U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0319 BLA

TERESA CALHOUN (o/b/o JOHN W. CALHOUN, III, deceased)	)	
Claimant-Petitioner	)	
v.	)	
U.S. STEEL CORPORATION	)	
	)	DATE ISSUED: 04/24/2015
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto and Chaney PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (2012-BLA-05578) of Administrative Law Judge Lystra A. Harris denying benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §901-944 (2012) (the Act). This case involves a miner's claim filed on January 10, 2011. Director's Exhibit 2.

The administrative law judge credited the miner with thirty-two years and ten months of coal mine employment,[2] including at least thirty years of underground coal mine employment. Decision and Order at 4. The administrative law judge also found that the miner was totally disabled from a respiratory impairment. *Id.* at 11. Consequently, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] *Id.* However, the administrative law judge determined that employer rebutted the presumption by disproving the existence of both legal and clinical pneumoconiosis.[4] *Id.* at 15, 18-20. Accordingly, the administrative law judge denied benefits. *Id.* at 21.

On appeal, claimant argues that the administrative law judge erred in finding that employer rebutted the Section 411(c)(4) presumption. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers'

[1] Claimant is the surviving spouse of the miner, who died on October 9, 2011. Director's Exhibit 23.

[2] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[3] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[4] The administrative law judge further found that by disproving the existence of pneumoconiosis, employer rebutted the presumption that the miner's disability was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 20.

Compensation Programs (the Director), has filed a response, agreeing with claimant that the administrative law judge erred in finding that the Section 411(c)(4) presumption was rebutted. The Director urges the Board to vacate the denial of benefits and remand this case for further consideration of the evidence.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer disproved the existence of legal pneumoconiosis, relying on the opinion of Dr. Hippensteel. The administrative law judge further found that employer disproved the existence of clinical pneumoconiosis, based on the autopsy, CT scan, and medical opinion evidence.

In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge initially considered the autopsy report prepared by Drs. Tillack, Conces, and Lampros (the prosectors). In the autopsy report, the prosectors described "interstitial fibrosis," "a moderate amount of anthracotic pigment," and "emphysematous changes" on the miner's lung tissue slides. Employer's Exhibit 3 at 3. In a narrative comment, the prosectors described the autopsy findings:

> Examination of the lungs reveals prominent interstitial fibrosis and emphysematous changes with subpleural involvement. There is a moderate amount of anthracosis. Microscopic examination reveals interstitial fibrosis

[5] "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). This definition encompasses any chronic respiratory or pulmonary disease or 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).

> of the lung parenchyma with patchy involvement. Some areas demonstrate mild fibrosis with intra-alveolar hemorrhage. Large areas of fibrosis are not identified. The gross and microscopic findings of this case are consistent with usual interstitial pneumonia (UIP). UIP is a diffuse, bilateral interstitial lung disease that is characterized by patchy fibrosis with temporal heterogeneity. Involved areas will demonstrate varying severity. Prominent involvement of the subpleural areas creates a cobblestone appearance to the pleural surface. There is no evidence of coal macules or large regions of fibrosis with associated interdispersed pigment which would be more consistent with coal workers' pneumoconiosis.

Employer's Exhibit 3 at 3. The prosectors' final pathologic diagnoses included usual interstitial pneumonia, extensive panlobar interstitial fibrosis and emphysema, and moderate anthracosis. *Id.*

The administrative law judge initially found, as was within her discretion, that the autopsy report was "well-reasoned and supported by reference to particular findings, and entitled to substantial weight." *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 15. The administrative law judge concluded, however, that "the autopsy evidence alone does not rebut the presumption because it . . . does not rule out legal pneumoconiosis."[6] Decision and Order at 15.

Turning to the medical opinion evidence relevant to the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Rasmussen and Hippensteel. Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of a severe restrictive impairment due to diffuse interstitial fibrosis, caused by both coal mine dust exposure and cigarette smoking.[7] Director's Exhibit 13. Dr. Hippensteel disagreed, stating that the miner suffered from emphysema and idiopathic pulmonary fibrosis, a disease of the general population, but did not suffer from any coal mine dust-related disease or impairment. Employer's Exhibit 1 at 5. The administrative law judge accorded greater weight to the opinion of Dr. Hippensteel, than to the opinion of Dr. Rasmussen, because Dr. Hippensteel's opinion was well-reasoned and based on a review

[6] The administrative law judge also found that the autopsy evidence "does not rule out coal mine employment as a cause of the [m]iner's disability." Decision and Order at 15, *referencing* 20 C.F.R. §718.305(d)(ii).

[7] In his narrative report, Dr. Rasmussen also noted the presence of emphysema, but did not address its cause. Director's Exhibit 13

of more extensive medical documentation, including the autopsy evidence.[8] Decision and Order at 20. The administrative law judge concluded that Dr. Hippensteel's opinion is sufficient to affirmatively establish that the miner did not have legal pneumoconiosis. *Id.*

Claimant and the Director argue that the administrative law judge erred by finding that the evidence established rebuttal of the Section 411(c)(4) presumption. Specifically, claimant and the Director assert that substantial evidence does not support the administrative law judge's determination that the medical evidence established that the miner did not have legal pneumoconiosis. We agree.

In concluding that Dr. Hippensteel's opinion is sufficient to disprove the existence of legal pneumoconiosis, the administrative law judge found that Dr. Hippensteel's "opinion that the miner's pulmonary fibrosis and emphysema were unrelated to coal mine dust exposure because they were not associated with coal macules is well-reasoned and due full weight."[9] Decision and Order at 19. A close reading of Dr. Hippensteel's

[8] The administrative law judge correctly noted that, in contrast to Dr. Rasmussen, who examined the miner and performed objective testing, Dr. Hippensteel reviewed the miner's autopsy report, the hospitalization and treatment records, the results of a July 19, 2011 CT scan, and Dr. Rasmussen's medical report. Decision and Order at 9, 19.

[9] Addressing the cause of the miner's emphysema and fibrosis, Dr. Hippensteel explained:

> Even though generalized interstitial fibrosis can occur with coal workers[']
> pneumoconiosis, the microscopic evidence in this case shows that his
> pulmonary fibrosis was unrelated to coal workers['] pneumoconiosis. The
> emphysema demonstrated on autopsy showed on prior ventilatory function
> testing to not have caused any functional obstructive impairment in [the
> miner] and was not associated with coal macules. In other words, coal
> workers['] pneumoconiosis has been ruled out as a cause for [the miner's]
> disabling restrictive lung impairment prior to his death.
>
> Idiopathic pulmonary fibrosis (pathologically known as usual interstitial
> pneumonitis or UIP) is a disease of the general public . . . . General
> anesthesia and surgical biopsies of lung to evaluate this problem can be
> associated with acute flaring of inflammation in the lungs, with acute
> worsening of lung function postoperatively, as occurred with [the miner.]

Employer's Exhibit 1 at 5.

opinion, however, reveals that the administrative law judge has mischaracterized his opinion. *See generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). As the Director asserts, while Dr. Hippensteel appeared to rely on the absence of coal macules to inform his opinion as to the cause of the miner's emphysema, it is unclear whether he relied on the absence of coal macules to inform his opinion as to the cause of the miner's fibrosis. Director's Brief at 5; Employer's Exhibit 1 at 5. Further, to the extent Dr. Hippensteel may have relied on the absence of coal macules in formulating his opinion, Dr. Hippensteel concluded only that "coal workers' pneumoconiosis," i.e. clinical pneumoconiosis, had been "ruled out" as a cause of the miner's disabling impairment. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 2-174 (4th Cir. 2000) (stating that a medical diagnosis finding no coal workers' pneumoconiosis is not equivalent to a finding of no legal pneumoconiosis); Decision and Order at 19; Employer's Exhibit 1 at 5. Dr. Hippensteel did not address whether coal mine dust exposure contributed to, or aggravated, the miner's emphysema, regardless of the presence of clinical coal workers' pneumoconiosis. Similarly, as noted by the Director, in stating that idiopathic pulmonary fibrosis is a disease of the general public, Dr. Hippensteel has not explained why the miner's thirty-two years of coal mine dust exposure could not also have caused, contributed to, or aggravated, his disease.[10] Director's Brief at 4-5. In light of these considerations, the administrative law judge has not adequately explained her conclusion that Dr. Hippensteel's opinion is well-reasoned, and sufficient to disprove the existence of legal pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Thus, this aspect of the administrative law judge's decision does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that an administrative law judge set forth the rationale underlying her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Finally, we find merit in the Director's contention that the administrative law judge erred in according greater weight to the opinion of Dr. Hippensteel, than to the opinion of Dr. Rasmussen, because Dr. Hippensteel's opinion is "more consistent with the other evidence of record and is based on a review of more extensive and probative evidence," including the autopsy report. Decision and Order at 20; Director's Brief at 5. An administrative law judge may credit a medical opinion she finds based on a review of

[10] In contrast, as noted by the Director, Office of Workers' Compensation Programs, Dr. Rasmussen opined that "[c]oal mine dust itself is known to cause diffuse interstitial fibrosis" and cited to medical literature to support his conclusion that coal miners have ten times the incidence of diffuse interstitial fibrosis than is found in the general population. Director's Exhibit 13 at 4; Director's Brief at 5. Dr. Hippensteel reviewed Dr. Rasmussen's report, but did not comment on this aspect of his opinion. Employer's Exhibit 1.

more extensive evidence. *See Sabett v. Director, OWCP*, 7 BLR 1-299, 1-301 n.1 (1984). However, here, the administrative law judge has not explained how her determination to credit Dr. Hippensteel's opinion that the miner did not have legal pneumoconiosis, because it was supported by his review of the autopsy evidence, is consistent with her conclusion that the autopsy evidence itself does not disprove the existence of legal pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Nor has the administrative law judge explained how, in this case, Dr. Rasmussen's lack of awareness of the autopsy findings rendered his opinion less credible.[11] *Id.* We therefore vacate the administrative law judge's finding that the medical opinion evidence disproves the existence of legal pneumoconiosis. Consequently, we also vacate the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.[12] *See Wojtowicz*, 12 BLR at 1-165.

We next address the administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis. Discussing the pathology evidence, the administrative law judge correctly noted that, while the autopsy report includes a final diagnosis of "moderate anthracosis," the report also states that "[t]here [was] no evidence of coal macules or large regions of fibrosis with associated interdispersed pigment which would be more consistent with coal workers' pneumoconiosis." Decision and Order at 14-15; Employer's Exhibit 3. The administrative law judge also noted that while the regulations list anthracosis as a disease that is included within the definition of clinical pneumoconiosis, the regulations also specify that an autopsy finding of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis. Decision and Order at 14, *citing* 20 C.F.R. §§718.201(a)(1), 718.202(a)(2). Further, the administrative law judge noted that the regulations provide that diseases that satisfy the definition of clinical pneumoconiosis are "characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the

[11] While Dr. Rasmussen did not review the autopsy report, his opinion is largely consistent with the prosectors' conclusions, in that he similarly opined that the miner suffered from interstitial fibrosis, but did not appear to suffer from "coal workers' pneumoconiosis," and also concluded that the miner suffered from emphysema. Director's Exhibit 13. Further, while Dr. Rasmussen opined that the miner's fibrosis could also have been caused by asbestosis, a disease not identified on the autopsy, Dr. Rasmussen stated that he did not observe x-ray evidence of pleural plaquing, which would have confirmed the presence of the disease. *Id.*

[12] We, therefore, also vacate the administrative law judge's related finding that, by disproving the existence of pneumoconiosis, employer rebutted the presumption that the miner's disability was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 20.

fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." Decision and Order at 14, *quoting* 20 C.F.R. §718.201(a)(1). The administrative law judge concluded that, because the autopsy prosectors "specifically stated that their findings were more consistent with usual interstitial pneumonia than with coal workers' pneumoconiosis because they did not observe coal macules or large regions of fibrosis with associated pigmentation," the autopsy evidence establishes that the miner "did not have clinical pneumoconiosis." Decision and Order at 15.

The Director argues that the administrative law judge's finding that the autopsy evidence disproves the existence of clinical pneumoconiosis is "problematic." Director's Brief at 3. We agree. As the administrative law judge recognized, "anthracosis," which was a primary anatomic diagnosis on autopsy, is a disease listed in the regulations as falling within the definition of clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1); Decision and Order at 14; Employer's Exhibit 3 at 1. Moreover, as the Director asserts, while the autopsy report stated that the miner's lungs contained no "large regions" of fibrosis with associated interdispersed pigment, the report did not conclude that there was no fibrotic reaction to coal mine dust exposure at all. Director's Brief at 3; Employer's Exhibit 3 at 3. In light of these factors, the administrative law judge did not adequately explain her determination that the autopsy evidence disproves the existence of clinical pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-165. Therefore, we vacate the administrative law judge's finding that the autopsy evidence disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and remand the case for reconsideration of the autopsy evidence regarding the existence of clinical pneumoconiosis.

We further find merit in the Director's contention that the administrative law judge erred in crediting, as well-reasoned, Dr. Hippensteel's opinion that the miner's anthracosis was not clinical pneumoconiosis because "[a] finding of anthracosis can occur in coal workers' pneumoconiosis, but is not specific to the disease and can be found in lungs of persons who have never been around a coal mine." Director's Brief at 5, *quoting* Employer's Exhibit 1 at 5; Decision and Order at 19. As the Director asserts, the administrative law judge has not explained how Dr. Hippensteel's opinion, that anthracosis can be found in non-miners, supports a conclusion that this miner's anthracosis was not related to his thirty-two years of coal mine dust exposure. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Wojtowicz*, 12 BLR at 1-165. On remand, the administrative law judge must reconsider whether Dr. Hippensteel's opinion disproves the existence of clinical pneumoconiosis.

In summary, on remand, the administrative law judge should reconsider whether employer has established rebuttal of the Section 411(c)(4) presumption by disproving the existence of both legal and clinical pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i). If employer proves that the miner did not have legal or clinical

pneumoconiosis, employer has rebutted the presumption. If employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must consider whether employer is able to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that no part, not even an insignificant part, of the miner's disability was caused by either legal or clinical pneumoconiosis.[13] *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015)(Boggs, J., concurring & dissenting).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

[13] Contrary to the administrative law judge's statement, claimant does not have the burden to establish that pneumoconiosis was a substantially contributing cause of the miner's totally disabling pulmonary impairment. Decision and Order at 20. Rather, employer has the burden to establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." *W. Va. CWP Fund v. Bender*, F.3d , No. 12-0234, 2015 WL 147069 (4th Cir. Apr. 2, 2015), *citing* 20 C.F.R. §718.305(d)(1)(ii).