U.S. Department of Labor

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

BRB No. 17-0501 BLA

DOROTHY L. BAUM (Widow of CLAIR BAUM) Claimant-Respondent v. EARTHMOVERS UNLIMITED, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/21/2018 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2014-BLA-05667) of Administrative Law Judge Drew A. Swank rendered on a claim 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 survivor's claim[1] filed on July 18, 2013, and is before the Board for the second time.

In the initial decision, the administrative law judge determined that employer is the responsible operator. He also found that the miner had at least 15.99 years of employment in conditions substantially similar to those in an underground mine and had a totally disabling respiratory or pulmonary impairment at the time of his death pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] He further found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, the Board affirmed the administrative law judge's findings that employer is the responsible operator and that claimant invoked the rebuttable presumption at Section 411(c)(4). *Baum v. Earthmovers Unlimited, Inc.*, BRB No. 16-0075 BLA, slip op. at 3, 8 (Nov. 10, 2016) (unpub.). The Board vacated, however, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. The Board held that while the administrative law judge properly found that employer failed to rebut the existence of clinical pneumoconiosis, he erred in evaluating the medical opinion evidence in finding that employer also failed to rebut the existence of legal pneumoconiosis.[3] *Baum*, BRB No. 16-0075 BLA, slip op. at 10-11. The Board further vacated the administrative

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[1] Claimant is the surviving spouse of the miner, who died on March 28, 2013. Director's Exhibit 8. Because the miner was not awarded benefits during his lifetime, claimant is not eligible for automatic survivor's benefits pursuant to Section 422 (*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

[2] Under Section 411(c)(4) of the Act, the miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner 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 also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] The Board noted that employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis at 20 C.F.R. §718.305(d)(2)(i). The Board explained, however, that because legal pneumoconiosis is relevant to rebuttal under 20 C.F.R. §718.305(d)(2)(ii), it was necessary to address the administrative law judge's finding that employer also failed to establish that claimant does not have legal pneumoconiosis. *Baum v. Earthmovers Unlimited, Inc.*, BRB No. 16-0075 BLA, slip op. at 10 (Nov. 10, 2016) (unpub.).

law judge's finding that employer failed to establish that no part of the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(2)(ii). *Baum*, BRB No. 16-0075 BLA, slip op. at 11-12. Consequently, the Board remanded the case to the administrative law judge to reconsider whether the medical opinion evidence disproved the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i) and whether the medical evidence established that no part of the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). *Baum*, BRB No. 16-0075 BLA, slip op. at 12.

On remand, the administrative law judge again found that employer did not rebut the presumption that the miner's death was due to pneumoconiosis and awarded benefits accordingly.

In the present appeal, employer contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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

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 and the Board previously affirmed the finding that the autopsy evidence established the existence of clinical pneumoconiosis, in order to rebut the presumption employer must prove that "no part" of the miner's death was caused by legal or clinical pneumoconiosis.[5] 20 C.F.R. §718.305(d)(2)(ii). Thus, the administrative law

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5.

[5] 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). This definition encompasses any chronic respiratory or pulmonary disease or 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

judge first considered whether employer established that the miner did not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A).

To disprove legal pneumoconiosis, employer must establish that the miner did not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). On remand, the administrative law judge considered the medical opinions of Drs. Fino and Swedarsky.[6] Dr. Fino opined that the miner did not have legal pneumoconiosis, but had emphysema and chronic obstructive pulmonary disease (COPD) unrelated to coal mine dust exposure.[7] Employer's Exhibit 1. Dr. Swedarsky similarly opined that the miner did not have legal pneumoconiosis, but had centriacinar emphysema related entirely to cigarette smoking.[8] Employer's Exhibit 2. The administrative law judge found that the opinions of Drs. Fino and Swedarsky are poorly reasoned and inadequately explained and, therefore, do not rebut the presumption of legal pneumoconiosis. Decision and Order on Remand at 6.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Fino and Swedarsky.[9] Employer's Brief at 6-14. We disagree. Dr. Fino

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of the lung tissue to that deposition caused by coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[6] The administrative law judge also considered the autopsy opinion of Dr. Heggere and correctly noted that he diagnosed simple coal workers' pneumoconiosis with associated centrilobular emphysema, but did not otherwise address the cause of the emphysema. Decision and Order on Remand at 4-5; Director's Exhibit 9.

[7] Dr. Fino's opinion is based on his review of medical evidence, including hospital treatment records. Employer's Exhibit 1.

[8] Dr. Swedarsky's opinion is based on his review of autopsy evidence and hospital treatment records. Employer's Exhibit 2.

[9] We reject employer's argument that the administrative law judge is biased against employer as his failure to take official notice of Dr. Fino's and Dr. Swedarsky's professional qualifications "is part of a pattern of looking for reasons to support a result he was determined to reach before the evidence was even reviewed." Employer's Brief at 6. The decision to take official notice of a matter is a procedural issue committed to the administrative law judge's discretion. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-14, 1-21 (1999) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). As employer did not ask the administrative law judge to take official notice of

opined that the miner's "90 pack[-]year cigarette smoking history can certainly explain [his] disabling obstruction and reduction in diffusion" and that there was "no evidence to suggest that coal dust inhalation contributed to the disability."[10] Employer's Exhibit 1 at 4. Dr. Swedarsky similarly observed that based on the miner's 90 pack-year cigarette smoking history, "[his] centriacinar emphysema could be attributed to cigarette smoking only." Employer's Exhibit 2 at 15. Contrary to employer's contention, the administrative law judge permissibly discredited their opinions because in attributing the miner's impairment entirely to smoking, neither physician adequately explained why the miner's coal mine dust exposure did not contribute, along with cigarette smoking, to his emphysema/COPD. *See* 65 Fed. Reg. 79,920, 79,941-42 (Dec. 20, 2000) (identifying centriacinar emphysema as a type of emphysema that may be caused by coal mine dust exposure); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 577-78, 21 BLR 2-12, 2-20 (3d Cir. 1997); Decision and Order on Remand at 6.

Further, the administrative law judge found that while Dr. Swedarsky diagnosed centriacinar emphysema, a type of emphysema he stated is caused by cigarette smoking, he "did not relate his [diagnosis] to the miner, or explain why, in this instance, he diagnosed this kind of emphysema versus another." Decision and Order on Remand at 5. Thus the administrative law judge permissibly discredited this aspect of Dr. Swedarsky's opinion as inadequately explained and based on generalities, rather than on the specifics of the miner's condition. *See Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); Decision and Order on Remand at 5.

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the professional qualifications of its experts, *see Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003), we find no error in the administrative law judge noting that no resume, curricula vitae, or other list of qualifications was submitted into the record for Drs. Fino and Swedarsky. *See Maddaleni v. Pittsburg & Midway Coal Mining Co*., 14 BLR 1-135, 1-140 (1990); Decision and Order on Remand at 5, 6. Moreover, the administrative law judge did not discredit either physician based on his qualifications, nor has employer shown that the treatment of its evidence was otherwise prejudiced by the administrative law judge's qualifications determinations. The Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence, which is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). Employer has not met that burden.

[10] Dr. Fino opined that the miner had a disabling respiratory impairment consistent with emphysema and chronic obstructive pulmonary disease. Employer's Exhibit 1.

As the trier-of-fact, the administrative law judge has broad discretion to assess the credibility of the medical opinions and assign them appropriate weight. *See Balsavage*, 295 F.3d at 396, 22 BLR at 394-95; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In asserting that the opinions of Drs. Fino and Swedarsky are "thorough, well-reasoned, based upon their review of all the medical evidence of record, and comprehensive in their analysis of the . . . miner's health and medical conditions prior to death," employer is seeking a reweighing of the evidence, which the Board is not empowered to do. Employer's Brief at 13-14; *see Anderson*, 12 BLR at 1-113; *Worley*, 12 BLR at 1-23. Thus, we affirm the administrative law judge's finding that employer failed to rebut the presumed existence of legal pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(2)(i)(A); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997); Decision and Order on Remand at 6.

The administrative law judge next addressed whether employer established the second method of rebuttal by showing that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii). The administrative law judge considered the opinions of Drs. Fino and Swedarsky that the miner's death was caused by stage IV lung cancer.[12] Employer's Exhibits 1, 2. Dr. Fino opined that the miner's "underlying COPD – regardless of cause – did not cause, contribute to, or hasten his death." Employer's Exhibit 1. Dr. Swedarsky opined that the miner's moderately differentiated adenocarcinoma of the lung was related to cigarette smoking and that coal dust exposure did not significantly contribute to, or hasten, his death. Employer's Exhibit 2.

[11] Employer also argues that the administrative law judge mischaracterized Dr. Swedarsky's report by attributing a statement by the autopsy prosector to Dr. Swedarsky. Employer's Brief at 10-11. Because the administrative law judge provided valid reasons for discrediting Dr. Swedarsky's opinion, the administrative law judge's error, if any, in discrediting his opinion for other reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order on Remand at 5-6. Therefore, we need not address employer's additional challenges to the administrative law judge's consideration of Dr. Swedarsky's opinion.

[12] The administrative law judge also considered Dr. Heggere's opinion and correctly noted that he did not address the role, if any, of pneumoconiosis in the miner's death. Decision and Order on Remand at 7; Director's Exhibit 9.

The administrative law judge found that aside from citing medical studies to support their opinions that the miner's terminal lung cancer was not caused by coal mine dust, neither Dr. Fino nor Dr. Swedarsky explained why the miner's clinical or legal pneumoconiosis did not play some role in his death. Decision and Order on Remand at 7. Thus the administrative law judge permissibly discredited their opinions as conclusory. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004) (Roth, J., dissenting); *Balsavage*, 295 F.3d at 396, 22 BLR at 2-396; *Lango*, 104 F.3d at 577-78, 21 BLR at 2-20; *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 8. As it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that no part of the miner's death was caused by pneumoconiosis. Decision and Order on Remand at 8. We, therefore, further affirm his determination that employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2)(ii).

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and employer did not rebut the presumption, claimant is entitled to survivor's benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge