U.S. Department of Labor

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

BRB No. 15-0461 BLA

LINDA ANN IRVIN (Widow of LARRY IRVIN) Claimant-Respondent v. HARLAN CUMBERLAND COAL COMPANY, LLC and NATIONAL UNION FIRE/CHARTS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/31/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizen's Law Center), Whitesburg, Kentucky, for claimant.

Tighe A. Estes (Fogle Keller Purdy, 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 (2013-BLA-05160) of Administrative Law Judge Scott R. Morris, rendered on a survivor's claim[1] filed on September 29, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). The administrative law judge credited the miner with more than fifteen years of underground coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the weight of the evidence sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and determined, therefore, that claimant invoked the presumption of death due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Finding that employer failed to establish rebuttal of the presumption, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in excluding the results of the objective tests performed by Drs. Dahhan and Almusaddy, which were cited by Drs. Westerfield and Broudy in their medical opinions. Employer also argues that the administrative law judge improperly applied the "no part" standard in considering whether employer disproved that the miner's death was due to pneumoconiosis, and erred in rejecting the opinions of its medical experts under 20 C.F.R. §718.305(d)(2)(ii). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response unless specifically requested to do so by the Board.

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,

[1] Claimant is the surviving spouse of the miner, who died on September 3, 2011. Director's Exhibit 8. The miner filed a claim on December 27, 2004, which was denied by the district director in a Proposed Decision and Order issued on September 22, 2005. Director's Exhibit 1. The miner took no further action on this claim. Because the miner's claim was finally denied, claimant is not automatically entitled to receive survivor's benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

[2] Relevant to this survivor's claim, Section 411(c)(4) provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where the survivor establishes that the miner worked fifteen or more years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that the miner had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

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).

I. Denial of Employer's Request to Reopen the Record

The admissibility of Dr. Dahhan's April 8, 2010 and April 16, 2010 blood gas studies, and Dr. Almusaddy's October 7, 2005 and October 18, 2005 pulmonary function studies, was the subject of three orders from the administrative law judge and two responses from employer. This issue first arose when the administrative law judge sent an order to the parties in which he stated, "in reviewing this case in preparation for decision, I have been unable to locate in the record the results of certain tests referenced in the medical reports by Dr. Westerfield and Dr. Broudy." December 9, 2014 Order at 1. The administrative law judge instructed employer to identify the exhibit and page number where these tests, performed by Drs. Dahhan and Almusaddy, appear in the record. *Id*.

In response to this order, and to the administrative law judge's subsequent Show Cause Order, employer requested that the record be reopened and the evidence at issue be admitted for the administrative law judge's consideration. Employer's January 5, 2015 Response to Order at 2; Employer's Response to Show Cause Order at 2. Employer maintained that the August 27, 2012 cover letter accompanying Dr. Westerfield's report, Director's Exhibit 16, reflects that employer submitted copies of the medical records reviewed by Dr. Westerfield, including Dr. Dahhan's blood gas studies. Employer's January 5, 2015 Response to Order at 1-2; Employer's Response to Show Cause Order at 1. Employer further cited a note from the claims examiner, included in Director's Exhibit 16, indicating that the medical records submitted with Dr. Westerfield's report were already in the file. *Id*. Employer alleged that it reasonably relied on the claims examiner's note to assume that the records were part of the Director's Exhibits and that to deny its request to reopen the record under these circumstances would cause employer to experience "a manifest injustice." Employer's Response to Show Cause Order at 2. Employer acknowledged that Dr. Almusaddy's pulmonary studies were not submitted for inclusion in the record, but asserted that an electronic copy was attached to a letter sent to claimant's counsel on April 11, 2014. *Id*. at 2.

The administrative law judge ultimately denied employer's request to reopen the record in an Order issued on March 4, 2015. The administrative law judge stated, "I do

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Decision and Order at 4.

note that the cover letter to [Director's Exhibit] 16 bears the statement 'enclosed . . . you will find a copy of the records review [sic] by Dr. Westerfield' and includes a handwritten note stating 'med [sic] records already in file.'"[4] Order Denying Employer's Request to Reopen the Record at 3. Nevertheless, the administrative law judge found that employer was not entitled to any relief because it "failed to ensure that the evidence it relies upon in its case-in-chief is actually evidence of record." *Id*. He also observed that employer did not establish that this evidence was not readily available prior to the hearing. Accordingly, the administrative law judge rejected employer's request "for the extraordinary remedy of reopening a closed record," on the grounds that employer did not establish that the evidence was "new" and "material" under 29 C.F.R. §18.54(c)[5] and did not establish good cause. *Id*.

On appeal, employer argues that the administrative law judge erred in denying its request to reopen the record to admit the test results, primarily reiterating its arguments submitted in response to the administrative law judge's orders. Employer requests that the Board remand the case to the administrative law judge with instructions to reopen the record to admit the studies.

Employer's allegation of error regarding the administrative law judge's denial of its request to reopen the record is without merit. An administrative law judge is granted broad discretion in resolving procedural and evidentiary issues. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). In accordance with this standard, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of discretion. *See Clark*, 12 BLR at 1-153. Employer has not satisfied its burden in this case. The administrative law judge reasonably found that employer was not entitled to reopen the record for admission of the objective tests performed by Drs. Dahhan and Almusaddy because this evidence was readily available before the hearing, and employer failed to verify that the tests were in the Director's Exhibits admitted into the record. Accordingly, the administrative law judge reasonably concluded that employer "was afforded the opportunity to be heard, to

[4] The administrative law judge also noted that employer "conceded that the pulmonary function studies performed by Dr. Almusaddy on October 7 and October 18, 2005, 'do not appear to be in the record.'" Order Denying Employer's Request to Reopen the Record at 2.

[5] The regulation at 29 C.F.R. §18.54(c) provides, in relevant part, "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record."

present its case in full, and the material it has moved to submit is not 'new material evidence.' Therefore, no 'manifest injustice' has occurred." March 4, 2015 Order Denying Employer's Request at 3; *see Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989). Accordingly, we deny employer's request that we remand this case to the administrative law judge to reopen the record.

II. Invocation of the Section 411(c)(4) Presumption – Total Disability

In considering whether claimant established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge observed that, in light of his denial of employer's request to reopen the record, the record did not contain any pulmonary function studies or blood gas studies relevant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 10. The administrative law judge further noted that there was no evidence establishing that the miner suffered from cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii). *Id*.

When considering total disability under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the medical opinions of Drs. Echeverria, Westerfield, and Broudy. The administrative law judge found that Dr. Echeverria's diagnosis of a totally disabling respiratory impairment is entitled to "little weight," because Dr. Echeverria did not set forth his underlying rationale.[6] Decision and Order at 15; Director's Exhibit 11. The administrative law judge concluded, nevertheless, "the little weight I do accord to Dr. Echeverria's opinion weighs in favor of a finding that the [m]iner was totally disabled due to a respiratory impairment at the time of his death." Decision and Order at 15.

Similarly, the administrative law judge gave "little weight" to Dr. Westerfield's opinion, as expressed at his deposition, that the miner had a totally disabling respiratory impairment at the time of his death, but noted that this "little weight" supported a finding of total respiratory disability. *Id*.; Employer's Exhibit 1 at 16, 29. The administrative law judge gave "no weight" to Dr. Westerfield's earlier opinion, set forth in his August 13, 2012 medical report, that the miner was not totally disabled because that opinion was contradicted by his deposition testimony that the miner had a totally disabling respiratory impairment and because the objective studies he relied on are not in the record. Decision and Order at 15 n.21. The administrative law judge also gave "little weight" to Dr. Broudy's opinion that the miner did not have a total respiratory or pulmonary disability

[6] The administrative law judge determined that Dr. Echeverria was the miner's treating physician under 20 C.F.R. §718.104(d), but declined to give his opinion any additional weight on this ground in light of his finding that it was unreasoned. Decision and Order at 14-15.

because Dr. Broudy was unaware of the nature of the miner's usual coal mine work. *Id*. at 16; Employer's Exhibit 2, 3 at 11. The administrative law judge further stated that he gave "no weight" to Dr. Broudy's opinion "to the extent that [he] relied on [m]iner's October 2005 pulmonary function tests, which are not of record." Decision and Order at 16. Finally, the administrative law judge accorded "little weight" to Dr. Broudy's opinion because, at his deposition, he "retreated" from his assessment of the miner's disability by acknowledging that the miner's lung function had declined since his last measurements. *Id*.; Employer's Exhibit 3 at 24.

Based on these credibility findings, the administrative law judge determined that "the weight of the physician's [sic] opinions of record favors a finding that the [m]iner was totally disabled due to a respiratory impairment at the time of his death." Decision and Order at 16. The administrative law judge further observed that the lay testimony detailing the miner's physical limitations supported the medical findings of total disability. *Id*. The administrative law judge concluded, therefore, that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. Decision and Order at 16.

The only allegation of error that employer raises with respect to the administrative law judge's finding of total disability is that, because the administrative law judge erred in denying employer's request to reopen the record for the admission of the objective tests cited by Drs. Westerfield and Broudy, the administrative law judge erred in discrediting their opinions on the ground that the objective tests were not of record. In light of our affirmance of the administrative law judge's decision not to reopen the record, we reject employer's argument. We further affirm the remainder of the administrative law judge's findings under 20 C.F.R. §718.204(b)(2), as unchallenged by employer on appeal. *See Skrack v. v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Accordingly, we affirm the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption.

III. Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis, or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge first determined that employer did not rebut the presumed existence of legal or clinical pneumoconiosis, as the preponderance of the evidence demonstrated that the miner suffered from both conditions. Decision and Order at 24-25.

With respect to the second method of rebuttal, the administrative law judge gave "little weight" to Dr. Westerfield's opinion that the miner's death was due solely to complications of cancer because he did not identify the miner's specific smoking history and did not adequately explain why legal pneumoconiosis, which he admitted the miner suffered from, did not play a role in the miner's death. Decision and Order at 26; Director's Exhibit 16; Employer's Exhibit 1 at 24-25. The administrative law judge also gave "little probative weight" to Dr. Broudy's opinion on death causation because it is equivocal. Decision and Order at 26; Director's Exhibit 11; Employer's Exhibit 3. In contrast, the administrative law judge gave "normal probative weight" to Dr. Echevarria's opinion that pneumoconiosis hastened the miner's death. Decision and Order at 25; Director's Exhibits 11, 14. Having discredited the opinions of employer's experts, the administrative law judge concluded that employer failed to rebut the presumed causal relationship between pneumoconiosis and the miner's death at 20 C.F.R. §718.305(d)(2)(ii). Decision and Order at 27.

Employer argues that the administrative law judge erred by failing to apply the death causation standard applicable to claimants, i.e., pneumoconiosis must be a "substantially contributing" cause of the miner's death, when addressing rebuttal at 20 C.F.R. §718.305(d)(2)(ii). Brief in Support of Petition for Review at 12, *citing Arch on the Green v. Groves*, 761 F.3d 594, 25 BLR 2-615 25 BLR 2-615 (6th Cir. 2014). Employer also contends that the administrative law judge did not properly weigh the opinions of Drs. Westerfield and Broudy in finding the evidence insufficient to establish that no part of the miner's death was caused by pneumoconiosis under 20 C.F.R. §718.305(d)(2)(ii). Employer specifically asserts that the administrative law judge erred in according little weight to Dr. Westerfield's opinion because he did not determine an exact smoking history. Employer argues that the smoking history is not truly relevant because Dr. Westerfield did not attribute the miner's death to smoking, but instead attributed it to respiratory failure, and sepsis from opportunistic infections, with myeloma as the underlying cause. In addition, employer contends that the administrative law judge erred in finding Dr. Broudy's opinion to be equivocal.[7] Employer's arguments are not persuasive.

We reject employer's assertion that it is required to show only that pneumoconiosis was not a "substantially contributing" cause of the miner's death for purposes of rebuttal. Employer's Brief in Support of Petition for Review at 12. In *Big*

[7] We affirm, as unchallenged on appeal, the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by establishing that the miner had neither legal nor clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25.

Branch Res., Inc. v. Ogle, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, rejected this argument, albeit in the context of rebuttal of the presumed fact of total disability due to pneumoconiosis, stating:

> Simply put, the "play no part" or "rule-out" standard and the "contributing cause" standard are two sides of the same coin. Where the burden is on the employer to disprove a presumption, the employer must "rule-out" coal mine employment as a cause of the disability. Where the employee must affirmatively prove causation, he must do so by showing that his occupational coal dust exposure was a contributing cause of his disability.

Ogle, 737 F.3d at 1071, 25 BLR at 2-449. The court's holding applies with equal force in the context of death causation. We affirm, therefore, the administrative law judge's application of the "no part" standard in addressing rebuttal of the presumption of death causation under 20 C.F.R. §718.305(d)(2)(ii).[8]

With respect to the medical opinion evidence, the administrative law judge acted within his discretion in giving little weight to Dr. Westerfield's opinion on death causation because, in failing to explain why the miner's legal pneumoconiosis was not a factor in the respiratory failure that he characterized as a direct cause of death, Dr. Westerfield "never severed the causal connection between the miner's pneumoconiosis and his ultimate death." Decision and Order at 26; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); Director's Exhibit 18 at 6. We affirm, therefore, the administrative law judge's finding that Dr. Westerfield's opinion was insufficient to rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(ii).[9]

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[8] We also reject employer's argument that the administrative law judge "erred by utilizing the 'no part' test when determining that the causation of [m]iner's disability was related to legal pneumoconiosis" or by not "analyz[ing] whether pneumoconiosis was a 'substantially contributing cause'" of disability. Brief in Support of Petition for Review at 12 (emphasis added). In this survivor's claim, the cause of the miner's disability is irrelevant to the issue of whether employer rebutted the presumption that the miner's death was due to pneumoconiosis. *See* 20 C.F.R §718.305(d)(2); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

[9] Alternatively, based on the administrative law judge's unchallenged finding that employer failed to establish that the miner's obstructive impairment was not legal pneumoconiosis, claimant was considered to have conclusively established that the miner's chronic obstructive pulmonary disease (COPD) was legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Big Branch Res., Inc. v. Ogle*, 737

Regarding Dr. Broudy's opinion, the administrative law judge permissibly found it to be equivocal because Dr. Broudy initially stated, "I don't think so," when asked whether he believed that pneumoconiosis was a causal factor in the miner's death, but then stated, "pneumoconiosis could have contributed to his respiratory failure, which resulted in him being placed on a respirator." Employer's Exhibit 3 at 29; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 188, 19 BLR 2-111, 2-117 (6th Cir. 1995); Decision and Order at 26. We affirm, therefore, the administrative law judge's determination to accord Dr. Broudy's opinion less weight because "it lays neither for nor against a finding that [e]mployer has met its burden to 'rule out' the connection between [m]iner's pneumoconioses and his death." Decision and Order at 26; *see Holdman*, 202 F.3d at 882, 22 BLR at 2-42.

Because the administrative law judge permissibly discredited the opinions of employer's experts and found them insufficient to disprove the presumed causal relationship between pneumoconiosis and the miner's death, we affirm the administrative law judge's determination that employer failed to establish rebuttal under 20 C.F.R. §718.305(d)(2)(ii). *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). Thus, we need not address employer's arguments challenging the administrative law judge's

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F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 17-22. As the administrative law judge recognized, Dr. Westerfield explicitly admitted that the miner's COPD contributed to his death. Decision and Order at 12-13; Director's Exhibit 16 at 7-8. Thus, Dr. Westerfield's opinion is insufficient, on its face, to establish that no part of the miner's death was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

decision to accord "normal probative weight" to Dr. Echevarria's opinion that pneumoconiosis hastened the miner's death, as it does not support employer's burden of proof. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

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