U.S. Department of Labor

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

BRB Nos. 20-0359 BLA
and 20-0360 BLA

KAREN OLIVER (Widow of and o/b/o RONALD R. OLIVER) Claimant-Respondent v. W-P COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/29/2021 DECISION and ORDER

Appeals of the Decisions and Orders Awarding Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Kathy L. Snyder and Andrea Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decisions and Orders Awarding Benefits on Remand (2017-BLA-06091, 2017-BLA-05564) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] These appeals involve a miner's claim filed on April 22, 2015, and a survivor's claim filed on January 17, 2017.

In a Decision and Order issued on June 13, 2008, the administrative law judge found Claimant[2] 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). He further found Employer did not rebut the presumption and awarded benefits in the miner's claim.[3] In a separate Decision and Order issued on the same date, the administrative law judge found Claimant was entitled to derivative survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

In consideration of Employer's appeal, the Benefits Review Board affirmed, as unchallenged, the administrative law judge's finding that the Miner was totally disabled,

[1] We have consolidated for decision Employer's appeals of the awards in the miner's claim and the survivor's claim.

[2] Claimant is the widow of the Miner, who died on October 15, 2016. Miner's Claim (MC) Director's Exhibit 53. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

[3] 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) (2018); 20 C.F.R. §718.305(b).

[4] Under Section 422(*l*) of the Act, 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*) (2018).

but vacated his length of coal mine employment determination because it was not adequately explained. *Oliver v. W-P Coal Co.*, BRB Nos. 18-0484 BLA and 19-0017 BLA, slip op. at 3-6 (Aug. 30, 2019) (unpub.). Thus, the Board vacated the award of benefits in the miner's claim and remanded the case for further consideration of whether Claimant invoked the Section 411(c)(4) presumption. *Id*. at 6. The Board also vacated the administrative law judge's award of derivative benefits in the survivor's claim, as it was dependent on the award of benefits in the miner's claim. *Id*. at 6-7.

On remand, the administrative law judge found Claimant established 16.5 years of qualifying coal mine employment and reinstated his determination that she invoked the Section 411(c)(4) presumption. He further found Employer did not rebut the presumption and awarded benefits in the miner's claim and derivative survivor's benefits pursuant to Section 422(*l*).

On appeal, Employer argues the administrative law judge erred in finding it did not rebut the presumption. Additionally, Employer asserts that because the miner's claim was erroneously awarded, Claimant is not entitled to derivative survivor's benefits. Claimant responds, urging affirmance of the awards in both claims. Employer filed a reply brief, reiterating its arguments. The Director, Office of Workers' Compensation Programs, declined to file a brief in either appeal.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

[5] We affirm, as unchallenged, the administrative law judge's findings that the Miner had 16.5 years of qualifying coal mine employment and Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] 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 West Virginia. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 3.

The Miner's Claim - Section 411(c)(4) Rebuttal

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 "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.[8]

Legal Pneumoconiosis

To prove that the Miner did not have legal pneumoconiosis, Employer must establish he 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)(1)(i)(A).

Employer relies on the opinions of Drs. Zaldivar and Spagnolo. Dr. Zaldivar opined the Miner had a primarily restrictive impairment caused by morbid obesity and heart failure, and some mild obstruction due to smoking-related emphysema. Miner's Claim (MC) Director's Exhibit 16 at 4-5; MC Employer's Exhibit 17 at 37. He concluded there was no evidence of legal pneumoconiosis. *Id.* Dr. Spagnolo opined the Miner did not have an obstructive or restrictive impairment. MC Employer's Exhibits 14 at 7, 11; 18 at 23-25, 43-44. Rather, he indicated the Miner's blood gas studies showed an oxygen defect with exercise caused by severe heart disease and obesity unrelated to coal mine dust exposure. MC Employer's Exhibits 14 at 11; 18 at 25, 32-34, 43-44. The administrative law judge found both opinions not well-reasoned and insufficient to satisfy Employer's burden of proof. MC Decision and Order on Remand at 22-23.

[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). 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). "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).

[8] The administrative law judge found that Employer disproved the existence of clinical pneumoconiosis. MC Decision and Order on Remand at 8-19, 26, 29.

Employer contends the administrative law judge did not give valid reasons for discrediting its experts on legal pneumoconiosis. Employer's Brief at 7-15. We disagree.

As the administrative law judge correctly noted, Dr. Zaldivar stated that when "pneumoconiosis causes a restrictive impairment, it does so by having physical evidence of clinical pneumoconiosis" and there is no evidence the Miner had clinical pneumoconiosis "because there is no radiographic pneumoconiosis." MC Director's Exhibit 16 at 4-5. Citing to medical literature, he further explained that where the etiology of a restrictive impairment is due to coal or silica dust, "the finding is one of progressive massive fibrosis." *Id*. at 4. According to Dr. Zaldivar, the Miner's restrictive impairment was not "intrinsic" in that his "lungs [couldn't] expand" because the Miner's stomach was "pushing up" on his lungs, making the chest "heavy" and the lungs "smaller." MC Employer's Exhibit 17 at 36.

Contrary to Employer's contention, the administrative law judge permissibly found Dr. Zaldivar's opinion unpersuasive because the regulations provide that a claim shall not be denied solely on the basis of a negative chest x-ray, and they further recognize that legal pneumoconiosis can exist in the absence of positive x-ray evidence. *See* 20 C.F.R. §§718.202(a)(4), 718.202(b); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009) (affirming the discrediting of a physician's opinion because the administrative law judge "fairly read" it as requiring radiographic evidence of clinical evidence before he would diagnose legal pneumoconiosis); MC Decision and Order on Remand at 22; MC Director's Exhibit 16 at 4-5; MC Employer's Exhibit 17 at 37-39, 51.

There also is no merit in Employer's contention the administrative law judge applied the wrong legal standard in evaluating Dr. Zaldivar's opinion. Employer's Brief at 10. The administrative law judge did not require Dr. Zaldivar to rule out coal mine dust exposure as a contributing factor in the Miner's impairment. MC Decision and Order on Remand at 7-8, 20-22. Rather, he set forth the proper legal standard and permissibly found that Dr. Zaldivar did not adequately explain why he "eliminated" a diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Looney*, 678 F.3d at 316-17; *Clark*, 12 BLR at 1-155; MC Decision and Order on Remand at 20-22; MC Employer's Exhibit 17 at 41-43. Thus, the administrative law judge based his rejection of Dr. Zaldivar's opinion on his finding that it was not well-reasoned, not because the physician failed to meet a more stringent legal standard.

We also see no error in the administrative law judge's rejection of Dr. Spagnolo's opinion on legal pneumoconiosis. Dr. Spagnolo opined that Miner did not have legal pneumoconiosis based, in part, on his belief that the Miner's pulmonary function studies did not show a restrictive or obstructive impairment. MC Employer's Exhibits 14 at 7, 11; 18 at 23-24, 27-28, 35-36, 43-44. The administrative law judge permissibly discredited this rationale as contrary to his finding that "the [M]iner had a totally disabling pulmonary impairment, which was partially based on the [M]iner's pulmonary function studies." MC Decision and Order on Remand at 23; *see Oliver*, BRB Nos. 18-0484 BLA and 19-0017 BLA, slip op. at 3 n. 6; *see also 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, we reject Employer's assertion that the case must be remanded for the administrative law judge to resolve the conflict among its own experts as to whether the Miner had an obstructive or restrictive respiratory impairment. Employer's Brief at 14. Because Employer has the burden to affirmatively establish the absence of legal pneumoconiosis, it bears the risk of non-persuasion if its evidence is found insufficient. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). The administrative law judge permissibly discredited Dr. Spagnolo's opinion on legal pneumoconiosis because he did not adequately address the etiology of the respiratory impairment Dr. Zaldivar clearly identified.[9] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; MC Decision and Order on Remand at 23. Further, because the administrative law judge gave a valid reason for discrediting Dr. Spagnolo's opinion on the etiology of the Miner's restrictive impairment, we need not address Employer's arguments that the administrative law judge failed to consider Dr. Spagnolo's rationale for why the Miner's

[9] Employer conceded the Miner was totally disabled in the prior appeal insofar as Dr. Zaldivar opined the Miner's restrictive impairment precluded him from performing his usual coal mine work. *See* Employer's Brief in *Oliver v. W-P Coal Co.*, BRB Nos. 18-0484 BLA and 19-0017 BLA (Aug. 30, 2019) (unpub.) at 9 n.2. Employer noted in the prior appeal, however, that it contested the administrative law judge's finding that the pulmonary function studies were qualifying for total disability. *Id*. Employer resurrects this argument to the extent it believes this affects the administrative law judge's findings on legal pneumoconiosis. *See* Employer's Brief at 11-15. It does not. Employer does not dispute Dr. Zaldivar's pulmonary function studies showed a restrictive impairment. *Id*. Whether those studies are qualifying or not, the issue on rebuttal as it pertains to legal pneumoconiosis is the etiology of the restrictive impairment Dr. Zaldivar diagnosed. *See* 20 C.F.R. §718.305(d)(1)(i)(A).

oxygen impairment was unrelated to coal mine dust exposure. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Employer's arguments on legal pneumoconiosis are a request to 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). We therefore affirm the administrative law judge's determination that Employer did not disprove the existence of legal pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer established "no part of the [M]iner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143 (4th Cir. 2015); MC Decision and Order on Remand at 27-28. Contrary to Employer's contention, the administrative law judge permissibly found the opinions of Drs. Zaldivar and Spagnolo on the cause of the Miner's respiratory disability unpersuasive because they did not diagnose legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); MC Decision and Order on Remand at 28; MC Director's Exhibit 16; MC Employer's Exhibits 14, 17, 18. We therefore affirm the administrative law judge's finding that Employer failed to establish that no part of the Miner's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Bender*, 782 F.3d at 143; MC Decision and Order on Remand at 27-28.

The Survivor's Claim - Derivative Entitlement

The administrative law judge found that Claimant satisfied the eligibility requirements for derivative survivor's benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018); Survivor's Claim Decision and Order on Remand at 3-4. Employer raises no specific error with that finding other than to assert the Miner was not entitled to benefits. Having affirmed the administrative law judge's award of benefits in the miner's claim, we affirm his determination that Claimant is derivatively entitled to survivor's

[10] Contrary to the Employer's contention, the administrative law judge considered the qualifications of its experts but nonetheless permissibly found their opinions were not adequately reasoned. *See* MC Decision and Order on Remand at 18, 20-23.

benefits. 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decisions and Orders Awarding Benefits on Remand in the miner's and survivor's claims are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge