U.S. Department of Labor

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

BRB No. 15-0149 BLA

LINDA PYLE[1] (o/b/o GEORGE PYLE, deceased) Claimant-Respondent v. ROCHESTER & PITTSBURGH COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/08/2015 DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Margaret M. Scully (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

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

[1] The miner died on February 16, 2013. Employer's Exhibit 17. Claimant, the miner's surviving spouse, is pursuing the miner's claim. Hearing Tr. at 4, 10-11.

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-5377) of Administrative Law Judge Richard A. Morgan awarding benefits on a claim filed pursuant to 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 September 30, 2010.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited the miner with twenty-one years of coal mine employment,[3] at least fifteen years of which were spent in underground mines, and found that the evidence established 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 rebuttable presumption that the miner was totally disabled due to pneumoconiosis set forth at Section 411(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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,

[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 coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory impairment. Employer asserts that the administrative law judge failed to consider all contrary probative evidence, and misallocated the burden of proof by requiring employer to disprove the existence of a totally disabling respiratory impairment. Employer's Brief at 19. Employer's contentions lack merit.

Evaluating the evidence relevant to total disability, the administrative law judge initially considered the results of three pulmonary function studies, and three blood gas studies, conducted on November 30, 2010, August 16, 2011, and January 11, 2012.[5] The administrative law judge noted correctly that, with the exception of one study yielding qualifying[6] results in its pre-bronchodilator values only, all three pulmonary function studies produced non-qualifying results.[7] Decision and Order at 7, 25-26; Director's Exhibit 10; Claimant's Exhibit 4; Employer's Exhibit 1A. The administrative law judge further correctly noted that, in contrast, all three of the blood gas studies produced

[5] The administrative law judge further found that the record contains no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 25.

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The pulmonary function study dated November 30, 2010, conducted in conjunction with Dr. Celko's examination of the miner, produced non-qualifying values both before, and after, the administration of bronchodilators. Director's Exhibit 10. The study dated August 16, 2011, conducted in conjunction with Dr. Fino's examination of the miner, produced qualifying pre-bronchodilator values, but non-qualifying post-bronchodilator values. Employer's Exhibit 1A. Finally, the January 11, 2012 study, performed by Dr. Celko, produced non-qualifying values both before, and after, the administration of bronchodilators. Claimant's Exhibit 4.

qualifying values. Decision and Order at 8, 26; Director's Exhibit 10; Claimant's Exhibit 5; Employer's Exhibit 1A.

Turning to the medical opinion evidence, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Celko, Sood, Fino, and Renn.[8] Decision and Order at 9-17, 27-29. Dr. Celko examined the miner and performed objective testing on behalf of the Department of Labor. Dr. Celko opined that the miner was "totally disabled from a pulmonary standpoint" based on "his moderate mixed restrictive obstructive lung disease and hypercarbic/hypoxemic respiratory failure," as demonstrated by pulmonary function and blood gas studies. Director's Exhibit 10; Decision and Order at 20.

The administrative law judge noted that Dr. Sood, who reviewed the available medical evidence, similarly opined that the miner had a totally disabling respiratory impairment, based on the obstructive and restrictive defects demonstrated by his pulmonary function studies, and his qualifying blood gas study results. Claimant's Exhibit 10 at 5-7; Claimant's 10A at 3.

Dr. Fino also opined that the miner was totally disabled from a respiratory standpoint, based on the "reduction in FVC and FEV1" and "significant oxygen transfer abnormality" reflected on his pulmonary function and blood gas studies. Employer's Exhibits 1A, 12; Decision and Order at 10-11.

Finally, Dr. Renn stated that the miner had reduced lung capacity and a gas exchange impairment, related to cardiovascular disease, morbid obesity, and obesity-hypoventilation syndrome. Decision and Order at 15-16; Employer's Exhibit 2 at 3, 7-8; Employer's Exhibit 13 at 33-35; Employer's Exhibit 18. Dr. Renn concluded that the miner was disabled as a whole man due to these extrinsic factors, but that his disabling impairment was not the consequence of an "intrinsic" lung disease. Decision and Order at 15-16; Employer's Exhibit 2 at 7-8. In a supplemental report, following his review of additional medical evidence, Dr. Renn stated that his prior conclusions were unchanged. Employer's Exhibit 18 at 2. Dr. Renn further stated that the miner "did not have a totally disabling respiratory/pulmonary impairment. The cause of his impairment was his chronic left ventricular congestive heart failure upon which, finally, was superimposed an

[8] The administrative law judge also summarized the opinions of Drs. Rasmussen, Fiehler, Qian, Perper and Tomashefski, and the miner's hospitalization and treatment records. Decision and Order at 27-28; Claimant's Exhibits 1, 8, 9; Employer's Exhibits 6-9, 10, 14-16. These physicians did not address whether the miner was totally disabled from a respiratory or pulmonary standpoint.

acute myocardial infarction, thus worsening his already precarious medical position." Decision and Order at 16; Employer's Exhibit 18 at 2.

The administrative law judge initially found that Dr. Sood's opinion, that the miner was totally disabled from a pulmonary standpoint, was "by far the most persuasive." Decision and Order at 29. The administrative law judge further found that it was "clear" that the physicians "agreed that the miner was totally disabled by his morbid obesity and heart disease, both non-pulmonary conditions which resulted in a respiratory and pulmonary disability." *Id.* The administrative law judge therefore concluded that "claimant has met [her] burden of proof in establishing the existence of total disability." *Id.*

Employer contends that the administrative law judge erred in evaluating the opinions of Drs. Fino and Renn. Employer specifically asserts that both "Dr. Fino and Dr. Renn attributed [the miner's] oxygen transfer abnormality and pulmonary abnormalities to his multiple medical problems which included cardiomegaly and massive obesity." Employer's Brief at 21. Thus, employer contends, because neither Dr. Fino nor Dr. Renn "attributed [the miner's] disability to primary lung disease," the opinions of Drs. Fino and Renn "should have been weighed and credited as contrary probative evidence along with the non-qualifying pulmonary function studies in determining whether claimant had established total disability pursuant to [20 C.F.R.] §718.204." Employer's Brief at 21.

Employer's contention lacks merit. The administrative law judge correctly noted that, pursuant to 20 C.F.R. §718.204(a), "if . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled . . . ." 20 C.F.R. §718.204(a); Decision and Order at 26-27. Thus, contrary to employer's contention, the issue is not whether a respiratory or pulmonary impairment is due to an intrinsic, or extrinsic, disease process; the relevant inquiry at 20 C.F.R. §718.204(b)(2) is solely whether a totally disabling respiratory or pulmonary impairment is, or was, present.

The administrative law judge correctly noted that Dr. Fino opined that the miner suffered from a totally disabling respiratory or pulmonary impairment, albeit from non-pulmonary causes. Decision and Order at 10-11; Employer's Exhibit 1A. Further, pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge permissibly interpreted Dr. Renn's opinion that the miner was "totally impaired from the total man standpoint" due to his reduced lung capacity and arterial oxygenation abnormalities, as an opinion that the miner suffered from a totally disabling respiratory or pulmonary impairment that resulted from non-pulmonary causes. *See Balsavage v. Director,*

OWCP, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002) (holding that it is the function of the administrative law judge to review the physicians' opinions); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 29. Thus, there is no merit to employer's assertion that the administrative law judge should have weighed the opinions of Drs. Fino and Renn against the evidence supporting total disability. Employer's Brief at 20. Because substantial evidence supports the administrative law judge's finding that "the physicians agreed" that the miner's multiple ailments resulted in "respiratory and pulmonary disability," we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997).

We further reject employer's contention that the administrative law judge erred in not weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b)(2), with the burden on claimant. Employer's Brief at 20. The administrative law judge acknowledged the non-qualifying nature of the miner's pulmonary function studies as a whole, but permissibly found that the physicians who reviewed the objective evidence of record agreed that it reflected the existence of a totally disabling respiratory or pulmonary impairment. *See Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Decision and Order at 8-16. Thus, the administrative law judge both separately considered the pulmonary function study and blood gas study results, pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and integrated his consideration of the objective test results into his consideration of the medical opinions. Decision and Order at 25-29. Therefore, as the administrative law judge adequately considered all contrary probative evidence, *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc), and concluded that "claimant [met her] burden of proof," we affirm the administrative law judge's finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).[9] Decision and Order at 29.

[9] As employer asserts, the administrative law judge stated, at the beginning of his total disability analysis, that claimant had established a "prima facie case that the miner was incapable of performing his usual coal mine employment" and that the burden fell to employer to prove otherwise. Employer's Brief at 20; Decision and Order at 26, *citing Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). The administrative law judge's statement is not accurate, as claimant bears the burden of proof of establishing, based on the evidence as a whole, that the miner was totally disabled by a respiratory or pulmonary impairment from performing his usual coal mine work. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); 20 C.F.R.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

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,[10] 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 established that the miner did not have legal pneumoconiosis, the administrative law judge noted that Dr. Perper, a pathologist, and Drs. Celko and Sood, each opined that the miner suffered from legal pneumoconiosis, in the form of centrilobular emphysema due, at least in part, to coal mine dust exposure. Decision and Order at 23; Director's Exhibit 10; Claimant's Exhibits 9, 9A, 10, 10A. In addition, Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of a respiratory impairment due, in part, to coal mine dust exposure. Claimant's Exhibit 1. In contrast,

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§§718.204(b)(1)(i), (ii); 718.305(b)(1)(iii); 725.103. In this case, however, any error in the administrative law judge's statement of the burden of proof is harmless, as his analysis reflects that he weighed the evidence relevant to total disability with the burden of proof on claimant. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

Dr. Tomashefski, a pathologist, and Drs. Renn and Fino, each opined that the miner did not have legal pneumoconiosis.[11]

The administrative law judge initially found that Dr. Sood submitted the most persuasive reports of record.[12] Decision and Order at 24. The administrative law judge further found that the opinions of Drs. Tomashefski, Renn, and Fino, were unpersuasive and inadequately explained as to the cause of the miner's emphysema. Decision and Order at 23-24. Therefore, the administrative law judge determined that the opinions of Drs. Tomashefski, Renn, and Fino were not sufficient to disprove the existence of legal pneumoconiosis. Decision and Order at 24.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Renn and Fino.[13] We disagree. As summarized by the administrative law judge, Dr. Renn initially opined that the miner did not have legal pneumoconiosis, or

[11] The administrative law judge also considered the opinions of Dr. Qian, the autopsy prosector, and Dr. Fiehler, who treated the miner and completed the death certificate, together with the miner's other hospitalization and treatment records. Decision and Order at 23-24. Dr. Qian diagnosed centrilobular emphysema, but did not offer an opinion as to its cause. Claimant's Exhibit 8. Dr. Fiehler stated that the miner died due to hypoxic, hypercarbic respiratory failure, due to morbid obesity. Employer's Exhibit 17. Dr. Fiehler also noted that the miner had a history of chronic obstructive pulmonary disease (COPD), but did not address its cause. Employer's Exhibit 15. The miner's other hospitalization and treatment records also document COPD, but do not address its cause. Employer's Exhibit 16.

[12] As employer does not challenge the administrative law judge's credibility determination regarding Dr. Sood's opinion, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[13] Employer raises no challenge to the administrative law judge's consideration of Dr. Tomashefski's opinion, relevant to the existence of legal pneumoconiosis. Dr. Tomashefski opined that the miner did not have legal pneumoconiosis, based on his observation that there was no spatial relationship between the miner's centrilobular emphysema and black pigment deposition within his lung to suggest that his centrilobular emphysema was due to coal mine dust exposure. Decision and Order at 23; Employer's Exhibit 10 at 3. The administrative law judge found the opinion of Dr. Tomashefski to be unpersuasive, in light of Dr. Perper's explanation that such a spatial relationship was not necessary to diagnose legal pneumoconiosis. Decision and Order at 23; Claimant's Exhibit 9A. As this determination is unchallenged on appeal, it is affirmed. *See Skrack*, 6 BLR at 1-711.

centrilobular emphysema, and attributed the miner's gas exchange impairment to cardiovascular disease and obesity. Decision and Order at 15-16, 23; Employer's Exhibits 2 at 7-8; Employer's Exhibit 13 at 33-34. In a supplemental report, Dr. Renn again asserted that the miner did not suffer from legal pneumoconiosis. Employer's Exhibit 18 at 2. While Dr. Renn acknowledged the presence of centrilobular emphysema, based on the unanimous pathology evidence he reviewed, he did not address the cause of the miner's emphysema. Employer's Exhibit 18. The administrative law judge noted that Dr. Fino similarly opined that the miner did not suffer from legal pneumoconiosis, and that his significant oxygen transfer abnormalities and reduced FVC and FEV1 were due to cardiomegaly and obesity. Employer's Exhibits 1A, 1B, 12, 19. The administrative law judge correctly noted that Dr. Fino did not explicitly address the existence of emphysema. Decision and Order at 24; Employer's Exhibits 1A, 1B, 12, 19.

Contrary to employer's argument, the administrative law judge permissibly questioned the opinions of Drs. Renn and Fino, that the miner did not suffer from legal pneumoconiosis, because he found that neither physician adequately addressed the miner's centrilobular emphysema, or explained how he eliminated the miner's twenty-one years of coal mine dust exposure as a potential cause of the disease. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 23-24. As the administrative law judge's basis for discrediting the opinions of Drs. Renn and Fino is rational and supported by substantial evidence, this finding is affirmed. *See Soubik*, 366 F.3d at 233, 23 BLR at 2-97; *Mancia*, 130 F.3d at 584, 21 BLR at 2-234.

Employer also asserts that the administrative law judge failed to adequately address the opinion of Dr. Fiehler, the treating physician who attended the miner during his final hospitalization and signed his death certificate. Employer's Brief at 29; Employer's Exhibits 15, 17. Contrary to employer's contention, the administrative law judge specifically addressed Dr. Fiehler's opinion, correctly noting that Dr. Fiehler did not list any coal mine dust-related disease either on the death certificate, or in the miner's hospitalization and treatment records. Decision and Order at 23. Moreover, as employer concedes, because Dr. Fiehler did not specifically address the absence of pneumoconiosis, Dr. Fiehler's conclusions are "insufficient to disprove the existence of legal pneumoconiosis." Employer's Brief at 30. Thus, employer has not demonstrated any error in the administrative law judge's consideration of Dr. Fiehler's opinion.

Accordingly, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[14] Employer's failure to disprove legal

[14] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Renn and Fino, we need not address employer's remaining

pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis.[15] *See* 20 C.F.R. §718.305(d)(1). Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis.

The administrative law judge next addressed whether employer could establish rebuttal by showing that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge permissibly discounted the disability causation opinions of Drs. Tomashefski, Renn, and Fino because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Soubik*, 366 F.3d at 234, 23 BLR at 2-99; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, BLR (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013). Thus, we affirm the administrative law judge's finding that employer failed to establish that no part of the miner's respiratory disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption. Therefore, we affirm the award of benefits.

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arguments regarding the weight he accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[15] We, therefore, need not address employer's allegations of error with respect to the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); Employer's Brief at 23-25.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge