U.S. Department of Labor

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

BRB No. 17-0361 BLA

CLEO MATNEY (Widow of STUARD MATNEY)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 04/30/2018
and	)	
HEALTHSMART CASUALTY CLAIM	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Green and Lucinda L. Fluharty (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05080) of Administrative Law Judge Tracy A. Daly, rendered on a survivor's claim filed on February 14, 2013, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that the miner had twenty-eight years of coal mine employment at an underground mine site. The administrative law judge also found that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, 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] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the miner was totally disabled due to a respiratory or pulmonary impairment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.[3]

[1] Claimant is the widow of the miner, Stuard Matney, who died on April 18, 2011. Director's Exhibit 9. There is no evidence in the record that the miner was awarded benefits or had a claim pending at the time of his death. Therefore, Section 422(*l*) of the Act, which provides that a 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, is not applicable in this case. 30 U.S.C. §932(*l*) (2012).

[2] Under Section 411(c)(4) of the Act, a miner's death is presumed to be due to pneumoconiosis if he 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

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

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.[4] 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).

I. Invocation of the Presumption – Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents or prevented him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a claimant may establish total disability based on pulmonary function tests, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). In this survivor's claim, the issue is whether the miner was totally disabled "at the time of his death." 20 C.F.R. §718.305(b)(1)(iii).

The administrative law judge found that claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) because the sole pulmonary function study was non-qualifying,[5] the weight of the blood gas study evidence[6] was non-qualifying, and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order

[4] Because the record reflects that the miner's coal mine employment occurred in Virginia, 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, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 23.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values that exceed those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The February 19, 2003 blood gas study performed by Dr. Rasmussen was qualifying at rest but non-qualifying after exercise. Director's Exhibit 10. The blood gas study performed by Dr. Hippensteel on June 24, 2003 was non-qualifying at rest and no exercise study was performed. Employer's Exhibit 3. The administrative law judge found that "where the exercise test results and the more recent test results are non-qualifying, [c]laimant has not established total disability under Section 718.204(b)(2)(ii)." Decision and Order at 8.

at 7-8; Director's Exhibit 10; Employer's Exhibit 3. However, the administrative law judge determined that Dr. Rasmussen's opinion diagnosing a totally disabling respiratory or pulmonary impairment was entitled to "controlling weight" and was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and by a preponderance of the evidence as a whole at 20 C.F.R. §718.204(b)(2).[7] Decision and Order at 16, 18; Director's Exhibit 10; Employer's Exhibit 2.

Employer argues that the administrative law judge erred in relying on Dr. Rasmussen's opinion to find total disability established. In addition, employer asserts that the administrative law judge erred in selectively analyzing Dr. Swedarsky's contrary opinion and in relying on Dr. Rasmussen's opinion to discredit the opinions of Drs. Swedarsky and Basheda. We reject employer's allegations of error.

Dr. Rasmussen examined the miner on February 19, 2003. Director's Exhibit 10. He administered a pulmonary function study, observing that the FEV1, FVC and FVC/FEV1 ratio were normal, but that the miner's maximum breathing capacity was moderately reduced. *Id*. Dr. Rasmussen also obtained a blood gas study, stating that it showed a moderate impairment in oxygen transfer at rest. *Id*. Regarding the post-exercise portion of the blood gas study, he noted:

> [T]he [miner] exercised for only 4 minutes and reached a maximum of 2 mph at a 2% grade. In spite of this very light exercise level, the [miner] achieved an oxygen uptake of 12cc/kg/min, which was 48% of his predicted maximum oxygen uptake. This is quite excessive for this exercise. His EKG and blood pressure responses were normal. His anaerobic threshold was not identified. His heart rate was excessive at 69% of predicted maximum. His volume of ventilation was markedly increased, however, he retained a breathing reserve

[7] The administrative law judge also considered the medical opinions of Drs. Swedarsky and Basheda pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 16-18. Drs. Swedarsky testified at his deposition that he did not "believe that there was a significant impact on [the miner's] pulmonary function from coal workers' pneumoconiosis on the basis [of what he observed on the pathological slides]." Employer's Exhibit 6 at 35. He also stated, "none of [the miner's] admissions or medical encounters from 2003 until the time of his death were occasioned by respiratory insufficiency." *Id*. at 31. Dr. Basheda concluded that the miner did not have a totally disabling respiratory impairment based on the objective studies. Employer's Exhibits 5, 7 at 15-17, 33-34. Further, the administrative law judge accurately found that Dr. Dennis did not offer an opinion concerning total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 16; Director's Exhibit 11.

> of 69 liters. There was no increase in VD/VT ratio. There was minimal impairment in oxygen transfer.
>
> Overall, these studies indicate very poor exercise tolerance, but at least minimal loss of lung function. The [miner] does not retain the pulmonary capacity to perform his last regular coal mine job.[8]

Id. At his deposition on June 26, 2014, Dr. Rasmussen testified that he diagnosed a totally disabling pulmonary impairment because the miner "developed abnormal gas exchange during exercise at a very light exercise level . . . [W]ere he to have exercised to a level near the type of work that he did, he would have been much more hypoxic. That's speculation of course but that would be a pretty typical pattern that we would see."[9] Employer's Exhibit 2 at 17. Dr. Rasmussen further testified that he would not expect the miner's gas exchange to improve between his examination in 2003 and the miner's death in 2011, but he had no knowledge of the miner's pulmonary condition in 2011.[10] *Id*. at 20-21.

In weighing Dr. Rasmussen's opinion, the administrative law judge noted his speculation that the miner would become more hypoxic with greater exercise, and also considered that he did not review any evidence regarding the miner's pulmonary condition between 2003 and 2011. Decision and Order at 16-17. The administrative law judge, however, credited Dr. Rasmussen's diagnosis of a totally disabling pulmonary impairment, stating:

> Dr. Rasmussen's opinion is well-documented by his examination findings and test results, including the fact that the miner was only able to exercise at a minimal level. Dr. Rasmussen includes a thorough and reasoned discussion

---

[8] Dr. Rasmussen reported that the miner's last coal mine work was as a shear operator, which required the miner to engage in heavy lifting, rock breaking, and dusting with fifty pound bags of rock dust. Director's Exhibit 10.

[9] Similarly, when asked by claimant's counsel what he would say "if you're asked to speculate, what would happen if [the miner] had exercised further, you think that he would probably desaturate more, but you really don't know one way or the other," Dr. Rasmussen answered, "that's absolutely right." Employer's Exhibit 2 at 19.

[10] Dr. Rasmussen stated, "I would doubt that it would get better," in response to the question, "would you believe or anticipate that [the miner's] breathing, his gas exchange and so forth, would have gotten better in the time between when you examined him and when he died?" Employer's Exhibit 2 at 20.

> as to why both the test results[,] as well as the miner's poor exercise tolerance[,] support his conclusion that the miner did not have the pulmonary capacity in 2003 to perform the heavy manual labor required by his coal mine employment. Therefore, Dr. Rasmussen's opinion is both well-documented and well-reasoned and the undersigned accords his opinion significant weight.

Id. at 17. Thus, contrary to employer's contention, the administrative law judge specifically considered that Dr. Rasmussen's opinion – that the miner "would have been much more hypoxic" if exercised further – involved "speculation…but that would be a pretty typical pattern we would see." Employer's Exhibit 2 at 17. Moreover, the administrative law judge permissibly found that Dr. Rasmussen's opinion was entitled to significant weight because Dr. Rasmussen explained why the results of his examination supported his diagnosis of a totally disabling pulmonary impairment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763 21 BLR 2-587, 2-605 (4th Cir. 1999); Decision and Order at 16-17; Employer's Exhibit 2 at 17. In addition, regardless of any speculation by Dr. Rasmussen, the administrative law judge permissibly relied on his statement that the miner's "poor exercise tolerance" and "at least minimal loss of lung function" alone would prevent him from performing the heavy manual labor required by his usual coal mine employment. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *Walker v. Director, OWCP*, 927 F.2d 181, 184, 15 BLR 2-16, 2-21-22 (4th Cir. 1991); Decision and Order at 16; Director's Exhibit 10.

Additionally, we reject employer's argument that the administrative law judge erred in discounting Dr. Swedarsky's opinion, but not Dr. Rasmussen's opinion, when both relied on pulmonary function studies conducted eight years earlier. Contrary to employer's allegation, the administrative law judge accurately noted that Dr. Rasmussen did not rely on the results of the miner's 2003 pulmonary function study to diagnose a totally disabling impairment. Decision and Order at 16-17. As the administrative law judge correctly observed, Dr. Rasmussen based his diagnosis on the abnormal gas exchange evident on the 2003 blood gas studies and the miner's poor exercise tolerance, stating that they revealed a totally disabling impairment that would not improve over time. *Id*.; Director's Exhibit 10; Employer's Exhibit 2 at 17. In contrast, the administrative law judge permissibly found that Dr. Swedarsky relied on the results of the miner's 2003 pulmonary function study to rule out a disabling respiratory or pulmonary impairment, without "address[ing] the basis for Dr. Rasmussen's finding of pulmonary impairment, specifically the miner's poor exercise tolerance on only light exercise." Decision and Order at 17; *see* Employer's Exhibit 6 at 29, 31. For these reasons, the administrative law judge rationally determined

that Dr. Swedarsky's opinion was entitled to little weight on the issue of total disability. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 17.

With respect to the opinion of Dr. Basheda, the administrative law judge rationally found that it was entitled to little weight, based on Dr. Basheda's erroneous assumption that the February 2003 resting blood gas studies revealed non-qualifying values and his failure to explain why a minimal impairment would not have prevented the miner from performing heavy manual labor. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 17-18; Employer's Exhibit 7 at 16. Because the administrative law judge provided valid rationales for his credibility determinations under 20 C.F.R. §718.204(b)(2)(iv), we affirm the administrative law judge's conclusion that Dr. Rasmussen's medical opinion is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2).[11] Decision and Order at 18. Therefore, we also affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1).

II. Rebuttal of the Presumption

In order to rebut the presumption of death due to pneumoconiosis under Section 411(c)(4), employer must establish that the miner had neither legal nor clinical[12] pneumoconiosis, or that "no part of the miner's death was caused by pneumoconiosis as

---

[11] Contrary to employer's contention that the administrative law judge failed to weigh like and unlike evidence together, the administrative law judge explained why he found Dr. Rasmussen's report more persuasive than the non-qualifying objective studies and the contrary medical opinions. Decision and Order at 18.

[12] Legal pneumoconiosis is defined as "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 "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. The phrase "arising out of coal mine employment" denotes "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).

defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(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.

A. Rebuttal of the Presumed Existence of Pneumoconiosis

Employer does not contest that it did not rebut the presumed existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(2)(i)(B), and we therefore affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19; Employer's Brief at 14. Rather, employer argues that the administrative law judge failed to weigh the evidence and make a determination concerning whether it rebutted the presumed existence of legal pneumoconiosis. However, because employer must disprove both legal and clinical pneumoconiosis, employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis under 20 C.F.R. §718.305(d)(2)(i).[13]

B. Rebuttal of Death Due to Pneumoconiosis

Employer also argues that the administrative law judge erred in his consideration of whether employer rebutted the presumed fact of death causation. *See* 20 C.F.R. §718.305(d)(2)(ii). In finding that employer failed to prove that no part of the miner's death was due to clinical pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Swedarsky and Basheda.[14] Decision and Order at 20. The administrative law judge gave less weight to their opinions because they did not adequately explain why clinical pneumoconiosis did not contribute to the miner's death. *Id*. at 20-21. The administrative law judge therefore found that their opinions did not rebut the presumed fact that the miner's death was due to pneumoconiosis. *Id*. at 21.

---

[13] The administrative law judge concluded that considering the evidence as a whole, employer did not prove that the miner did not have clinical or legal pneumoconiosis without specifically addressing legal pneumoconiosis. *See* Decision and Order at 20. However, given our holding that employer failed to disprove clinical pneumoconiosis and death due to clinical pneumoconiosis, error by the administrative law judge is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

[14]The administrative law judge gave "little weight" to Dr. Dennis's opinion that progressive massive fibrosis was a hastening factor in the miner's death, because it was outweighed by Dr. Swedarsky's opinion that the miner did not have progressive massive fibrosis. Decision and Order at 20; *see* Director's Exhibit 11; Employer's Exhibits 1, 6.

Initially, employer argues that the administrative law judge erred in failing to consider Dr. Rasmussen's opinion concerning rebuttal of death causation. Although the administrative law judge did not specifically consider Dr. Rasmussen's opinion when evaluating the cause of the miner's death, remand is not required on this basis. Employer merely asserts that Dr. Rasmussen "did not implicate pneumoconiosis as a cause of [the miner's death]" without explaining how Dr. Rasmussen's testimony is credible evidence sufficient to support its burden to establish that no part of the miner's death was caused by pneumoconiosis.[15] Employer's Brief at 17; *see* 20 C.F.R. §718.305(d)(2)(ii); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference.").

In addition, employer argues that the administrative law judge selectively analyzed Dr. Swedarsky's opinion, asserting that Dr. Swedarsky sufficiently explained why coal workers' pneumoconiosis did not contribute to or hasten the miner's death based on the lung pathology. Employer also contends that, contrary to the administrative law judge's finding, Dr. Basheda provided ample support for his conclusion that pneumoconiosis did not play a part in the miner's death.

We reject employer's assertions concerning the administrative law judge's weighing of the opinions of Drs. Swedarsky and Basheda. In his medical report, Dr. Swedarsky stated that "[t]he post mortem lung examination gives no indication as to the cause of death or the chain of events leading to the subject's death." Employer's Exhibit 1. In addition, Dr. Swedarsky observed that the "tissue sections do document the presence of simple coal worker[s'] pneumoconiosis with patchy interstitial fibrosis, emphysema and extensive pulmonary edema, however, the histologic picture may not correlate with lung function." *Id*. At his deposition, Dr. Swedarsky testified that "[w]hat I cannot do is say what actually killed him, but I can say that, since the coal workers' pneumoconiosis is mild

---

[15] Dr. Rasmussen stated at his deposition:

> I do not have any idea what his breathing was like when he died. If I were to tell you, based on what I saw in 2003, I would be hard put to – or to speculate if his lung disease caused or hastened his death, but that's based only on the information I have. I have no idea what the circumstances of his death were or anything of the kind, but on the basis of what I saw, my opinion would be that there is not enough evidence for me to say that his lung disease hastened or contributed significantly to his death.

Employer's Exhibit 2 at 21.

and it's a space-occupying lesion that, on the basis of what I see on the slides, it didn't contribute to or hasten his death." Employer's Exhibit 6 at 30-31. The administrative law judge permissibly found Dr. Swedarsky's opinion that clinical pneumoconiosis did not contribute to the miner's death unpersuasive in light of his statement that he could not accurately assess what the miner's lung function was at death based on the autopsy slides he reviewed. *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 20.

Dr. Basheda diagnosed simple coal workers' pneumoconiosis. Employer's Exhibit 5. At deposition, he testified that the miner had only a "minimal impairment" that was not disabling and that "there was really no significant impairment when you look at his objective data." Employer's Exhibit 7 at 17, 19. He concluded that "[i]t appears [the miner] suffered a cardiac death" and that the death was not in any way related to coal dust exposure.[16] Employer's Exhibit 7 at 18. Contrary to employer's assertion, the administrative law judge permissibly discredited Dr. Basheda's opinion because it was based in part on the absence of a significant pulmonary impairment, which was contrary to the administrative law judge's finding that the miner was totally disabled. *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 21. The administrative law judge also permissibly determined that Dr. Basheda did not adequately explain why the miner's lengthy coal mine employment did not play any part in the miner's death. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 21. Consequently, we affirm the administrative law judge's determination that employer did not rebut the presumption that the miner's death was due to clinical pneumoconiosis, thereby precluding rebuttal of death causation at 20 C.F.R. §718.305(d)(2)(ii).[17] *See Copley*, 25 BLR at 1-89.

[16] Dr. Basheda stated, "When you see both pathologist[s] describing pulmonary congestion and pulmonary edema, that's an accumulation of fluid in the lungs, and he had underlying cardiovascular disease . . . So the pathologic finding most likely [is] the result of a cardiac event[.]" Employer's Exhibit 7 at 18.

[17] Because the administrative law judge provided valid rationales for discrediting the opinions of Drs. Swedarsky and Basheda, we need not address employer's additional arguments concerning the administrative law judge's weighing of their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge