U.S. Department of Labor

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

BRB Nos. 15-0056 BLA
and 15-0057 BLA

LESIA REYNOLDS (o/b/o and Widow of THOMAS REYNOLDS)	)	
Claimant-Respondent	)	
v.	)	
BLACK BEAUTY COAL MINING COMPANY c/o AMERICAN MINING CLAIMS SERVICE	)	
	)	DATE ISSUED: 12/03/2015
and	)	
PEABODY INVESTMENTS, INCORPORATED	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Thomas E. Springer, III (Springer Law Firm, PLLC), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (09-BLA-5036, 11-BLA-5337) 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 claim filed on October 10, 2006, and a survivor's claim filed on August 9, 2010.

The district director denied the miner's claim on May 14, 2007, finding that the evidence did not establish that the miner suffered from pneumoconiosis. Director's Exhibit 27. The miner timely requested modification. Director's Exhibit 27. In a Proposed Decision and Order dated April 17, 2008, the district director granted the miner's request for modification, and awarded benefits. Director's Exhibit 34. After considering additional evidence, the district director reaffirmed the award of benefits on July 22, 2008. Director's Exhibit 45. At employer's request, the case was forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. Director's Exhibits 46, 49.

While the case was pending before the OALJ, the miner died on May 4, 2010. Director's Exhibit 52. The case was, therefore, remanded to the district director so that the miner's claim could be consolidated with claimant's survivor's claim.[1] *Id.* The district director awarded benefits in the survivor's claim and, at employer's request, the claims were forwarded to the OALJ for a hearing, which was held on November 15, 2013.

[1] Claimant, the miner's widow, filed a survivor's claim on August 9, 2010. Claimant's Exhibit 57. Claimant also notified the district director that she would be pursuing the miner's claim on behalf of the miner's estate. Director's Exhibit 52.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited the miner with twenty-three years of qualifying coal mine employment,[3] and noted that employer conceded 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 claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The administrative law judge determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

The administrative law judge then considered claimant's survivor's claim. The administrative law judge noted that Section 422(*l*), 30 U.S.C. §932(*l*), provides that a survivor of a miner who is 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. The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 422(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Specifically, employer argues that the administrative law judge erred in relying upon 20 C.F.R. §718.305(b)(2), which employer alleges is invalid, to find that the miner's surface coal mine employment was substantially similar to underground coal mine employment. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Employer further argues that the administrative law judge improperly granted modification based upon a change in the law, and erred in his determination regarding the commencement date for benefits. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds in support of the administrative law judge's award of benefits. The Director urges the Board to reject

[2] 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 qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4); *see* 20 C.F.R. §718.305.

[3] The record reflects that the miner's last coal mine employment was in Illinois. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

employer's contention that 20 C.F.R. §718.305(b)(2) is invalid. The Director further contends that the administrative law judge permissibly relied upon the preamble to the 2001 revised regulations in discounting the opinions of employer's physicians on rebuttal. In two separate reply briefs, employer reiterates its previous contentions.

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).

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

Employer argues that the administrative law judge erred in finding that the miner invoked the Section 411(c)(4) presumption. Employer specifically challenges the administrative law judge's finding that the miner established twenty-three years of qualifying coal mine employment. Section 411(c)(4) requires at least fifteen years of employment either in "underground coal mines," or in "a coal mine other than an underground mine" in "substantially similar" conditions. 30 U.S.C. §921(c)(4). Section 411(c)(4) does not define the term "substantially similar." Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Although the miner was unable to provide testimony in this case, claimant provided uncontradicted testimony regarding the miner's exposure to coal mine dust in his surface coal mine work as a bulldozer operator. Claimant testified that the miner's clothes were filthy and black when he came home from his shift. Hearing Tr. at 25. Claimant further testified that she would have to wash coal dust out of the miner's eyes and nose every day. *Id.* at 25-26. Claimant testified that, even when the miner worked in an "enclosed dozer," the cabs were not always "air tight," and he would still come home with coal dust up his nose and in his eyes. *Id.* at 40. The administrative law judge found "credible the uncontradicted testimony of [claimant] that throughout the period in which she lived with [the miner], in other words 1982 through 2005, the [m]iner came home from work each day dirty with 'coal soot' around his eyes and in and around his nostrils." Decision and Order at 5. The administrative law judge found claimant's testimony sufficient to establish that the miner was regularly exposed to coal mine dust from 1982 through 2005. *Id.* The administrative law judge, therefore, found that claimant established that the miner worked in conditions substantially similar to those in an underground coal mine, and credited the miner with twenty-three years of qualifying coal

mine employment. *Id.* Substantial evidence, in the form of claimant's credited testimony as to the miner's work conditions, supports the administrative law judge's determination.

Employer challenges the administrative law judge's determination on the basis that he relied on 20 C.F.R. §718.305(b)(2), which employer contends is arbitrary, capricious, and an abuse of discretion because "it lacks any support in the rulemaking record or elsewhere." Employer's Brief at 18. We observe that in promulgating 20 C.F.R. §718.305(b)(2), the Department of Labor (DOL) explained that the regulation was intended to codify the Director's long-standing interpretation of "substantially similar," as reflected in the standard set forth by the United States Court of Appeals for the Seventh Circuit in *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).[4] 78 Fed. Reg. 59,102, 59,104 (Sept. 25, 2013). The United States Courts of Appeals for the Sixth and Tenth Circuits have recognized that 20 C.F.R. §718.305(b)(2) did not change the law, but merely codified the DOL's long-standing position. *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44, 25 BLR 2-549, 2-564-66 (10th Cir. 2014). As the Act does not define the term "substantially similar," the DOL promulgated 20 C.F.R. §718.305(b)(2) in order to fill the legislative gap. The Director's long-standing interpretation of the Act is reasonable and entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). Consequently, we reject employer's argument that 20 C.F.R. §718.305(b)(2) is invalid, and affirm the administrative law judge's finding that claimant established twenty-three years of qualifying coal mine employment.

In light of our affirmance of the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment, and employer's concession that the miner suffered from a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

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

[4] In *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988), interpreting the originally-enacted Section 411(c)(4), the Seventh Circuit rejected the argument that surface miners needed to present evidence addressing the conditions in underground mines in order to prove substantial similarity. Instead, the court held that an aboveground miner "is required only to produce sufficient evidence of the surface mining conditions under which he worked." *Id.*

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Repsher, Fino, and Rosenberg. Drs. Repsher, Fino, and Rosenberg diagnosed the miner with disabling emphysema due to cigarette smoking, and each opined that the miner's emphysema was not due to his coal mine dust exposure. Director's Exhibit 16; Employer's Exhibits 3, 6, 7.

The administrative law judge discredited the opinions of Drs. Repsher, Fino, and Rosenberg because he found that each was inconsistent with the scientific evidence credited by the DOL in the preamble to the 2001 regulatory revisions. Decision and Order at 6-18. The administrative law judge also discredited the opinions of Drs. Repsher, Fino, and Rosenberg because the physicians did not adequately explain how they determined that the miner's coal mine dust exposure did not contribute to his disabling emphysema. *Id.* at 10-11, 14, 16. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 18.

Initially, we reject employer's contention that the administrative law judge erred in referring to the preamble to the 2001 regulatory revisions in determining the credibility of the medical opinion evidence. It was within the administrative law judge's discretion to rely on the preamble as a guide to assess the credibility of the medical evidence in this case. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *see also Sterling*, 762 F.3d at 491, 25 BLR at 2-645; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257,

[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). "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).

24 BLR 2-369, 2-383 (3d Cir. 2011). Further, contrary to employer's contention, the administrative law judge's utilization of the preamble did not render the Section 411(c)(4) presumption "irrebuttable." Employer's Brief at 30. The administrative law judge merely consulted it as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32.

We also reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Repsher, Fino, and Rosenberg. Noting that the preamble to the revised regulations acknowledges the prevailing views of the medical community that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited their opinions because he found that none of the physicians adequately explained why the miner's coal mine dust exposure did not contribute, along with his cigarette smoking, to his disabling emphysema. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 10-11, 14, 16.

The administrative law judge also accorded less weight to Dr. Repsher's opinion because he found it to be based on statistical probabilities, rather than on the miner's specific condition. Dr. Repsher noted that, "on the average, non-smoking and non-asthmatic coal miners with 0/0 through 3/3 simple [coal workers' pneumoconiosis] will have normal pulmonary function," with the average loss of FEV1 being "so small that it is not detectable in an individual miner." Director's Exhibit 16 at 6. Dr. Repsher, therefore, stated that, in the miner's case, "to an overwhelming probability, any detectable [chronic obstructive pulmonary disease] would be the result of cigarette smoking and/or asthma, but not the result of the inhalation of coal mine dust." *Id.* The administrative law judge permissibly found that, in light of the findings of the DOL, as set forth in the preamble, that statistical averaging can hide the effect of coal mine dust exposure in individual miners, Dr. Repsher did not adequately explain why this particular miner's impairment did not arise, in part, out of his coal mine dust exposure.[6] *See*

[6] The administrative law judge found that Dr. Repsher's statistical analysis was itself flawed:

> [B]oth the average smoker and the average miner fortunately escape the harmful effects of cigarette smoke and coal dust, whereas in both groups there is a distinct susceptible minority that does suffer significant lung damage. Therefore to rely on a purely statistical analysis focusing on the average miner's loss of lung function is to assume, *a fortiori*, that the

Goodin, 743 F.3d at 1345-46, 25 BLR at 2-568; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103-04; Decision and Order at 10, *citing* 65 Fed. Reg. at 79,941.

Moreover, the administrative law judge permissibly accorded less weight to Dr. Fino's opinion because it conflicted with the recognition in the preamble to the 2001 regulations that emphysema due to coal mine dust may occur independently of clinical pneumoconiosis.[7] Decision and Order at 13, *citing* 65 Fed. Reg. at 79,939 (indicating that "exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis]"); *see also Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 650 F.3d at 256-57, 24 BLR at 2-382-83.

The administrative law judge also found that Dr. Rosenberg's reasoning for concluding that the miner's disabling emphysema was unrelated to coal mine dust exposure was inconsistent with scientific studies approved by the DOL in the preamble to the 2001 amended regulations. Dr. Rosenberg eliminated coal dust exposure as a source

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> [m]iner fell within the non-susceptible majority of miners and not the susceptible minority. Significantly, Dr. Repsher made just the opposite assumption regarding the [m]iner's smoking, placing him among the susceptible minority (13%) of smokers who suffer clinically significant damage from cigarette smoke.
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> In sum, I find that the statistical analysis propounded by Dr. Repsher, in which the miner is placed among the majority of miners who escaped the harmful effects of coal dust, but among the minority of smokers who suffer lung damage, is selective and unpersuasive.

Decision and Order at 9-10.

[7] The administrative law judge found that, although Dr. Fino acknowledged exceptions, he "clearly espoused the view that there was a direct correlation between emphysema due to coal mine dust exposure and the amount of clinical pneumoconiosis present." Decision and Order at 13. For example, the administrative law judge noted that Dr. Fino interpreted a study as demonstrating that "the amount of clinical pneumoconiosis does estimate the amount of emphysema due to coal mine dust . . . ." Decision and Order at 12, *quoting* Employer's Exhibit 3 at 7.

of the miner's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in the miner's FEV1 compared to his FVC, a finding that Dr. Rosenberg opined is uncharacteristic of a coal mine dust-induced lung disease.[8] Employer's Exhibit 7 at 9. The administrative law judge noted, however, that scientific evidence endorsed by the DOL recognizes that coal dust exposure can cause a significant decrease in a miner's FEV1/FVC ratio. Decision and Order at 15; *see* 65 Fed. Reg. at 79,943 (finding that coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio). Consequently, the administrative law judge permissibly discounted Dr. Rosenberg's opinion as to the cause of the miner's disabling emphysema because the doctor relied on an assumption that is contrary to the medical science credited by the DOL. *See Sterling*, 762 F.3d at 491-92, 25 BLR at 2-645.

Because the administrative law judge permissibly discredited the opinions of Drs. Repsher, Fino, and Rosenberg,[9] we affirm his finding that employer failed to establish that the miner did not have legal pneumoconiosis. Employer's failure to disprove the existence of 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 that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis.

With regard to the second method of rebuttal, the administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Repsher, Fino, and Rosenberg, that the miner did not suffer from legal pneumoconiosis, also undercut their opinions that the miner's disabling impairment was unrelated to his coal mine employment. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013); *see also Brandywine Explosives &*

[8] Dr. Rosenberg opined that the miner's coal mine dust exposure was not the cause of his pulmonary impairment because the miner's pulmonary function studies indicated a reduced FEV1/FVC ratio, and not a preserved FEV1/FVC ratio. Employer's Exhibit 7 at 9. Although Dr. Rosenberg noted that he agreed with the Department of Labor that "[chronic obstructive pulmonary disease] may be detected by a decrease in the FEV1 and FEV1/FVC ratio, this does not generally apply to patients with legal [coal workers' pneumoconiosis]." *Id*. at 8.

[9] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Repsher, Fino, and Rosenberg, we need not address employer's remaining arguments regarding the weight he accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Supply v. Director, OWCP [*Kennard*], 790 F.3d 657, 668, BLR (6th Cir. 2015); *Goodin*, 743 F.3d at 1346 n.20, 25 BLR at 2-579 n.20; Decision and Order at 18. Therefore, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Because claimant established invocation of the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits in the miner's claim.

Benefits Commencement Date

Employer challenges the administrative law judge's determination regarding the commencement date of benefits in the miner's claim. Employer contends that benefits should not commence prior to January 2008, the month in which the miner requested modification of the initial denial of his claim. We disagree. Because the administrative law judge based his decision to grant modification on the correction of a mistake in a determination of fact,[10] the miner was entitled to benefits from the date he became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Eifler v. Peabody Coal Co.*, 926 F.3d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

Here, the administrative law judge determined that benefits should commence as of October 2006, the month in which the miner filed his claim. Decision and Order at 20. Because employer failed to rebut the Section 411(c)(4) presumption, the miner established all of the elements of entitlement. *See* 20 C.F.R. §§718.305(c), 718.202(a)(3), 718.204(c)(2). The administrative law judge did not credit any evidence that the miner was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim. Since substantial evidence supports the administrative law

[10] Contrary to employer's contention that the administrative law judge improperly granted modification based on a change in law, Employer's Brief at 17, the administrative law judge permissibly granted modification based upon a mistake in a determination of fact, namely, the ultimate fact of the miner's eligibility for benefits. *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999) (holding that the scope of modification based on correcting a mistake of fact is broad, encompassing "the ultimate issue of benefits eligibility").

judge's finding that the medical evidence does not reflect the date upon which the miner became totally disabled due to pneumoconiosis, we affirm the administrative law judge's determination that benefits are payable from October 2006, the month in which the miner filed his claim. 20 C.F.R. §725.503(b).

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 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 20-21. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to receive 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).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge