U.S. Department of Labor

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

BRB Nos. 17-0478 BLA
and 17-0479 BLA

LILLIE NEACE (o/b/o and Widow of ISHMEAL NEACE) Claimant-Respondent v. CUMBERLAND RIVER COAL COMPANY, Self-Insured Through ARCH COAL, INCORPORATED, c/o UNDERWRITERS SAFETY AND CLAIMS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/31/2018 DECISION and ORDER

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

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

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-05850, 2015-BLA-05647) of Administrative Law Judge John P. Sellers, III, awarding benefits 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[1] filed on August 1, 2011, and a survivor's claim filed on March 21, 2015.[2]

In the miner's claim, the administrative law judge credited the miner with twenty-four years of surface coal mine employment,[3] in conditions substantially similar to those in an underground mine. Additionally, the administrative law judge accepted employer's concession that the miner 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 the miner established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and invoked the rebuttable presumption that he was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4)(2012). The administrative law judge also found that employer failed to rebut the presumption and, therefore, awarded benefits in the miner's claim. In the survivor's claim, he found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 422(*l*) of the Act,[5] 30 U.S.C. §932(*l*)(2012), and awarded benefits accordingly.

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[1] The miner filed two prior claims for benefits, both of which were finally denied. Director's Exhibits 1-2. The miner's most recent prior claim, filed on March 12, 2002, was denied by the district director on July 24, 2003, for failure to establish any element of entitlement. Director's Exhibit 1.

[2] The miner died on March 6, 2015, while his case was pending before the Office of Administrative Law Judges. Claimant's Exhibit 4. Claimant, the widow of the miner, is pursuing the miner's claim. Decision and Order at 1.

[3] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 2. 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).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is, or was, totally disabled due to pneumoconiosis in cases where the evidence establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[5] Under 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 survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

On appeal, employer contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption.[6] Employer therefore argues that the administrative law judge erred in finding that claimant was automatically entitled to benefits pursuant to Section 422(*l*). Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[7]

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. 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).

[6] Six months after filing its brief in support of the petition for review, employer moved to hold this case in abeyance, arguing for the first time that the manner in which Department of Labor administrative law judges are appointed may violate the Appointments Clause of the Constitution, Art. II §2, cl. 2. The Board denied employer's motion because employer failed to raise this issue in its initial brief. *Neace v. Cumberland River Coal Co.*, BRB Nos. 17-0478 BLA and 17-0479 BLA (Apr. 19, 2018)(Order) (unpub.). On July 10, 2018, employer filed a Motion to Remand this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge. Employer relies on *Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 (June 21, 2018), which held that the manner in which certain administrative law judges are appointed violates the Appointments Clause. Employer's Motion to Remand at 1-5. The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by failing to raise it in its opening brief. We agree with the Director. Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue. *See Lucia*, 2018 WL 3057893 at *8 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[7] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Miner's Claim

Because the miner invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[8] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

To prove that the miner did not have legal pneumoconiosis, employer had to establish that the miner did not suffer from a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In determining that employer failed to establish that the miner did not have legal pneumoconiosis, the administrative law judge considered Dr. Jarboe's medical opinion.[9] Dr. Jarboe opined that the miner did not have legal pneumoconiosis, but instead suffered from chronic obstructive pulmonary disease due to smoking and bronchial asthma. Director's Exhibit 14; Employer's Exhibit 1. The administrative law judge found that Dr. Jarboe's opinion was not well-reasoned or well-documented, and thus found that employer failed to establish that the miner did not have legal pneumoconiosis. Decision and Order at 20-22.

Employer contends that the administrative law judge erred in discrediting Dr. Jarboe's opinion. Employer's Brief at 16-20. We disagree. Dr. Jarboe attributed the

[8] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is 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).

[9] The administrative law judge also considered Dr. Forehand's opinion diagnosing the miner with legal pneumoconiosis, in the form of obstructive lung disease due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 14. He found that Dr. Forehand's opinion did not assist employer in rebutting the presumed fact of legal pneumoconiosis. Decision and Order at 22.

miner's respiratory disability entirely to smoking and asthma, concluding that coal dust played no role in the miner's disability.[10] In finding that Dr. Jarboe did not adequately support his conclusion that the miner's obstructive lung disease was completely unrelated to coal dust, the administrative law judge identified three independently dispositive flaws in Dr. Jarboe's reasoning.

First, the administrative law judge correctly noted that Dr. Jarboe relied, in part, on the fact that the miner developed his respiratory symptoms several years after he left the mines. Decision and Order at 22; Employer's Exhibit 1 at 10. The administrative law judge permissibly found the physician's reasoning to be inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987)(noting the need for administrative law judges to "keep in mind the character of . . . black lung disease" as a "progressive and irreversible disease" when weighing evidence); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Decision and Order at 22.

Second, the administrative law judge permissibly found that Dr. Jarboe's opinion that coal mine dust exposure could not account for the miner's severely reduced diffusion capacity did not adequately explain why the miner's obstructive lung disease could not have been caused by both smoking and coal mine dust exposure in some combination. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983)(holding that the determination of whether a medical opinion is sufficiently reasoned is a credibility matter "for the factfinder to decide"); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Third, the administrative law judge observed correctly that Dr. Jarboe eliminated coal dust exposure as a source of the miner's obstructive impairment based on the marked decrease in the miner's FEV1/FVC ratio. Decision and Order at 20; Director's Exhibit 14B at 8. The administrative law judge rationally found that Dr. Jarboe's premise – that

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[10] Dr. Jarboe concluded:

> In summary, it is my reasoned opinion that the overall medical evidence does not support a diagnosis of legal pneumoconiosis. I feel that Mr .Neace's severe ventilatory and gas exchange impairment has been caused by a long history of very heavy smoking. This in turn has caused severe pulmonary emphysema. It is my reasoned opinion that the findings are not those of coal dust-induced impairment.

Director's Exhibit 14B at 12; Employer's Exhibit 1 at 10.

coal dust exposure causes proportional decrements in FEV1 and FVC, thereby preserving the FEV1/FVC ratio – conflicts with the scientific evidence credited by the Department of Labor in the preamble to the 2001 regulatory revisions. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014)(holding that the administrative law judge "was entitled to discredit [a] medical opinion because it was inconsistent with the DOL position set forth in the preamble" that "COPD caused by coal dust exposure may be associated with decrements in the FEV1/FVC ratio"); Decision and Order at 20, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (crediting studies showing that coal miners have an increased risk of developing chronic obstructive pulmonary disease, which "may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC").

Finally, employer's allegation that the administrative law judge erred in applying a "rule out" standard to Dr. Jarboe's opinion at 20 C.F.R. §718.305(b)(1)(i)(A) is not persuasive under the circumstances of this case. Employer's Brief at 14. While the administrative law judge admittedly misstated the standard in several places in his decision, it had no effect on the outcome. Dr. Jarboe opined that coal dust did not contribute at all to the miner's impairment. Director's Exhibit 14B at 12; Employer's Exhibit 1 at 10. For the foregoing reasons, that opinion was neither well-reasoned nor well-documented and it could not be credited, regardless of the standard applied. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1073 (6th Cir. 2013)(affirming the administrative law judge's determination to discredit employer's rebuttal opinions "based on whether they [were] sufficiently documented and reasoned" because that analysis was "a credibility matter" for the administrative law judge).[11] In other words, the administrative law judge did not discredit Dr. Jarboe's opinion *because* he did not rule out coal dust as a factor in the miner's impairment; he discredited Dr. Jarboe's opinion because the reasons Dr. Jarboe said *he could rule out* coal dust as a factor were deeply flawed.

We therefore affirm the administrative law judge's determination that employer did not rebut the presumed fact of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination

[11] Because the administrative law judge provided valid bases for according less weight to Dr. Jarboe's opinion, which we have affirmed, we need not address employer's remaining arguments regarding the weight he accorded the opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis.[12]

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption 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)(ii). The administrative law judge rationally discounted Dr. Jarboe's opinion that the miner's disability was not due to pneumoconiosis, because Dr. Jarboe did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 23-24. Therefore, we affirm the administrative law judge's determination that employer failed to establish that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

The Survivor's Claim

The administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 422(*l*) of the Act: that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order at 25. Because we have affirmed the award of benefits in the miner's claim, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[12] Because we have affirmed the administrative law judge's finding that employer did not rebut the presumed fact of legal pneumoconiosis, we need not address employer's contentions of error regarding the administrative law judge's finding that employer also failed to establish that the miner did not have clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

I agree with the majority's denial of employer's Motion to Remand this case for a new hearing before a different administrative law judge, as employer's Appointments Clause argument is untimely. I respectfully dissent, however, from the majority's decision to affirm the administrative law judge's finding that employer failed to rebut the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). I agree with employer that the administrative law judge used an improper "rule out" standard in determining whether Dr. Jarboe's opinion rebutted the existence of legal pneumoconiosis. Employer's Brief at 14.

To prove that the miner did not have legal pneumoconiosis, employer must demonstrate that the miner did not have a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). Dr. Jarboe opined that the miner's coal mine dust exposure was not a significantly contributing factor to his totally disabling obstructive lung disease, and that the miner instead suffered from a severe obstructive impairment that was due to cigarette smoking and asthma. Director's Exhibit 14; Employer's Exhibit 1. The administrative law judge found that Dr. Jarboe made several arguments in support of his opinion, "none of

which are persuasive to rule out even a minimal contribution by coal dust exposure." Decision and Order at 20. The administrative law judge went on to reiterate this language when considering several of Dr. Jarboe's rationales, finding that Dr. Jarboe failed to explain why the miner's impairment was due to smoking "without even a minimal contribution from coal dust," or explain why his rationale "would necessarily eliminate any contribution, even minimal" from coal dust, or "why coal mine dust exposure did not at least contribute minimally to the [m]iner's lung disease." *Id*. at 21.

Contrary to the administrative law judge's analysis, employer is not required to "rule out even a minimal contribution" from coal dust exposure to the miner's respiratory disease or impairment in order to disprove the existence of legal pneumoconiosis.[13] The proper inquiry is whether employer has shown by a preponderance of the evidence that the miner did not have a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Minich*, 25 BLR at 1-159. The administrative law judge's use of an incorrect rebuttal standard is not harmless error, as it is not possible to discern the extent to which it affected his credibility determinations in light of his repeated use of the wrong standard when evaluating Dr. Jarboe's opinion as a whole and his separate rationales. *See Consolidation Coal Co. v. Director, OWCP* [*Noyes*], 864 F.3d 1142, 1153-54 (10th Cir. 2017); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Given the administrative law judge's repeated application of the wrong rebuttal standard, I would vacate the administrative law judge's determination that employer failed to rebut the presumed fact of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). Therefore, I would also vacate the determination that employer failed to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii), and would remand this case for the administrative law judge to apply the proper rebuttal standard.

RYAN GILLIGAN
Administrative Appeals Judge

[13] The "rule out," or "no part," standard applies only to the second method of rebuttal relating to disability causation. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502, (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155-56 (2015) (Boggs, J., concurring and dissenting).