U.S. Department of Labor

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

BRB No. 17-0118 BLA

GENEVA BONNER (Widow of RAYMOND BONNER) Claimant-Respondent v. APEX COAL CORPORATION and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/26/2017 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2014-BLA-05468) of Administrative Law Judge Scott R. Morris on a survivor's claim filed on February 28, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that the autopsy evidence was sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b).[2] The administrative law judge also found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief. In a reply brief, employer reiterates its previous contentions.[3]

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,

[1] Claimant is the widow of the miner, who died on December 4, 2012. Director's Exhibit 10.

[2] The administrative law judge credited the miner with at least seventeen years of surface coal mine employment but found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis under Section 411(c)(4) because she did not establish that the miner's surface coal mine employment was in conditions substantially similar to those in an underground mine. Decision and Order at 7-8; *see* 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. Section 422(*l*), 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was eligible for benefits at the time of his death is automatically entitled to receive survivor's benefits, is also not available to claimant because the miner's claims were denied.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established that the miner had clinical pneumoconiosis and that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15, 22-23.

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).

To establish entitlement in a survivor's claim without the benefit of a presumption, claimant must establish that the miner's death was due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). A miner's death will be considered due to pneumoconiosis if it was a substantially contributing cause of the miner's death. 20 C.F.R. §718.205(b)(1), (2), (4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Bradberry v. Director, OWCP*, 117 F.3d 1361, 1365, 21 BLR 2-166, 2-176 (11th Cir. 1997) (pneumoconiosis that hastens a miner's death by even a short period of time substantially contributes to death).

In this case, the administrative law judge found that claimant failed to establish the existence of either clinical or legal pneumoconiosis,[5] based on the x-ray and medical opinion evidence at 20 C.F.R. §718.202(a)(1), (4). Decision and Order at 20. He found however that claimant established the existence of clinical pneumoconiosis based on the autopsy evidence pursuant to 20 C.F.R. §718.202(a). *Id*. at 15.

Addressing whether claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), the administrative law judge considered only the death certificate prepared by Dr. McDermott and the medical opinion of Dr. Alexander. *Id*. at 23-24. The administrative law judge described Dr. McDermott's

[4] The record indicates that the miner's coal mine employment was in Alabama. Director's Exhibits 7, 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is "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).

findings as those of "the prosector," noting that the death certificate documented metastatic prostate cancer as the immediate cause of death, with ischemic cardiomyopathy, chronic obstructive pulmonary disease (COPD)/asthma and "black lung" as underlying causes, "per the autopsy report."[6] *Id*. at 24; *see* Director's Exhibit 10.

The administrative law judge then observed: "Dr. Alexander, who performed the autopsy, found that the cause of death was acute exacerbation of [COPD]. He found overwhelming evidence of COPD with advanced emphysema and pneumoconiosis due to coal mining exposure and considerable evidence to show an association between pneumoconiosis and emphysema."[7] Decision and Order at 24; *see* Director's Exhibit 11. The administrative law judge concluded:

> [E]ven though Dr. Alexander did not cite coal workers' pneumoconiosis as *the* primary cause of death, he listed it as one substantially contributing cause among others.
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> . . .
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> [The miner's] severe coronary artery disease, clinical history of prostatic adenocarcinoma, severe centribolar [sic] emphysema of all lobes, cardiomegaly do not disqualify [the miner] from eligibility because pneumoconiosis played a significant, even if not the most significant, role in his death. Because coal workers' pneumoconiosis played a substantial role as an underlying cause in [the miner's] death, I find that . . . [the miner's] death was due to pneumoconiosis.

Decision and Order at 24; *citing Bradberry v. Director, OWCP*, 117 F.3d 1361, 1365, 21 BLR 2-166, 2-176 (11th Cir. 1997).

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[6] Dr. McDermott identified metastatic prostate cancer as the sole cause of the miner's death on a death certificate he completed prior to the availability of Dr. Alexander's autopsy report. Hearing Transcript at 20-21. At claimant's request, Dr. McDermott prepared a second death certificate after reviewing Dr. Alexander's autopsy report. Director's Exhibit 10.

[7] Dr. Alexander stated: "There was overwhelming evidence identified at autopsy of chronic obstructive pulmonary disease [(COPD)] with advanced emphysema and pneumoconiosis due to coal mining exposure. There is considerable evidence to show association between pneumoconiosis and emphysema. Cause of death was found at autopsy to likely be acute exacerbation of [COPD]." Director's Exhibit 11.

Employer contends that the administrative law judge erred in finding that Dr. Alexander identified pneumoconiosis as a substantially contributing cause of the miner's death. Employer's Brief in Support of Petition for Review at 14. Employer suggests that the administrative law judge may have improperly attributed to Dr. Alexander, Dr. McDermott's identification of pneumoconiosis as a contributing cause of death on the death certificate. *Id*. Employer also contends that it is unclear whether the administrative law judge found that claimant established that the miner's death was due to clinical or legal pneumoconiosis. Finally, employer alleges that the administrative law judge erred in failing to consider the opinions of Drs. Caffrey and Rosenberg that neither pneumoconiosis nor coal dust exposure played a role in the miner's death. *Id*. at 12-14, 16-19.

Taken together, employer argues that the administrative law judge did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that an administrative law judge accurately address all relevant evidence, resolve all material issue of fact and law, and set forth an explanation for each of his findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We agree.

As employer maintains, the administrative law judge mistakenly identified Dr. Alexander as the physician who listed coal workers' pneumoconiosis as a substantially contributing cause of the miner's death, when it was Dr. McDermott who listed this on the death certificate. Decision and Order at 24; Director's Exhibit 10. The administrative law judge therefore did not address whether Dr. Alexander's conclusion that the "[c]ause of death was found at autopsy to likely be acute exacerbation of [COPD]," supported a finding of death due to pneumoconiosis under 20 C.F.R. §718.205(b). Director's Exhibit 11.

The administrative law judge also did not specifically indicate whether he found that the miner's death was hastened by clinical pneumoconiosis or legal pneumoconiosis. This distinction is significant in light of Dr. Alexander's reference to exacerbation of COPD as the cause of death *and* the administrative law judge's determination that claimant did not establish that the miner had legal pneumoconiosis, i.e., an obstructive or restrictive impairment significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 20. Finally, employer is correct in asserting that the administrative law judge erred failing to consider all of the relevant evidence, in the form of the opinions of Drs. Caffrey and Rosenberg, that pneumoconiosis did not cause or hasten the miner's death. Director's Exhibits 19, 20; Employer's Exhibit 5.

In light of these errors and omissions, the administrative law judge's findings under 20 C.F.R. §718.205(b) do not accord with the APA and prevent us from determining whether they are rational and supported by substantial evidence. *See O'Keeffe*, 380 U.S. 359, 362; *Wojtowicz*, 12 BLR at 1-165. We must therefore vacate the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b) and remand this case to the administrative law judge for a specific determination of whether claimant proved that the miner's death was due to clinical or legal pneumoconiosis.

On remand, the administrative law judge must first reconsider the death certificate prepared by Dr. McDermott, and the medical opinions of Drs. Alexander, Caffrey and Rosenberg, to determine whether claimant has established that the miner's death was due to *clinical* pneumoconiosis at 20 C.F.R. §718.205(b) under the standard adopted by the Eleventh Circuit in *Bradberry*.[8] In addressing this issue, the administrative law judge is required to reconsider the opinions of Drs. Alexander and Rosenberg regarding the extent of the miner's clinical pneumoconiosis because this is relevant to weighing the medical opinions on death due to clinical pneumoconiosis at 20 C.F.R. §718.205(c).[9] If the

[8] We reject employer's contention that the administrative law judge should have applied the standard adopted by the United States Court of Appeals for the Sixth Circuit in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003), which requires proof that pneumoconiosis hastened the miner's death "through a specifically defined process that reduces the miner's life by an estimable time." Employer's Brief in Support of Petition for Review at 13. Because this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, the Sixth Circuit's holding in *Williams* does not constitute binding precedent.

[9] Employer correctly alleges that the administrative law judge erred in rejecting Dr. Rosenberg opinion that the miner's pneumoconiosis was so minimal that it could not be detected on x-ray, to the extent that Dr. Rosenberg's opinion is consistent with the administrative law judge's finding that the x-ray evidence is negative for pneumoconiosis. Decision and Order at 19; Director's Exhibit 19. The administrative law judge also erred in rejecting Dr. Rosenberg's opinion based on his view that simple pneumoconiosis is "rarely progressive." *See. Nat'l Mining Ass'n v. Chao*, 292 F.2d 849, 863 (2002).

The administrative law judge also did not adequately address Dr. Caffrey's criticisms of Dr. Alexander's pathology findings. The administrative law judge did not adequately explain why Dr. Caffrey's observation of only two lesions of clinical pneumoconiosis necessarily undercut Dr. Caffrey's assertion that Dr. Alexander had not identified the required diagnostic criteria for clinical pneumoconiosis. *See Wojtowicz v.*

administrative law judge finds that claimant has not established that the miner's death was due to clinical pneumoconiosis, he must determine whether claimant has established that the miner's death was due to *legal* pneumoconiosis.

To properly assess whether legal pneumoconiosis caused the miner's death, the administrative law judge must first reconsider his finding that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order at 20. The administrative law judge discredited the conflicting medical opinions of Drs. O'Reilly and Rosenberg, while also finding that Dr. Rosenberg's opinion was entitled to greater weight because he "reviewed additional and more recent medical records in composing his report." Decision and Order at 19-20. The administrative law judge did not provide valid rationales for his credibility determinations.

Regarding Dr. O'Reilly's opinion diagnosing an obstructive impairment due to smoking and coal dust inhalation, the administrative law judge erred in finding that Dr. O'Reilly had to diagnose a totally disabling respiratory or pulmonary impairment to satisfy the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 19. Furthermore, total respiratory or pulmonary disability is not an element of entitlement in this survivor's claim where the Section 411(c)(4) presumption is not available because claimant failed to establish at least fifteen years of qualifying coal mine employment. 20 C.F.R. §§718.205(a), 718.305(b)(1), (2).

As to Dr. Rosenberg's opinion ruling out legal pneumoconiosis, the administrative law judge found that it was better-documented than Dr. O'Reilly's opinion, without addressing Dr. Rosenberg's reliance, in part, on the length of time that passed between the miner's retirement from mining and the development of his COPD/emphysema. Decision and Order at 20. This view could be interpreted as at odds with the DOL's recognition of pneumoconiosis, whether clinical or legal, as a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust

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Duquesne Light Co., 12 BLR 1-161, 1-165 (1989). The administrative law judge on remand must reconsider whether Dr. Alexander's diagnosis of extensive clinical pneumoconiosis based on a severe amount of anthracotic pigment deposition on gross examination and microscopic findings of "coal miner macules" with fibrosis in the miner's lungs is clinical pneumoconiosis under 20 C.F.R. §718.201(a). In addition, the administrative law judge erred in failing to address whether Dr. Alexander linked the anthracosis he observed in the miner's lymph nodes to fibrosis in the miner's lungs before crediting those findings as supportive of a finding of clinical pneumoconiosis. *See Hapney v. Peabody Coal Co.*, 22 BLR 1-104, 1-116 (2001).

exposure." 20 C.F.R. §718.201(c); *see* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40, 25 BLR 2-675, 685-87 (6th Cir. 2014); *Consolidation Coal Co. v. Kramer,* 305 F.3d 203, 209-10, 22 BLR 2-467, 2-478-79 (3d Cir. 2002). In addition, the administrative law judge did not resolve the conflict between Dr. Rosenberg's observation of minimal dust retention in the miner's emphysematous lung tissue, and the administrative law judge's crediting of Dr. Alexander's description of severe anthracotic pigment and fibrosis throughout the miner's lungs. Decision and Order at 15; Director's Exhibits 11, 19.

Finally, the administrative law judge erred in omitting Dr. Alexander's opinion from consideration under 20 C.F.R. §718.202(a)(4), as Dr. Alexander's statement that there was an "association" between the miner's emphysema and "pneumoconiosis" could constitute a diagnosis of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2), (b). Director's Exhibit 19. If the administrative law judge finds that claimant has proven that the miner had legal pneumoconiosis, he must then consider whether claimant has proven that the miner's death was due to legal pneumoconiosis at 20 C.F.R. §718.205(b).

When weighing the relevant medical opinions on remand under 20 C.F.R. §718.205(b) and, if necessary, 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the physicians and the extent to which their opinions are supported by the evidence and explained. *See Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As previously indicated, the administrative law judge may also consider the extent to which each physician's opinion is consistent with the premises set forth in the preamble to the 2001 revised regulations. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). The administrative law judge must render his findings on remand in compliance with the APA by explicitly identifying the relevant evidence, rendering findings as to its credibility and probative value, and setting forth these findings in detail, including the underlying rationales. *See Wojtowicz,* 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge