrative law judge did not address Dr. Sargent's opinion, Employer has mischaracterized it. Dr. Sargent did not invalidate the May 21, 2010 pulmonary function study as Employer contends; rather, he stated he was "unable to comment on the validity" of the study because the one-page report

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

did not include the number of trials performed. Employer's Exhibit 2. During his deposition, Dr. Sargent stated the study was "likely valid" based on the flow volume:

> Well, I only have one page, so it doesn't show the actual trials that were done to determine[] reproducibility. As you know, to determine the validity you have to have three trials that are within five percent of one another. Nevertheless, I would say that *the Flow Volume that was present here, with the pulmonary functions, seem[s] to show relatively good effort. So, again, I don't have the actual tracings to show the validity, but at least what I can see here says that these are likely valid pulmonary function tests.*

Employer's Exhibit 9 at 7-8 (emphasis added).

The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984); *Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984). Other than arguing the study does not meet the inapplicable quality standards and citing Dr. Sargent's opinion (which Employer mischaracterizes), Employer cites no evidence, nor do we discern any in the record, to support its contention that the May 21, 2010 study is unreliable. But without medical evidence establishing the unreliability of the study, neither an administrative law judge nor the Board has the requisite medical expertise to make such a determination.[7] *Vivian*, 7 BLR at 1-361; *Jeffries*, 6 BLR at 1-1014. Thus, we reject Employer's assertion that the administrative law judge erred by relying on the results of the qualifying May 21, 2010 pulmonary function study.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6-8. Consequently, we also affirm her finding that Claimant established total disability based on the overall evidence at 20 C.F.R. §718.204(b)(2) and therefore invoked the Section 411(c)(4) rebuttable presumption that the Miner's death was due to pneumoconiosis. *See Shedlock*, 9 BLR at 1-198.

[7] The face of the report states "[b]est patient efforts reported," although it is unclear who made this assessment. However, Dr. Robinette, who ordered the May 21, 2010 pulmonary function study in connection with a follow-up assessment for Claimant's lung disease, characterized the study as "evidence of significant obstructive lung disease." Director's Exhibit 16 at 15-16.

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

In order to rebut the Section 411(c)(4) presumption, Employer must establish the Miner had neither legal nor clinical pneumoconiosis,[8] or that "no part of the miner's 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.[9]

Legal Pneumoconiosis

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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Caffrey and Sargent to disprove legal pneumoconiosis. They each opined the Miner had emphysema[10] due entirely to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 1, 2, 8, 9. The administrative law judge found neither opinion sufficiently persuasive to support Employer's burden of proof. Decision and Order at 11.

Initially, we reject Employer's contention that the administrative law judge improperly required its experts to "rule out" coal mine dust exposure as a causative factor for the Miner's emphysema and thereby applied an incorrect legal standard. Employer's Brief at 9-12, 15-16 (unpaginated). The administrative law judge correctly noted the

[8] "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).

[9] The administrative law judge found "clinical pneumoconiosis is not established." Decision and Order at 10. We interpret this finding to mean Employer disproved the existence of clinical pneumoconiosis.

[10] The administrative law judge noted the diagnosis of emphysema was supported by the Miner's autopsy report and treatment records. Decision and Order at 11; Director's Exhibits 13, 15, 16.

definition of legal pneumoconiosis includes "any chronic pulmonary disease, respiratory impairment, or pulmonary impairment 'significantly related to[,] or substantially aggravated by[,] . . . dust exposure in coal mine employment.'" Decision and Order at 8 (quoting 20 C.F.R. §718.201(b)). She also accurately stated that, to rebut the existence of legal pneumoconiosis, "Employer has the burden of establishing that a pulmonary disease or respiratory impairment was not 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" Decision and Order at 8-9 (quoting 20 C.F.R. §718.201(b)). Thus, Employer's assertion that the administrative law judge applied an improper legal standard has no merit.

Employer alleges the administrative law judge improperly presumed the Miner's emphysema constituted legal pneumoconiosis. Employer's Brief at 15 (unpaginated). Contrary to Employer's argument, the Miner's emphysema is presumed to be legal pneumoconiosis by operation of the presumption. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Further, the administrative law judge specifically considered the physicians' opinions regarding its etiology in concluding Employer did not rebut the presumption by establishing it was not significantly related to, or substantially aggravated by, coal dust exposure. Decision and Order at 11.

Additionally, we reject Employer's assertion that the administrative law judge did not provide valid reasons for discrediting the opinions of Drs. Caffrey and Sargent. Employer's Brief at 12, 16 (unpaginated). As the administrative law judge accurately noted, both Drs. Caffrey and Sargent eliminated coal dust as a cause of the Miner's emphysema based on the autopsy findings showing what they described as a minimal amount of coal mine dust in his lungs.[11] They explained that coal mine dust can cause emphysema, but it is usually in relationship to the amount of coal mine dust in the lungs and the susceptibility of the individual.[12] Decision and Order at 11; Employer's Exhibits

[11] Dr. Sargent explained that the amount of emphysema is proportional to the amount of dust deposition in the lung, and opined that coal mine dust cannot be implicated as a cause of the Miner's emphysema because "there is only a small amount of dust deposition in the lung without any evidence of macule formation." Employer's Exhibit 2 at 2.

[12] Dr. Caffrey explained that "coal dust can cause emphysema, but it's usually in relationship to the amount of coal dust, anthracotic pigment in the patient's lungs; and again, in both cases it is an individual susceptibility. In other words, the same amount of tobacco smoke and the same amount of emphysema [sic] may result in a more severe form of emphysema in some patients and less in others. So it has something to do, they say, with our DNA." Employer's Exhibit 8 at 10.

1, 8. The administrative law judge permissibly found their opinions unpersuasive because they did not address how "the Miner's individual susceptibility" to emphysema from coal dust exposure may have affected his respiratory condition. Decision and Order at 11. Thus, she found they failed to adequately explain why the Miner's coal mine dust exposure could not have substantially contributed to, or aggravated, his emphysema even if it was also related to smoking. *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); Decision and Order at 11.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Thus, we affirm the administrative law judge's finding that Employer failed to disprove the Miner had legal pneumoconiosis.[13] 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *Mingo*, 724 F.3d at 558; Decision and Order at 11.

Death Causation

The administrative law judge next addressed whether Employer rebutted the presumption by establishing "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). Employer generally asserts the opinions of Drs. Caffrey and Sargent establish that pneumoconiosis did not contribute to the Miner's death.[14] We disagree. Dr. Caffrey opined the Miner's death was due to his significant cardiac problems, which were unrelated to coal dust exposure. Employer's Exhibits 1 at 4, 8 at 17. The administrative law judge permissibly found Dr. Caffrey's opinion not well-reasoned because he did not address the possibility of multiple, or contributing, causes of death and did not address whether the Miner's legal pneumoconiosis (emphysema) contributed to his death in any way. *See Hicks*, 138 F.3d at 533; *Minich*, 25 BLR 1-154-56; Decision and Order at 12.

Dr. Sargent attributed the Miner's death to multiple causes, including "lung disease" which he opined was neither caused nor aggravated by coal dust exposure. Employer's

[13] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

[14] The Miner's death certificate lists his immediate cause of death as "[a]cute on chronic systolic C[ongestive] H[eart] F[ailure]/Cardiac Arrest due to C[oronary] A[rtery] D[isease]." It further listed "Chronic Respiratory Failure due to COPD/possible Black Lung" and "Chronic Renal Insufficiency" as conditions leading to the immediate cause of death. Director's Exhibit 12.

Exhibit 9 at 10. The administrative law judge permissibly found his opinion "not well-reasoned" because Dr. Sargent did not diagnose legal pneumoconiosis and otherwise failed to explain the basis of his opinion. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014); *Hicks*, 138 F.3d at 533; *Minich*, 25 BLR 1-154-56; Decision and Order at 12; Employer's Exhibit 9 at 10. Because Employer raises no further challenge to the administrative law judge's death causation findings, we affirm her determination that Employer failed to rebut the presumption by establishing no part of the Miner's death was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge