U.S. Department of Labor

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

BRB Nos. 15-0171 BLA
and 15-0173 BLA

PEGGY A. CONLEY (Widow of, and on behalf of, the Estate of DONALD D. CONLEY)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/23/2016
and	)	
CONSOL ENERGY INCORPORATED c/o WELLS FARGO DISABILITY MANAGEMENT	)	
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 Granting Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier (employer).

Jeffrey S. Goldberg (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 appeals the Decision and Order Granting Benefits (2012-BLA-05200 and 2012-BLA-05643) of Administrative Law Judge Stephen R. Henley, rendered on a miner's claim and a survivor's claim[1] pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with "well in excess of fifteen years of qualifying coal mine employment" and accepted employer's concession that claimant established total respiratory or pulmonary disability and the additional requirements necessary to invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012).[2] Decision and Order at 5. The administrative law judge further found that employer failed to rebut the presumption and, therefore, awarded benefits in the miner's claim. Because the miner was entitled to benefits at the time of his death, the administrative law judge also found that claimant was automatically

[1] Claimant is the surviving spouse of the miner, who died on December 12, 2011. Director's Exhibit 41. The administrative law judge determined that the miner's prior claim was not included in the record, as it was withdrawn before disposition. Decision and Order at 2 n.3; Director's Exhibits 28, 32. Claimant is pursuing, on behalf of the miner's estate, the claim he filed on September 13, 2010. Director's Exhibits 2, 41, 45. Claimant also filed a survivor's claim on January 9, 2012. Survivor's Claim Exhibit 1. The administrative law judge granted claimant's unopposed motion waiving her right to an oral hearing and adjudicated both claims, based on his review of the record. Decision and Order at 3.

[2] Section 411(c)(4) sets forth a rebuttable presumption of total disability due to pneumoconiosis that is invoked if the miner establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in substantially similar conditions, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012) and awarded benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), has responded, and urges the Board to affirm the award of benefits.[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 supported by substantial evidence, is rational, and is 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).

I. The Miner's Claim

A. Rebuttal of the Presumed Existence of Pneumoconiosis

Upon invocation of the Section 411(c)(4) presumption, the burden shifted to employer to affirmatively prove that the miner did not have legal and clinical pneumoconiosis,[5] or that no part of his disability was caused by pneumoconiosis as

[3] We affirm, as unchallenged on appeal, the administrative law judge's acceptance of employer's concession that the miner suffered from a totally disabling respiratory or pulmonary impairment, and his findings that the miner had over fifteen years of qualifying coal mine employment, and that the Section 411(c)(4) presumption was invoked in the miner's claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2; Director's Exhibit 2.

[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).

defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Regarding the first method of rebuttal, the administrative law judge found that, although employer established the absence of clinical pneumoconiosis, the medical opinions of employer's physicians, Drs. Rosenberg and Castle, were insufficient to rebut the presumed existence of legal pneumoconiosis. Decision and Order at 20. The administrative law judge determined that neither physician adequately explained why the miner's thirty plus years of coal mine dust exposure did not contribute to, or aggravate, his disabling obstructive impairment. *Id*.

Employer argues that the administrative law judge erred in relying on the preamble to the 2001 regulatory revisions to apply a "medical principle that . . . all obstructive lung diseases have arisen, at least in part, out of coal mine employment." Brief in Support of Petition for Review at 18. Employer maintains that the statement of the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions, that coal dust-induced emphysema and cigarette smoking-induced emphysema occur through "similar mechanisms" does not establish as a regulatory fact, that respiratory damage caused by coal dust cannot be differentiated from that caused by smoking. *Id*., *quoting* 65 Fed. Reg. 79,939, 79,940 (Dec. 20, 2000). Citing the dissenting opinion in *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 326, 25 BLR 2-255, 2-267 (4th Cir. 2013) (Traxler, C.J., dissenting), employer asserts that the opinions of Drs. Castle and Rosenberg are consistent with the preamble because they agreed that "legal pneumoconiosis [can] cause an obstructive defect" and that "pneumoconiosis [can] cause disability in the absence of a positive x-ray." Brief in Support of Petition for Review at 19-20. Employer's allegations are without merit.

Rebuttal under 20 C.F.R. §718.305(d)(1)(i)(A) in this case requires employer to affirmatively establish that the miner did not have legal pneumoconiosis, which is defined under 20 C.F.R. §718.201(a)(2) as a "chronic lung disease or impairment and its sequelae arising out of coal mine employment." For the purposes of 20 C.F.R. §718.201(a)(2), "arising out of coal mine employment" means "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Contrary to employer's contention, the administrative law judge did not create an irrebuttable presumption that the miner's totally disabling obstructive impairment arose out of coal mine employment. Rather, he correctly determined that, on rebuttal, the burden shifts to employer to affirmatively prove that the miner did not have legal pneumoconiosis by establishing that the requisite association between coal dust exposure and the miner's totally disabling obstructive impairment did not exist. 20 C.F.R. §718.305(d)(1)(i)(A); *see Bender*, 782 F.3d at 134-35; Decision and Order at 17.

The administrative law judge's application of this standard to find the opinions of Drs. Castle and Rosenberg insufficient to satisfy employer's burden is rational and supported by substantial evidence. Contrary to employer's contention, the administrative law judge did not rely on the statements of the DOL in the preamble regarding the similar effects of smoking and coal dust exposure on the lungs to preclude employer from establishing that smoking alone caused the miner's obstructive lung impairment. *See* 65 Fed. Reg. at 79,939, 79,943 (Dec. 20, 2000). Rather, the administrative law judge acted within his discretion in determining that, although both physicians acknowledged that coal dust exposure can cause airways obstruction, they identified the miner's extensive smoking history[6] as the sole cause of his obstructive impairment without explaining why coal dust exposure could not have been a contributing cause of the miner's impairment. Decision and Order at 16; *see* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Westmoreland Coal Co. v. Amick*, 289 F.App'x. 638, 639 (4th Cir. 2008); Decision and Order at 16, 17. The administrative law judge also rationally found that the opinions of Drs. Castle and Rosenberg are inconsistent with DOL's observation in the preamble that the National Institute for Occupational Safety and Health determined that chronic obstructive pulmonary disease (COPD) caused by coal dust exposure causes decrements in the FEV1/FVC ratio.[7] 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Looney*, 678 F.3d at 314-16, 25 BLR at 2-130; Decision and Order at 16. We further reject, therefore, employer's argument that the administrative law judge's finding is in error because the preamble merely states that coal mine dust-induced COPD "may" be detected from

[6] The administrative law judge found that the miner had a smoking history that was "similar" to the forty-seven pack-year smoking history of the miner in *Westmoreland Coal Co. v. Amick*, 289 F.App'x. 638, 639 (4th Cir. 2008). Decision and Order at 17. In *Amick*, the Fourth Circuit affirmed an administrative law judge's discrediting of physicians' opinions that did not consider both smoking and coal dust exposure as potential causes of the miner's chronic obstructive pulmonary disease (COPD). *Amick*, 289 F.App'x at 639.

[7] The administrative law judge correctly noted that, in Dr. Castle's September 19, 2014 deposition, he testified that the miner's FEV1/FVC ratio was significantly reduced which, "*typically* in coal workers' pneumoconiosis[-]induced obstruction you don't get that type of reduction … [t]here is a *general* preservation of that ratio." Decision and Order at 12, *quoting* Employer's Exhibit 8 at 29 (emphasis added). The administrative law judge also accurately indicated that Dr. Rosenberg opined that the miner had a reduced FEV1/FVC ratio, consistent with smoking-related COPD, and that coal dust-induced COPD is *characterized* by a preserved ratio. Decision and Order at 13; Employer's Exhibit 4 at 5-6; Employer's Exhibit 9 at 19-20.

decreases in the FEV1/FVC ratio. Brief in Support of Petition for Review at 15. The administrative law judge permissibly determined that the opinions of Drs. Castle and Rosenberg were deficient, as neither physician addressed whether the miner was suffering from an obstructive impairment where coal dust was a substantial contributing cause, or substantial aggravating factor. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 16. Lastly, the administrative law judge acted within his discretion in finding the opinions of Drs. Castle and Rosenberg to be contrary to 20 C.F.R. §718.201(c), which provides that legal pneumoconiosis "is recognized as a latent and progressive disease" that may become "detectable only after cessation of coal mine employment."[8] *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

The persuasiveness of a medical opinion is a matter for the administrative law judge to decide, and the Board is not empowered to reweigh evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Castle and Rosenberg, we affirm the administrative law judge's finding that employer failed to disprove the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[9] *See Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting).

[8] Dr. Castle stated that the miner's chronic bronchitis was not caused by coal mine dust exposure because his exposure ended in 1995, and that once exposure ceases, industrial bronchitis "will abate within a relatively short period of time, usually less than six months." Employer's Exhibit 8 at 12. Dr. Rosenberg opined that the changes reflected in the miner's FEV1 and FVC were not associated with coal mine dust because, although pneumoconiosis "can be latent and progressive, when it does occur, it's a fairly unusual phenomenon with respect to airways disease, but it can occur," and "I'm sure his continuous smoking after leaving the mines is clearly making [the miner's COPD] worse, and that's what's causing the problem." Employer's Exhibit 9 at 22-23.

[9] The administrative law judge found that employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 14-15. Because rebuttal of the presumed existence of pneumoconiosis requires affirmative evidence disproving the existence of both legal and clinical pneumoconiosis, the administrative law judge's finding that employer did not disprove legal pneumoconiosis precludes rebuttal under 20

C.F.R. §718.305(d)(1)(i). *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

B. Rebuttal of the Presumed Causal Relationship Between Pneumoconiosis and Total Disability

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); Decision and Order at 19. The administrative law judge permissibly discounted the disability causation opinions of Drs. Castle and Rosenberg because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See 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). Because the administrative law judge properly found that employer failed to disprove the existence of legal pneumoconiosis, or that no part of the miner's disability was due to pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption, and further affirm the award of benefits in the miner's claim. 30 U.S.C. §921(c)(4); *see Bender*, 782 F.3d at 138-43; *Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

II. 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*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge