U.S. Department of Labor

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

BRB No. 16-0226 BLA

WANDA F. BOWLING (Widow of HARLIE BOWLING)	)	
Claimant-Respondent	)	
v.	)	
SCOTT COAL COMPANY	)	
	)	DATE ISSUED: 04/20/2017
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand – Award of Benefits (2012-BLA-05362) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on October 10, 2010 and is before the Board for the second time.[1]

In the prior appeal, the Board affirmed the administrative law judge's findings that the miner had 19.4 years of qualifying coal mine employment and established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). The Board therefore affirmed the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] *Bowling v. Scott Coal Co.*, BRB No. 14-0392 BLA (July 10, 2015) (unpub.). The Board, however, vacated the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. Specifically, the Board held that the administrative law judge erred in finding that the doctrine of collateral estoppel precluded employer from establishing rebuttal by proving that the miner did not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i); *Bowling*, BRB No. 14-0392 BLA, slip op. at 5. The Board also held that the administrative law judge erred in evaluating the opinions of Drs. Rosenberg and Jarboe in finding them insufficient to establish that the miner did not have legal pneumoconiosis. *Id.* Finally, the Board held that the administrative law judge misstated the standard for rebuttal on the issue of causation by stating that employer must establish that the miner's "disability did not arise out of, or in connection with, coal mine employment." *Id*. The Board instructed that if the administrative law judge finds that employer cannot disprove that the miner had pneumoconiosis, he must determine whether employer rebutted the presumption by establishing that "no part of the miner's death was caused by pneumoconiosis as defined

[1] Claimant is the surviving spouse of the miner, who died on February 18, 2006. Director's Exhibit 9.

[2] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. Additionally, pursuant to Section 422(*l*) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012). Claimant cannot benefit from Section 422(*l*), however, because the miner was not determined to be eligible to receive benefits at the time of his death. Director's Exhibits 1-4.

in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *Bowling*, BRB No. 14-0392 BLA, slip op. at 5.

On remand, the administrative law judge found that employer failed to disprove the existence of clinical and legal pneumoconiosis and, therefore, failed to rebut the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(2)(i). The administrative law judge further found that employer failed to rebut the presumption by proving that pneumoconiosis played no part in the miner's death under 20 C.F.R. §718.305(d)(2)(ii). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

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.[3] 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).

Because claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[4] or by establishing 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); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.

[3] Because the miner's last coal mine employment was in Tennessee, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 1, 4.

[4] "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).

Employer argues that the administrative law judge erred in finding that it failed to disprove the existence of clinical pneumoconiosis. The administrative law judge initially considered the x-ray evidence submitted in connection with the miner's most recent lifetime claim, consisting of nine interpretations of three x-rays taken on January 23, 2002, February 9, 2002, and April 26, 2002. Decision and Order on Remand at 3, 4; Director's Exhibit 4.

Dr. Baker, a B reader, and Dr. Alexander, a dually-qualified B reader and Board-certified radiologist, both read the January 23, 2002 film as positive for pneumoconiosis. Director's Exhibit 4. In contrast, Dr. Wiot, who is also dually-qualified, read the x-ray as negative. Director's Exhibit 4. Based on the equal number of positive and negative readings by the dually-qualified readers, to whom he accorded the greatest weight, the administrative law judge permissibly found this x-ray to be in equipoise. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order on Remand at 4.

Dr. Alexander and Dr. Ahmed, a dually-qualified reader, read the February 9, 2002 x-ray as positive, whereas Drs. Shipley and Perme, who are also dually-qualified readers, read it as negative. Director's Exhibit 4. Based on the equal number of positive and negative readings by the dually-qualified readers, the administrative law judge permissibly found this x-ray to be in equipoise. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; Decision and Order on Remand at 4.

Finally, Dr. Ahmed read the April 26, 2002 x-ray as positive, while Dr. Dahhan, a B reader, read it as negative. Director's Exhibit 4. Based on Dr. Ahmed's superior qualifications, the administrative law judge permissibly found this x-ray to be positive for the existence of pneumoconiosis. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; Decision and Order on Remand at 4. Having found none of the most recent x-rays to be negative, but one of the x-rays to be positive, the administrative law judge reasonably concluded that the x-ray evidence tended to support, rather than disprove, the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order on Remand at 5.

Employer asserts that the administrative law judge ignored relevant "negative" x-ray evidence contained in the miner's treatment records. Employer's Brief at 12-13. Contrary to employer's argument, the administrative law judge permissibly declined to accord any weight to the treatment record x-rays, in part, because the qualifications of the readers are unknown and because they did not "reliably address the presence or absence

of pneumoconiosis."[5] Decision and Order on Remand at 3, *citing* 65 Fed. Reg. 79,929 (Dec. 20, 2000) (adjudicator may consider whether a film read for reasons unrelated to diagnosing the existence of pneumoconiosis reliably addresses the presence or absence of the disease); *see Church v. E. Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon*., 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co*., 7 BLR 1-216, 1-218-19 (1984) (the significance of narrative x-ray readings that make no mention of pneumoconiosis is an issue to be resolved by the administrative law judge in the exercise of his or her discretion as fact-finder).

We also reject employer's contention that the administrative law judge failed to adequately consider the x-rays contained in the miner's earlier lifetime claims. The administrative law judge acknowledged that the x-rays submitted in the miner's earlier lifetime claims, taken between 1970 and 1997, are largely negative for pneumoconiosis. Decision and Order on Remand at 2-3. Based on the recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the

[5] Employer correctly asserts that the quality standards apply only to evidence developed in connection with a claim for benefits. 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Thus, the x-ray interpretations contained in the miner's medical treatment records are not subject to the quality standards set forth at 20 C.F.R. §718.102. *Stowers*, 24 BLR at 1-92. The administrative law judge was still required to address whether the treatment x-rays are sufficiently reliable, however, despite the inapplicability of the quality standards. Noting the position of the Department of Labor that x-rays read "for reasons unrelated to diagnosing the existence of pneumoconiosis, e.g., lung cancer or cardiac surgery" may not "reliably address the presence or absence of pneumoconiosis," the administrative law judge discounted these readings. Decision and Order on Remand at 3, *citing* 65 Fed. Reg. 79,929 (Dec. 20, 2000). Because the administrative law judge properly addressed the reliability of the treatment x-rays, any error in his statement that the treatment x-rays do not conform to the quality standards because the readings are not recorded under the ILO classification system is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Employer also correctly asserts that the administrative law judge erred in stating that the treatment x-rays were not properly designated as evidence pursuant to 20 C.F.R. §725.414. Employer's Brief at 13. The limitations on evidence at Section 725.414 do not apply to treatment records. 20 C.F.R. §725.414(a)(4). However, as the administrative law judge did not exclude the treatment x-rays from consideration pursuant to Section 725.414, but found the readings to be unreliable, this error is also harmless. *See Larioni*, 6 BLR at 1-1278.

cessation of coal mine dust exposure," 20 C.F.R. §718.201(c), and in light of the significant gap between the prior claim x-rays and the x-rays taken in 2002, the administrative law judge permissibly concluded that the more recent x-rays are of greater probative value. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order on Remand at 2-4.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the more probative x-ray evidence supports, rather than disproves, the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1).[6] *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41, 25 BLR 2-675, 2-687-88 (6th Cir. 2014); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order on Remand at 6. We therefore affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer next argues that the administrative law judge erred in his consideration of the computed tomography (CT) scan evidence relevant to the existence of clinical pneumoconiosis at 20 C.F.R. §718.107. Employer's Brief at 16-17. As with the x-ray evidence contained in the treatment records, the administrative law judge noted that none of the CT scan interpretations specifically address the presence or absence of pneumoconiosis.[7] Decision and Order on Remand at 4-5. With respect to the most

[6] We reject employer's contention that the administrative law judge erred in failing to consider two negative x-ray readings from March 2003 and November 2003. These readings, contained in the miner's treatment notes, do not address the presence or absence of pneumoconiosis, and the readers' qualifications are unknown. Director's Exhibit 4. As we have affirmed the administrative law judge's finding that such x-rays are not sufficiently reliable and, thus, are entitled to no weight, any error in the administrative law judge's failure to specifically address these two x-ray interpretations is harmless. *See Larioni*, 6 BLR at 1-1278; Director's Exhibit 4.

[7] The administrative law judge noted that a computed tomography (CT) scan dated April 3, 1995 was interpreted as revealing a calcified granuloma in the right upper lobe, emphysema, and a probable resolving area of focal bronchopneumonia in the left upper lobe anteriorly. Decision and Order on Remand at 4; Employer's Exhibit 4 at 103. A CT scan dated February 16, 2002 disclosed atelectasis of the lung bases bilaterally or early infiltrates. Decision and Order on Remand at 4; Director's Exhibit 10 at 8. A CT scan dated February 3, 2006 disclosed findings consistent with pneumonia superimposed on emphysema and irregular pulmonary nodules. Decision and Order on Remand at 4; Director's Exhibit 10 at 26-27. The radiologist recommended follow-up to differentiate

recent CT scan dated February 3, 2006, the administrative law judge found that the recommendation for follow-up to better identify the abnormalities observed rendered the interpretation equivocal and further undermined its probative value. *Id*. at 5; Director's Exhibit 10 at 26-27. Consequently, the administrative law judge permissibly found that the CT scan evidence does not support employer's burden to disprove the existence of clinical pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order on Remand at 5. We affirm that finding as it is based on substantial evidence. *Martin*, 400 F.3d at 305, 23 BLR at 2-283.

Employer also asserts that the administrative law judge erred in his consideration of the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Employer's Brief at 17. Employer submitted the medical opinions of Drs. Rosenberg and Jarboe, who relied, in part, on a mistaken view that the x-ray and CT scan evidence is negative for the existence of the disease. Decision and Order on Remand at 5, 8; Employer's Exhibits 1, 2. The administrative law judge permissibly discredited their opinions as inconsistent with the x-ray evidence. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Decision and Order on Remand at 5, 8; Employer's Brief at 17; Employer's Exhibits 1, 2. We therefore affirm the administrative law judge's finding that the medical opinion evidence fails to establish that the miner did not have clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis.[8] 20 C.F.R. §718.305(d)(2)(i).

Finally, employer contends that the administrative law judge erred in his consideration of whether employer rebutted the presumed fact of death causation. Employer's Brief at 17-28. Initially, we reject employer's assertion that the administrative law judge applied an incorrect rebuttal standard at 20 C.F.R. §718.305(d)(2)(ii). Employer's Brief at 23. The administrative law judge properly stated that employer's burden to establish that "no part of the miner's death was caused by pneumoconiosis," equates to a requirement that employer "rule[]out" any causal

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between benign and malignant processes and to consider the sequelae from infection, atelectasis, and focal pleural thickening. *Id.*

[8] We therefore need not address employer's contentions of error regarding the administrative law judge's findings with respect to the existence of legal pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

relationship between the miner's pneumoconiosis and his death. 20 C.F.R. §718.305; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-446 (6th Cir. 2013); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-155 (2015) (Boggs, J., concurring and dissenting); Decision and Order on Remand at 6.

Further, the administrative law judge permissibly found that the opinions of Drs. Rosenberg[9] and Jarboe[10] are not sufficiently credible to establish that no part of the miner's death was caused by pneumoconiosis because the physicians did not diagnose the miner with clinical pneumoconiosis, which is contrary to the administrative law judge's finding that employer failed to disprove that the miner had the disease. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-452; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-74 (6th Cir. 2013); *Skukan v. Consolidation Coal Co.*, 993

[9] Dr. Rosenberg opined that the miner died due to complications related to the therapeutic administration of anticoagulation medication for a small pulmonary embolism. Employer's Exhibit 1 at 16. Dr. Rosenberg noted that during the same hospital admission, the miner was treated for chronic obstructive pulmonary disease (COPD) and related respiratory failure. Dr. Rosenberg opined that the miner was predisposed to the development of thromboembolic disease by his severe COPD and right ventricular dysfunction. *Id.* Dr. Rosenberg stated that the miner's COPD was due to smoking and had no causal relationship to past coal mine dust exposure or the presence of coal workers' pneumoconiosis. *Id.* In a supplemental report, Dr. Rosenberg opined that even if he were to assume the presence of clinical coal workers' pneumoconiosis, his opinion about the cause of the miner's death would not change, because the characteristics of the miner's functional impairment were overwhelmingly indicative of a smoking-related form of COPD. *Id.* at 22-23.

[10] Dr. Jarboe opined that the miner's death was due to renal failure resulting from severe hemorrhage into his abdominal cavity and his retroperitoneum. Employer's Exhibit 2 at 22. He stated that this hemorrhage was caused by anticoagulation medication administered for treatment of a pulmonary embolus and that these were conditions of the general public, unrelated to the inhalation of coal mine dust or the presence of coal workers' pneumoconiosis. *Id.* Dr. Jarboe added that, even if he were to assume that the miner's pulmonary emphysema and severe airflow obstruction contributed to his death, these conditions were not caused by coal mine dust exposure, but were due to smoking and asthma. *Id.* at 22-23. In a supplemental report, Dr. Jarboe stated that even if he assumed the presence of simple clinical coal workers' pneumoconiosis his opinion would be unchanged, because simple pneumoconiosis is a disease state without symptoms or physical signs, and would not cause a pulmonary functional impairment of sufficient severity to cause or contribute to death. *Id.* at 28.

F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004) (Roth, J., dissenting); Decision and Order on Remand at 8, 10-11.

Moreover, contrary to employer's contention, the administrative law judge acknowledged that both physicians explained that their opinions would not change if they assumed the existence of clinical pneumoconiosis. Decision and Order on Remand at 7, 8, 10. The administrative law judge permissibly found, however, that as both physicians specifically determined that claimant did not suffer from pneumoconiosis, the fact that they assumed the existence of the disease in the alternative did not render their causation opinions any more credible. *See Epling*, 783 F.3d at 504-05, 25 BLR at 2-721 (a doctor's opinion as to causation may not be credited at all unless there are "specific and persuasive reasons" for concluding that the doctor's view on causation is independent of his or her mistaken belief that the claimant does not have pneumoconiosis, in which case it may be assigned, at most, "little weight"); *Soubik*, 366 F.3d at 234, 23 BLR at 2-99 (a physician's superficial hypothetical assumption of pneumoconiosis is insufficient to reconcile his contrary opinion with the administrative law judge's finding of the disease, as it is exceedingly difficult for a doctor to properly assess the contribution by pneumoconiosis to a miner's death if he does not believe pneumoconiosis was present); Decision and Order on Remand at 8, 10.

Because the administrative law judge has provided sufficient bases for finding the opinions of Drs. Rosenberg and Jarboe not credible, and their opinions are the only opinions supportive of employer's burden, we affirm the administrative law judge's finding that employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(ii).[11]

[11] We therefore need not address employer's arguments regarding the weight accorded to the miner's death certificate, which recorded pneumoconiosis as a factor "contributing to death." *See Larioni*, 6 BLR at 1-1278; Director's Exhibit 9.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge