U.S. Department of Labor

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

BRB No. 14-0172 BLA

CLARA K. DUFFIELD (WIDOW of RICHARD L. DUFFIELD) Claimant-Petitioner	)	
v.	)	DATE ISSUED: 02/26/2015
ONEIDA COAL COMPANY, INCORPORATED Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DECISION and ORDER

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

Clara K. Duffield, Sutton, West Virginia, *pro se*.

John C. Artz (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2011-BLA-6050) of Administrative Law Judge Richard A. Morgan, 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).[1] This case involves a survivor's claim filed on September 13, 2010. The administrative law judge accepted the parties'

[1] Claimant is the widow of the miner, who died on June 19, 2010. Decision and Order at 4; Director's Exhibit 4.

stipulation that the miner had coal workers' pneumoconiosis, credited the miner with at least fifteen years of underground coal mine employment, and found that claimant had a smoking history of eighty-six pack years. The administrative law judge then determined that claimant established that the miner was totally disabled by a pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge determined, therefore, that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). Based on his finding that the evidence established that the miner's death was not due to pneumoconiosis, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, submitted a letter in which he stated that he would not file a substantive response brief, unless requested to do so.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[3] 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).

Once the administrative law judge determines that claimant has invoked the presumption that the miner's death was due to pneumoconiosis under amended Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that the miner did not have clinical pneumoconiosis,[4] or legal pneumoconiosis,[5] or by

[2] Under amended Section 411(c)(4), a 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 suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] The record reflects that the miner's coal mine employment was in West Virginia. Decision and Order at 2 n.2; Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[4] The regulation at 20 C.F.R. §718.201(a)(1) provides:

establishing that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201(a). 20 C.F.R. §718.305(d)(2); *see Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). In this case, the administrative law judge initially set forth the requirements for invoking, and rebutting, the amended Section 411(c)(4) presumption of death due to pneumoconiosis, and stated, "[a]s discussed below, the employer has rebutted the presumption by evidence establishing that the miner's death did not arise in whole or in part out of dust exposure in the miner's coal mine employment." Decision and Order at 18. After determining that claimant invoked the presumption, however, the administrative law judge summarized claimant's burden to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205[6] and then considered the relevant medical opinion evidence. *Id*. at 22-25. The administrative law judge concluded that "the evidence establishes that pneumoconiosis was not a substantially contributing cause of death," and denied benefits. *Id*. at 25.

Because we cannot discern whether the administrative law judge weighed the relevant evidence with the burden on employer to affirmatively prove that no part of the

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> "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[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).

[6] To establish entitlement to survivor's benefits under 20 C.F.R. Part 718, without the presumption, claimant is required to demonstrate that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that the miner's death was caused by complications of pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39, 1-40-1-41 (1988). 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 Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92 (4th Cir. 1992).

miner's death was caused by pneumoconiosis, or with the burden on claimant to affirmatively prove that the miner's death was due to pneumoconiosis, we must vacate the denial of benefits and remand the case to the administrative law judge for reconsideration. On remand, the administrative law judge must initially consider whether employer has rebutted the amended Section 411(c)(4) presumption, while placing the burden on employer to affirmatively establish that the miner did not have legal pneumoconiosis, and to affirmatively establish that pneumoconiosis, as defined in 20 C.F.R. §718.201, played no part in the miner's death.[7] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(2); *see Copley*, 25 BLR at 1-89. If the administrative law judge determines that employer has established rebuttal, he must specifically consider whether claimant has affirmatively established entitlement to survivor's benefits under 20 C.F.R. Part 718, without relying on the presumption.[8]

We will now review the administrative law judge's weighing of the medical opinion evidence. On the death certificate, dated June 19, 2010, Dr. Stewart attributed the miner's death to liver failure, as a consequence of metastatic colon cancer. Director's Exhibit 9. In the section requesting a listing of "[o]ther significant conditions contributing to death but not resulting in the immediate cause," Dr. Stewart identified "chronic obstructive lung disease and CAD [(coronary artery disease)], HBP [(high blood pressure)], and coal workers' pneumoconiosis." *Id*.

[7] The parties' stipulation to the existence of coal workers' pneumoconiosis, and the administrative law judge's finding that the autopsy evidence was sufficient to establish the existence of coal workers' pneumoconiosis, precludes employer from affirmatively proving that the miner did not have clinical pneumoconiosis. 20 C.F.R. §§718.201(a)(1), 718.305(d)(2)(i)(B); Decision and Order at 13. Because employer cannot affirmatively prove that the miner did not have clinical pneumoconiosis, employer cannot rebut the amended Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(i), which requires that employer establish that the miner did not have either legal, or clinical, pneumoconiosis. Rather, employer can establish rebuttal only by affirmatively proving that no part of the miner's death was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(2)(ii).

[8] Because the administrative law judge accurately found that there is no evidence of complicated pneumoconiosis, we affirm his finding that claimant is not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304; Decision and Order at 14. Consequently, claimant could not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b)(3).

Dr. Anselmo, a Board-certified pathologist, performed the miner's autopsy and submitted a report dated June 21, 2010. In his report, Dr. Anselmo diagnosed metastatic adenocarcinoma in all lung lobes, simple coal workers' pneumoconiosis, and bronchopneumonia, but did not offer an opinion as to whether any of these conditions contributed to the miner's death. Director's Exhibit 11. Dr. Anselmo opined in a subsequent letter, dated March 13, 2012, that "the finding of coal workers' pneumoconiosis contributed to the [miner's] demise to a certain degree." Claimant's Exhibit 9.

Dr. Tomashefski, who is a Board-certified pathologist, examined histologic slides and other evidence and, in a report dated August 3, 2012, diagnosed "extremely minimal" coal workers' pneumoconiosis, moderate to severe bullous focal, panlobular and centrilobular emphysema not due to coal dust, focal acute bronchopneumonia, and advanced metastatic colonic adenocarcinoma. Employer's Exhibit 1. Dr. Tomashefski stated that metastatic colonic adenocarcinoma was the underlying cause of the miner's death and that hepatic failure, due to metastatic adenocarcinoma, was the immediate cause of death. *Id*. Dr. Tomashefski further indicated that pneumoconiosis was an incidental microscopic finding with no clinical significance and could not have caused any respiratory symptoms or impairment. *Id*. Dr. Tomashefski also opined that respiratory failure due to the miner's emphysema and acute bronchopneumonia were contributory factors, but that the emphysema was due to smoking. *Id*. Dr. Tomashefski concluded that neither pneumoconiosis nor coal dust exposure caused, hastened or contributed to the miner's death. *Id*.

Dr. Zaldivar, a Board-certified pulmonologist, authored a medical report dated May 10, 2013, based upon his review of the miner's medical records. Employer's Exhibit 2. He diagnosed metastatic colon cancer, "minimal" simple coal workers' pneumoconiosis due to coal dust exposure, chronic obstructive pulmonary disease (COPD) and severe bullous emphysema caused by smoking, and pneumonia. *Id*. at 5-6. He opined that the miner's pneumoconiosis did not result in any pulmonary impairment, and did not cause or contribute to the miner's death. *Id*. at 6. Dr. Zaldivar stated that the miner's death resulted from the massive burden of cancer, which metastasized from his sigmoid colon. *Id*. Dr. Zaldivar further indicated that the miner's bullous emphysema was not a manifestation of coal workers' pneumoconiosis, but instead was due entirely to smoking. *Id*.

In weighing the relevant opinions, the administrative law judge acted within his discretion in finding that Dr. Stewart's comments on the death certificate were conclusory and, therefore, not reasoned on the issue of the extent to which pneumoconiosis contributed to the miner's death. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 24-25. Similarly, the administrative law judge

permissibly found that Dr. Anselmo's opinion was not reasoned, because he failed to identify, with specificity, the extent to which pneumoconiosis contributed to the miner's death. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-31 (4th Cir. 1997); Decision and Order at 24-25; Employer's Exhibit 9. We affirm, therefore, the administrative law judge's finding that the opinions of Drs. Stewart and Anselmo as to whether pneumoconiosis played a part in the miner's death were not reasoned. Decision and Order at 24-25.

With respect to the opinions of Drs. Tomashefski and Zaldivar, the administrative law judge indicated that Dr. Zaldivar performed a "comprehensive review of multiple enumerated medical records," and stated:

> Highly-qualified pathologist [Dr.] Tomashefski, after reviewing a plethora of clinical evidence and the histologic slides[,] described the most minimal, i.e., "extremely minimal" pneumoconiosis. Likewise, the well-qualified Dr. Zaldivar described the pneumoconiosis as "minimal" and not having any impact on the miner's death, which was due to metastatic adenocarcinoma, as [Dr. Anselmo] and Dr. Tomashefski related.

Decision and Order at 9, 25. Although the administrative law judge accurately characterized the qualifications of Drs. Tomashefski and Zaldivar, and the scope of their review of the miner's medical records, we cannot affirm his finding that their opinions were sufficient to affirmatively rebut the presumption that the miner's death was due to pneumoconiosis. The administrative law judge omitted from consideration a determination of whether employer, pursuant to its burden on rebuttal, established that no part of the miner's death was due to legal pneumoconiosis, which is required under 20 C.F.R. §718.305(d)(2)(i)(A).

The administrative law judge addressed the issue of the existence of legal pneumoconiosis earlier in his Decision and Order, stating:

> Of all the physicians[,] only Dr. Rasmussen suggested the miner may have had legal pneumoconiosis; Drs. Zaldivar and Tomashefski rule it out. The latter two determined that the COPD/emphysema was solely due to smoking. Given Dr. Rasmussen was less than explicit and only had a snapshot of the miner's condition, in 1989, and that Drs. Zaldivar and [Tomashefski][9] had a full panoply of medical and pathology evidence to consider, I find their opinions rule out legal pneumoconiosis.

[9] The administrative law judge referenced Dr. Rasmussen, rather than Dr. Tomashefski, but it is clear from the context that he meant to refer to the latter physician.

Decision and Order at 13-14. The administrative law judge's weighing of the medical opinions of Drs. Zaldivar and Tomashefski does not comply with the Administrative Procedure Act (APA),[10] as he did not fully address whether their opinions were adequately documented and reasoned.[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1984). In addition, the administrative law judge appeared to place the burden on claimant to establish that the miner suffered from legal pneumoconiosis, rather than on employer to affirmatively disprove the existence of the disease.

It is undisputed that Drs. Zaldivar and Tomashefski concluded that the miner's emphysema was due to smoking, and that coal dust exposure did not play any causal role. Employer's Exhibits 1 at 6, 2 at 7-8. However, it is not apparent that these physicians based their opinions on an accurate understanding of the miner's coal mine employment and smoking histories – an important factor in a case in which the physicians are considering whether the miner's lung disease is due to coal dust exposure, smoking, or a combination of the two. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). In order to assess whether the physicians met this criteria, the administrative law judge must render a definitive finding as to the length of each history. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). In this case, the administrative law judge found that the miner had an eighty-six pack year history of smoking, "based on the miner's treatment records."[12] Decision and Order at 4. The administrative law judge did not otherwise identify the evidence that he relied on, or explain how he arrived at his finding, as required by the APA. Because we cannot discern from the voluminous

[10] The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[11] The administrative law judge observed, in a footnote, that he "found each medical opinion documented and reasoned, unless otherwise noted," and that all of the opinions were reasoned, as "the documentation supports the doctor's assessment of the miner's health." Decision and Order at 13 n.20. Under the facts of this case, this statement does not satisfy the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1984).

[12] Later in his Decision and Order, the administrative law judge observed that the miner's treatment records "reflect a smoking history between 40 pack-years and 86 pack[-]years." Decision and Order at 10.

treatment records whether it is supported by substantial evidence, we vacate the administrative law judge's finding, and instruct him to render a finding on the length of the miner's smoking history on remand while explicitly identifying the supporting evidence and the underlying rationale.[13] *See Wojtowicz*, 12 BLR at 1-165.

In addition, the administrative law judge did not render a specific finding as to the miner's coal mine employment history. Rather, he found that the miner had "at least fifteen years of coal mine employment." Decision and Order at 3, 4. We vacate, therefore, the administrative law judge's finding that the opinions of Drs. Zaldivar and Tomashefski were sufficient to establish that the miner did not have legal pneumoconiosis and remand this case to the administrative law judge for him to render a determination as to the specific length of the miner's coal mine employment. He must then reconsider the opinions of Drs. Zaldivar and Tomashefski in light of their understanding of the miner's coal mine employment and smoking histories.

The administrative law judge must also reconsider whether the rationales that Drs. Zaldivar and Tomashefski actually provided for attributing the miner's emphysema solely to smoking are credible. In this regard, Dr. Tomashefski stated:

> Emphysema in [the miner's] lung is not spatially associated with coal macules, and is disproportionately severe relative to the minimal extent of pneumoconiosis and the mild degree of black pigment present within the lung. In my opinion, within reasonable degree of medical certainty, [the miner's] mixed panlobular and centrilobular emphysema is due to his sustained exposure to tobacco smoke over many years.

Employer's Exhibit 1 at 6. The administrative law judge did not consider whether Dr. Tomashefski's opinion is consistent with the consensus of medical opinion, recognized by the Department of Labor, that the damage caused by smoking and coal dust is based on similar mechanisms, that coal mine dust causes clinically significant obstructive disease, even in the absence of clinical pneumoconiosis, and that cigarette smoke and dust exposure have additive effects. *See* 65 Fed. Reg. 79,939-43 (Dec. 20, 2000); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR at 2-255, 265 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR

[13] Dr. Rasmussen recorded a smoking history of twenty-five pack years. Claimant's Exhibit 10. Dr. Tomashefski indicated that the miner smoked for forty years, but did not report how many packs he smoked per day. Employer's Exhibit 1. Dr. Zaldivar stated that the miner had smoked for eighty-six pack years. Employer's Exhibit 2. Claimant testified at the hearing that the miner smoked about a pack per day from at least 1972 until approximately 2000. Hearing Transcript at 27, 34.

2-115, 2-130 (4th Cir. 2012). The administrative law judge also did not apply this analysis to Dr. Zaldivar's opinion, which includes his comment that:

> [C]ritical clinical evaluation in this case allows me to conclude that the impairment which was measured as COPD in the breathing test was not a result of coal worker's pneumoconiosis. It was the result of bullous emphysema unrelated to coal mining. The pulmonary function abnormality taken together with the 80 plus years of smoking most reasonably is attributable to the smoking habit which caused the bullous emphysema. This occurs in any individual regardless of their occupation.

Employer's Exhibit 2 at 8; *see* 65 Fed. Reg. 79,939-43 (Dec. 20, 2000); *Cochran*, 718 F.3d at 323, 25 BLR at 2-265. The administrative law judge must address the extent to which the opinions of Drs. Tomashefski and Zaldivar are consistent with the scientific views adopted by the Department of Labor. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-130.

In sum, we have vacated the administrative law judge's findings that the evidence established that the miner did not have legal pneumoconiosis and that the miner's death did not arise in whole, or in part, out of pneumoconiosis. On remand, the administrative law judge must first reconsider whether employer has affirmatively established the absence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(A). In so doing, the administrative law judge must make a finding as to the length of the miner's coal mine employment and determine whether Drs. Zaldivar and Tomashefski had an accurate understanding of the miner's coal mine employment and smoking histories. The administrative law judge must also determine whether Drs. Zaldivar and Tomashefski based their opinions on premises that conflict with the medical science accepted by the Department of Labor. In light of his findings at 20 C.F.R. §718.305(d)(2)(i)(A), the administrative law judge must reconsider, at 20 C.F.R. §718.305(d)(2)(ii), whether employer has rebutted the presumed causal connection between pneumoconiosis and the miner's death by establishing that no part of the miner's death was caused by

pneumoconiosis as defined in 20 C.F.R. §718.201(a).[14] *See Copley*, 25 BLR at 1-89. If the administrative law judge determines that employer has rebutted the amended Section 411(c)(4) presumption, he must consider whether claimant can establish entitlement to survivor's benefits, without the presumption.

In rendering his credibility determinations as to each of the issues he must reconsider on remand, the administrative law judge is required to resolve all questions of fact and law, and set forth his findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Denying 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.

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BETTY JEAN HALL, Acting
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

[14] Regardless of whether the administrative law judge finds, on remand, that employer has rebutted the presumed existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(2)(i)(A), he must consider whether employer has rebutted the amended Section 411(c)(4) presumption by establishing that no part of the miner's death was caused by clinical pneumoconiosis at 20 C.F.R. §718.305(d)(2)(ii), based on the parties' stipulation to the existence of coal workers' pneumoconiosis, and the administrative law judge's finding that the autopsy evidence was sufficient to establish the existence of the disease. 20 C.F.R. §§718.201(a)(1), 718.305(d)(2)(ii).