U.S. Department of Labor

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

BRB Nos. 16-0671 BLA
and 16-0672 BLA

CHARLOTTE L. ATKINS (Widow of and o/b/o KENNETH L. ATKINS)	)	
Claimant-Respondent	)	
v.	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 08/08/2017
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 Awarding Miner's Benefits and Awarding Survivor's Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Paul E. Frampton and Sarah E. Smith (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits (2012-BLA-05829 and 2016-BLA-05201) of

Administrative Law Judge Morris D. Davis, rendered on claims[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted employer's stipulation that the miner had at least thirty-seven years of underground coal mine employment. Based on his determination that the evidence was sufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant established a change in an applicable condition of entitlement and invoked the rebuttable presumption pursuant to Section 411(c)(4) of the Act.[2] Further, the administrative law judge concluded that employer did not rebut the Section 411(c)(4) presumption and awarded benefits on the miner's claim accordingly. The administrative law judge then found that claimant was derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[3]

On appeal, employer argues that the administrative law judge erred in finding that the miner was totally disabled and 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 response brief in this appeal.[4]

---

[1] The miner, Kenneth L. Atkins, filed two prior claims, each of which was denied because the miner failed to establish total disability. Miner's Claim (MC) Director's Exhibits 1, 2. The miner filed this subsequent claim on April 18, 2011, and died on August 14, 2015, while the claim was still pending. MC Director's Exhibit 3; Survivor's Claim (SC) Exhibit 2. Claimant is the widow of the miner and is pursuing the subsequent claim on his behalf. Claimant also filed her own survivor's claim on August 29, 2015. SC Exhibit 1.

[2] Under Section 411(c)(4) of the Act, a miner's total disability 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); 20 C.F.R. §718.305(b).

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

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding, based on employer's stipulation, that the miner had thirty-seven years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Presumption – Total Disability

Pursuant to 20 C.F.R. §718.204(b)(i), the administrative law judge considered three pulmonary function studies, obtained by Dr. Gallai on July 24, 2011, by Dr. Klayton on July 18, 2012, and by Dr. Habre on October 22, 2012. Decision and Order at 15; Director's Exhibit 13; Claimant's Exhibits 1, 2. The administrative law judge determined that the July 18, 2012 study conducted by Dr. Klayton was invalid due to poor effort.[6] Decision and Order at 15. Based on the July 24, 2011 and October 22, 2012 studies, which the administrative law judge found were valid *and* qualifying,[7] he determined that claimant established total disability under this subsection. *Id*. at 16.

Employer asserts that the administrative law judge erred in not crediting Dr. Rosenberg's opinion that Dr. Gallai's July 24, 2011 qualifying study was invalid. We disagree. The administrative law judge correctly observed that Dr. Rosenberg summarily stated that the July 24, 2011 study was invalid but "did not specify any deficiencies" with regard to the tracings to support his conclusion.[8] Decision and Order at 15. We see no

---

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1-2, 5.

[6] The administrative law judge noted that tracings of the July 18, 2012 pulmonary function study were reviewed by Drs. Rosenberg and Zaldivar. Dr. Rosenberg stated that "efforts were not maximal based on the shape of the flow-volume curves." Employer's Exhibit 6. Dr. Zaldivar stated that tracings from the July 18, 2012 study were "superimposed on each other" and "do reveal hesitation at the beginning of exhalation" and thus "are only fair in their execution." Employer's Exhibit 7.

[7] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[8] In his October 1, 2012 report, Dr. Rosenberg summarized the values of the July 24, 2011 and July 18, 2012 studies. Employer's Exhibit 6. With regard to the July 18, 2012 study, Dr. Rosenberg reported that the "efforts were not maximal based on the shape of the flow-volume curves." *Id*. However, he made no remarks with regard to the

error in the administrative law judge's finding that the July 24, 2011 pulmonary function study was valid, based on the opinion of Dr. Gallai, who stated that the miner had good cooperation and understanding, and Dr. Zaldivar, who reviewed the tracings and indicated that they were acceptable. Decision and Order at 16; Director's Exhibit 13; Employer's Exhibit 7. Furthermore, the administrative law judge correctly found that no physician had invalidated the October 22, 2012 qualifying study. Decision and Order at 16. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[9] the administrative law judge credited the opinions of Drs. Gallai, Habre, and Zaldivar that the miner had a totally disabling respiratory or pulmonary impairment prior to his death, over the contrary opinion of Dr. Rosenberg.[10] Decision and Order at 18-19. Employer asserts that the administrative law judge erred in relying on Dr. Zaldivar's opinion to find that the miner was totally disabled, as Dr. Zaldivar opined that the qualifying results of the miner's pulmonary function studies were attributable to heart disease and "general weakness," and not an intrinsic lung disease. Employer's Exhibit 7. Employer's argument is rejected as without merit.

The relevant inquiry at 20 C.F.R. §718.204(b) is whether the miner's respiratory or pulmonary impairment precluded the miner from performing his usual coal mine work and comparable and gainful work. 20 C.F.R. §718.204(b)(1). The etiology of the miner's pulmonary impairment relates to the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer is able to successfully rebut the Section 411(c)(4) presumption. In this case, although Dr. Zaldivar indicated that the miner did not have an intrinsic lung disease, Dr. Zaldivar specifically

---

tracings associated with the July 24, 2011 study. *Id.* At the end of his report, Dr. Rosenberg summarily concluded that all of the miner's pulmonary function studies were invalid due to poor effort. *Id.* Dr. Rosenberg made no comments concerning the October 22, 2012 study, which was conducted after the date of his report.

[9] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 16-17.

[10] The administrative law judge gave little weight to Dr. Klayton's opinion that the miner was totally disabled because it was based on the July 18, 2012 pulmonary function study, which the administrative law judge found was invalid. Decision and Order at 18.

opined that the miner would not have been able "to perform any sort of meaningful activity" from a respiratory standpoint. Employer's Exhibit 7 at 7. Based on Dr. Zaldivar's statement, the administrative law judge rationally concluded that Dr. Zaldivar's opinion supports a finding that the miner was totally disabled.[11] Decision and Order at 13, 19.

In addition, we reject employer's general contention that Dr. Rosenberg's opinion should have been given greater weight on the issue of total disability. The administrative law judge correctly found that the validity of Dr. Habre's October 22, 2012 qualifying pulmonary function study was not challenged by Dr. Rosenberg. Decision and Order at 18. We see no error in the administrative law judge's decision to give Dr. Rosenberg's opinion little weight, as the physician failed to explain why the miner was not totally disabled, based on the qualifying October 22, 2012 study. *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 18.

In light of the foregoing, we affirm the administrative law judge's determination that claimant established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 19. We further affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b), based on the administrative law judge's consideration of all of the evidence, including the contrary probative evidence. *Id.*; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, and that she established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that the miner did not have legal

[11] Because the cause of a disabling respiratory impairment is not the proper inquiry at 20 C.F.R. §718.204(b)(2), we reject employer's assertion that the administrative law judge erred in crediting the opinions of Drs. Gallai and Habre, in finding that the miner was totally disabled, because, in employer's view, they allegedly did not discuss the effect of the miner's cardiac disease on his respiratory impairment. Decision and Order at 18; Employer's Brief at 22.

and clinical pneumoconiosis,[12] or by establishing 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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge initially determined that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 24. The administrative law judge then concluded, however, that the opinions of Drs. Rosenberg and Zaldivar were not well-reasoned to satisfy employer's burden to disprove legal pneumoconiosis. *Id.*

Employer suggests that the administrative law judge based his finding on vague references to chronic obstructive pulmonary disease in the miner's treatment record and not the record as a whole. But while employer generally argues that all of the relevant evidence must be considered in determining whether it disproved the existence of legal pneumoconiosis, it does not identify any specific evidence that the administrative law judge failed to consider. Employer's Brief at 28-30. Similarly, employer generally contends that the opinions of Drs. Rosenberg and Zaldivar are more comprehensive and detailed than those of Drs. Klayton and Habre because they explain why the miner did not have legal pneumoconiosis in conjunction with their review of the miner's treatment records. *Id.* at 31-32. Employer, however, does not explain why the administrative law judge's stated rationale for discrediting the opinions of Drs. Rosenberg and Zaldivar was improper.[13]

---

[12] "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).

[13] Dr. Rosenberg opined that the miner had no valid pulmonary function studies and thus did not have a respiratory impairment that could constitute legal pneumoconiosis. Employer's Exhibit 6. The administrative law judge rejected Dr. Rosenberg's opinion because he relied on a pulmonary function study that was not of record; he provided no rationale for invalidating one of the studies he reviewed; and he did not review the results of the qualifying October 22, 2012 pulmonary function study. Decision and Order at 23. With regard to Dr. Zaldivar's opinion, the administrative law judge observed that while Dr. Zaldivar attributed the miner's respiratory impairment to cardiac disease and not coal dust exposure, Dr. Zaldivar acknowledged that he "did not

The Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it, and must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board,* 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Employer's arguments lack specificity with regard to any alleged error by the administrative law judge and appear to be a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). Thus, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis and, therefore, failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[14]

The administrative law judge also found that employer failed to disprove the presumed fact of disability causation under 20 C.F.R. §718.305(d)(1)(ii). Employer contends that because the administrative law judge erred in weighing the medical opinions on legal pneumoconiosis, his findings under 20 C.F.R. §718.305(d)(1)(ii) should be vacated. Because we have affirmed the administrative law judge's determination that employer failed to disprove legal pneumoconiosis, employer's argument is without merit. Furthermore, we see no error in the administrative law judge's finding that the opinions of Drs. Rosenberg and Zaldivar are not credible to establish that the miner's disability was unrelated to legal pneumoconiosis, as neither physician diagnosed that disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order at 25. We therefore affirm the administrative law judge's determination that employer failed to rebut the presumption at 20 C.F.R. §718.305(d)(1)(ii), by establishing that no part of the miner's respiratory or pulmonary total disability was caused by legal pneumoconiosis. We therefore affirm the administrative law judge's award of benefits on the miner's claim.

Survivor's Claim

Employer contends that, in light of its challenge to the miner's award of benefits and the errors alleged in the miner's claim, claimant is not entitled to a derivative award

---

have the information necessary to make a determination on [the miner's] pulmonary function before the onset of his severe cardiac disease." *Id*; *see* Employer's Exhibit 7.

[14] Although employer disproved that the miner had clinical pneumoconiosis, it is required to disprove both the existence of clinical and legal pneumoconiosis in order to establish rebuttal of the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(ii).

of benefits in her survivor's claim. Thus, employer urges the Board to reverse the award of survivor's benefits. Employer's Brief at 35. However, based on our affirmance of the award of benefits in the miner's claim, we reject employer's argument.

The administrative law judge correctly determined that claimant meets the prerequisites for application of Section 932(*l*). 20 C.F.R. §725.212 (a)(3)(ii); Decision and Order at 26. We therefore affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to Section 932(*l*). *See Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge