U.S. Department of Labor

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

BRB Nos. 17-0391 BLA
and 17-0392 BLA

LORENE MATHIAS (Widow of and o/b/o PATRICK MATHIAS) Claimant-Respondent v. ALTEC ENERGY, INCORPORATED/ EMPLOYERS' INSURANCE OF WAUSAU Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/26/2018 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, 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 – Awarding Benefits (2012-BLA-05966, 2013-BLA-05563) of Administrative Law Judge Alan L. Bergstrom rendered on claims 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 miner's subsequent claim filed on May 20, 2011,[1] and a survivor's claim filed on December 12, 2012.[2]

In a Decision and Order dated April 14, 2017, the administrative law judge credited the miner with at least twenty-nine years of underground coal mine employment, and found that the evidence establishes that he had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption[3] and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. He further determined that employer failed to rebut the presumption and awarded benefits in the miner's claim. The administrative law judge also determined that claimant satisfies the criteria of Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012), based on the award of benefits in the miner's claim, and he awarded survivor's benefits accordingly.[4]

On appeal, employer contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption and in awarding derivative survivor's benefits pursuant to Section 932(*l*). Claimant responds in support of the award of benefits

[1] The miner filed three previous claims, all of which were finally denied. Director's Exhibits 1-4. The miner's most recent prior claim, filed on April 25, 2005, was denied on February 5, 2009 because the evidence did not establish that the miner was totally disabled. Director's Exhibit 4.

[2] Employer's appeal in the miner's claim was assigned BRB No. 17-0391 BLA, and its appeal in the survivor's claim was assigned BRB No. 17-0392 BLA. By Order dated May 30, 2017, the Board consolidated these appeals for purposes of decision only.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012), provides that 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 survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.

in both claims. The Director, Office of Workers' Compensation Programs, did not file a response brief in either 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.[5] 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).

The Miner's Claim – Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[6] or that "no part of the miner's 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 that employer failed to establish rebuttal by either method.

The administrative law judge initially found that employer failed to disprove the existence of simple clinical pneumoconiosis, and therefore could not establish that the miner did not have pneumoconiosis, because the autopsy evidence establishes that the miner had the disease.[7] Decision and Order at 23. Although he stated further that it was

[5] The record reflects that the miner's last coal mine employment was in Kentucky. Decision and Order at 18; Director's Exhibit 10. Accordingly, 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, 1-202 (1989) (en banc).

[6] "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).

[7] The administrative law judge noted that employer conceded that the x-ray and autopsy evidence establishes the existence of clinical pneumoconiosis. Decision and Order at 23. Employer does not contest that it failed to disprove the existence of clinical pneumoconiosis. That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis

unnecessary "at this stage" to discuss whether employer disproved that the miner had legal pneumoconiosis, he ultimately evaluated the medical opinions on this issue in the context of whether employer rebutted the presumption that pneumoconiosis, either clinical or legal, caused the miner's totally disabling impairment at 20 C.F.R. §718.305(d)(1)(ii).[8] Decision and Order at 23-24.

Specifically, the administrative law judge considered the 2005 opinion of Dr. Repsher and the 2012 opinion of Dr. Rosenberg.[9] Dr. Repsher opined that the miner did not have clinical or legal pneumoconiosis. Employer's Exhibit 2. Dr. Rosenberg also opined that the miner did not have clinical or legal pneumoconiosis, but suffered from a disabling obstructive impairment due to smoking. Director's Exhibit 19. The administrative law judge found Dr. Repsher's report to be outdated and assigned it "no weight."[10] Decision and

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precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

[8] The administrative law judge combined his discussion of whether employer disproved the existence of legal pneumoconiosis, with his discussion of whether employer proved that no part of claimant's totally disabling respiratory impairment was due to pneumoconiosis. Decision and Order at 23-25. While these are two separate and distinct issues with two separate standards of proof, the administrative law judge's error in conflating his analysis ultimately is harmless, as he discredited employer's physicians as inadequately reasoned. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, employer does not challenge this aspect of the administrative law judge's decision.

[9] The administrative law judge also considered the medical opinion of Dr. Gallai that the miner suffered from clinical and legal pneumoconiosis, and the pathology opinions of Drs. Abrenio and Oesterling. Decision and Order at 10-12, 25-26. Dr. Abrenio conducted the miner's autopsy on October 8, 2012; his diagnoses included simple pneumoconiosis, centrilobular emphysema, pulmonary anthracosis, pulmonary interstitial fibrosis, and bronchopneumonia. Director's Exhibit 4. Dr. Oesterling reviewed the autopsy report and slides and opined that the miner had "moderate legal and medical coal workers' pneumoconiosis." Employer's Exhibit 12.

[10] The administrative law judge noted that Dr. Repsher's "much earlier" opinion is contrary to the subsequent objective testing and pathology reports, as well as the administrative law judge's own findings that the miner had clinical pneumoconiosis and a totally disabling respiratory impairment. Decision and Order at 14-15, 23-25;

Order 25. The administrative law judge discredited Dr. Rosenberg's opinion that the miner did not have clinical pneumoconiosis because it is contrary to the autopsy evidence and the administrative law judge's own finding that employer did not disprove that the miner had the disease.[11] Decision and Order at 24. The administrative law judge also discredited Dr. Rosenberg's opinion that the miner did not have legal pneumoconiosis and that his disabling impairment is due to cigarette smoking, finding that such opinion was based on generalities. *Id.* at 23-24.

As an initial matter, we affirm the administrative law judge's finding that Dr. Repsher's opinion merits no weight, as it is unchallenged by employer on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further reject employer's argument that the administrative law judge failed to provide a proper basis for discrediting Dr. Rosenberg's opinion as to the cause of the miner's disabling obstructive impairment. Employer's Brief at 6. In excluding coal mine dust as a contributing factor, Dr. Rosenberg cited to medical studies and statistics indicating that the "general pattern" of obstruction in miners is such that the FEV1/FVC ratio is preserved, while in smoking-related obstruction the FEV1/FVC ratio is "generally reduced," as in the miner's testing. Director's Exhibit 19 at 8-9. Dr. Rosenberg also stated that the miner's emphysema was more diffuse, which is "typically" associated with smoking-induced emphysema. *Id.* at 9-10. Further, as summarized by the administrative law judge, "Dr. Rosenberg discussed at length articles which he stated establish that smoking has a much greater harmful effect on a patient's lungs as compared to coal mine dust exposure" as indicated by a greater annual loss of FEV1. Decision and Order at 17; Director's Exhibit 19 at 11-12.

Contrary to employer's argument, the administrative law judge acted within his discretion in finding that Dr. Rosenberg's opinion suffered from an over reliance on "statistical probabilities" that are not determinative of whether the miner's individual condition was related to coal mine dust exposure. Decision and Order at 25, *citing Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312, 316, 25 BLR 2-115, 2-126, 2-133 (4th Cir. 2012); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99,

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Employer's Exhibit 2. Thus, the administrative law judge accorded "no weight" to Dr. Repsher's opinion for the purposes of rebutting the Section 411(c)(4) presumption.

[11] As the administrative law judge's determination to discredit Dr. Rosenberg's opinion relevant to the existence of *clinical* pneumoconiosis is unchallenged on appeal, it is affirmed. *Skrack*, 6 BLR at 1-711.

2-103 (6th Cir. 1983). As the administrative law judge's basis for discrediting Dr. Rosenberg's opinion that the miner did not have legal pneumoconiosis is rational and supported by substantial evidence, it is affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Tenn. 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 n.6, 5 BLR at 2-103 n.6; Decision and Order at 25.

Having discredited Dr. Rosenberg's opinion that the miner had neither clinical nor legal pneumoconiosis, the administrative law judge permissibly found that "Dr. Rosenberg did not give a medical opinion that ruled-out pneumoconiosis as a cause, at least in part, of the miner's totally disabling respiratory impairment." *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015) ("no need for the [administrative law judge] to analyze the opinions a second time" at disability causation where the employer failed to establish that the impairment was not legal pneumoconiosis); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013) (administrative law judge rationally discounted a physician's disability causation opinion because he did not diagnose pneumoconiosis, contrary to the administrative law judge's finding); Decision and Order at 25. Because the administrative law judge permissibly discredited the opinions of Drs. Repsher and Rosenberg, the only opinions supportive of employer's burden, we affirm his determination that employer did not rebut the Section 411(c)(4) presumption by proving that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis.[12] 30 U.S.C.

[12] Drs. Gallai, Abrenio, and Oesterling either attributed the miner's disabling impairment, in part, to pneumoconiosis, or did not offer an opinion on the issue. Specifically, Dr. Gallai opined that the miner was totally disabled by his obstructive impairment, and that it was "impossible to apportion the amount of obstruction[,] bronchitis, hypoxia, and decreased perfusion capacity [that] is secondary to cigarette smoking and secondary to his coal dust exposure." Decision and Order at 15-16; Director's Exhibit 14. Dr. Abrenio opined that the miner died due to bronchopneumonia and that simple coal workers' pneumoconiosis contributed to his death, but did not otherwise address the existence or cause of any impairment the miner may have had. Decision and Order at 11; Director's Exhibit 4. Dr. Oesterling opined that the changes due to the miner's legal and clinical pneumoconiosis "appear sufficient to have resulted in some of his respiratory symptomatology prior to his demise" but that his "severe chronic heart disease . . . would have [had] far greater impact on his respiratory capacity than the damage due to coal dust." Decision and Order at 12; Employer's Exhibit 12. As these opinions do not assist employer in establishing rebuttal of the Section 411(c)(4) presumption by proving that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, we decline to address employer's arguments regarding the administrative

§921(c)(4); 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26. We therefore affirm the administrative law judge's award of benefits in the miner's claim. 30 U.S.C. §921(c)(4) (2012).

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order at 27-28. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits. *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

law judge's consideration of them. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 6-7.

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