U.S. Department of Labor

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

BRB No. 15-0184 BLA

REGINA K. BUCKLEY (Widow of FRED A. BUCKLEY) Claimant-Respondent v. SHREWSBURY COAL COMPANY and VALLEY CAMP COAL COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/29/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits – On Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits – On Remand (2011-BLA-05809) of Administrative Law Judge Thomas M. Burke, rendered on a survivor's claim[1] filed on August 9, 2010, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time. In its previous decision, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). *Buckley v. Shrewsbury Coal Co.*, BRB No. 13-0193 BLA, slip op. at 3 n.4 (Jan. 31, 2014) (unpub.). The Board, however, vacated the administrative law judge's determination that the miner had twenty-one years of qualifying coal mine employment, for purposes of invoking the presumption at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. *Id*. at 6. In the interest of judicial economy, the Board addressed the weighing of the medical opinion evidence on rebuttal of the presumption, holding that the administrative law judge erroneously substituted his opinion for that of the medical experts. *Id*. at 6-7. The Board remanded the case to the administrative law judge for reconsideration.

On remand, the administrative law judge determined that the miner's work at aboveground mines was in conditions substantially similar to those in an underground mine. The administrative law judge found, therefore, that claimant had more than fifteen years of qualifying coal mine employment and invoked the presumption of death due to pneumoconiosis set forth in Section 411(c)(4). The administrative law judge determined that employer did not rebut the presumed existence of legal pneumoconiosis[3] or the presumed causal relationship between pneumoconiosis and the miner's death. Accordingly, the administrative law judge awarded benefits.

[1] Claimant is the widow of the miner, who died on July 28, 2008. Director's Exhibit 9. The miner filed his claim on August 30, 2005, which was denied on October 1, 2008.

[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)(2012), as implemented by 20 C.F.R. §718.305.

[3] The administrative law judge previously found that employer established that the miner did not have clinical pneumoconiosis. 2012 Decision and Order at 19.

On appeal, employer argues that the administrative law judge erred in finding that it failed to rebut the presumed existence of legal pneumoconiosis because he ignored relevant evidence, and did not properly weigh the relevant medical opinions. Employer further contends that the administrative law judge erred in finding that it did not rebut the presumption that the miner's death was caused by pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.[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 supported by substantial evidence, rational, and in accordance with applicable law.[5] 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).

In order to rebut the Section 411(c)(4) presumption, employer must affirmatively prove that the miner did not have legal pneumoconiosis[6] and clinical pneumoconiosis,[7] or

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established that the miner's twenty-one years of coal mine employment at aboveground mines was in conditions substantially similar to underground coal mine employment and that she, therefore, invoked the presumption at Section 411(c)(4) that the miner's death was due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. 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).

[6] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[7] Clinical pneumoconiosis is defined as:

> [T]hose 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

establish that "no part of the miner's death was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(2)(ii); *see Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

I. Rebuttal of the Presumed Existence of Legal Pneumoconiosis

Employer is correct in arguing that the administrative law judge did not consider all of the relevant evidence, particularly the pathology evidence, in determining if the presumed existence of legal pneumoconiosis was rebutted pursuant to 20 C.F.R. §718.305(d)(2)(i)(A). Although the administrative law judge noted that the tissue slides from the biopsy performed on July 7, 2008, were interpreted as showing interstitial fibrosis, he did not indicate whether the pathologists opined as to whether coal dust exposure was a cause of the disorder, or analyze whether their opinions supported or contradicted other relevant evidence, including the medical opinions of Drs. Rosenberg, Basheda, Cohen and Rasmussen. Decision and Order on Remand at 7. Dr. Oesterling reviewed fourteen slides from biopsies of the miner's lungs and determined that the pattern he observed is typical of usual interstitial pneumonitis (UIP) and is not associated with coal dust inhalation. Employer's Exhibit 1. Dr. Bush evaluated the same slides and found that the miner was totally disabled due to "pulmonary fibrotic disease appearing histologically as [UIP]," a disease that was unrelated to his coal dust exposure. Employer's Exhibit 2. In addition, as employer points out, there are relevant biopsy reports and notes contained within the treatment records.[8] Director's Exhibit 11.

> 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). For the purposes of the definitions of both legal and clinical pneumoconiosis, "arising out of coal mine employment" means 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).

[8] The treatment records, *inter alia*, include the following: Dr. Tomchin, who reviewed slides from a lung biopsy performed on July 7, 2008, diagnosed usual interstitial pneumonitis (UIP). Director's Exhibit 11. Dr. Mark also reviewed the slides, stating that he could not make the diagnosis of UIP with certainty, because there was too much chronic organizing pneumonia present. *Id.* The treatment records also include office visit notes from Dr. Grey that contain diagnoses of interstitial lung disease and idiopathic pulmonary fibrosis. *Id.* Dr. Grey indicated that he suspected the miner's

There is also merit, in part, to employer's arguments concerning the administrative law judge's weighing of the medical opinion evidence relevant to the presumed existence of legal pneumoconiosis. The administrative law judge considered the medical opinions of Drs. Rosenberg, Basheda, Cohen, and Rasmussen, all of whom agreed that the miner had some form of interstitial fibrosis. Decision and Order on Remand at 4-7; Claimant's Exhibits 4, 5, 10; Employer's Exhibits 8, 9. The administrative law judge stated that Drs. Rosenberg and Basheda found that the miner's pulmonary condition was not due, in part, to coal dust exposure because coal dust inhalation does not cause diffuse interstitial fibrosis. Decision and Order on Remand at 7; Employer's Exhibits 8, 9. The administrative law judge also stated that Drs. Rosenberg and Basheda diagnosed "idiopathic fibrosis, that is, a fibrosis without an identifiable cause." Decision and Order on Remand at 7. The administrative law judge further determined that, in contrast, Drs. Rasmussen and Cohen opined that the miner's condition could not be classified as idiopathic because it had a known cause – the miner's coal dust exposure – and supported their opinions with citations to medical studies done by Cockroft, Brichet, and McConnochie, showing that diffuse interstitial fibrosis can be caused by coal dust exposure. *Id*. In addition, the administrative law judge observed that Dr. Rosenberg disagreed with these studies, testifying that "any literature that seems to show that coal dust exposure can cause idiopathic pulmonary fibrosis is 'not evidence based,' and that those studies were not controlled or long term." *Id*., *quoting* Employer's Exhibit 10 at 21. The administrative law judge further found that, because the medical studies are not in the record, he is unable to determine whether Dr. Rosenberg's interpretation of them is "accurate and creditable." Decision and Order on Remand at 8. The administrative law judge concluded:

> All that is left, then, is the bare, unsupported assertion by Drs. Basheda and Rosenberg that coal dust depositions in the lungs cannot cause diffuse interstitial fibrosis. As the Board's Decision and Order affirmed my finding that the credentials of Drs. Cohen and Rasmussen are superior to those of Drs. Basheda and Rosenberg in diagnosing a chronic dust-related lung disease, the medical assertion of these two doctors is not enough, especially against the combined credentials of Dr. Cohen and Dr. Rasmussen, to satisfy Employer's burden of proving that the miner's coal dust exposure did not cause his interstitial lung disease.

Id.

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interstitial lung disease was caused by coal dust exposure. *Id*. In addition, there are CT scan readings including findings of interstitial fibrosis. *Id*.

Employer contends that the administrative law judge erred in holding Dr. Rosenberg's opinion to a higher standard than the opinions of Drs. Rasmussen and Cohen. In support of this argument, employer maintains that the administrative law judge accepted the reliance of Drs. Rasmussen and Cohen on the medical literature, while discrediting Dr. Rosenberg's opinion because his criticism of the literature could not be properly evaluated without the studies appearing in the record. Employer states that, contrary to the administrative law judge's determination, there is no requirement that medical articles or studies be a part of the record, and further contends that the administrative law judge does not have the authority to independently review such articles to determine which expert's opinion is correct. In addition, employer asserts that the administrative law judge erred in failing to consider Dr. Rosenberg's explanation for concluding that the miner's interstitial fibrosis did not constitute legal pneumoconiosis. Employer also argues that, in contrast to the administrative law judge's finding, Dr. Basheda provided a detailed explanation supporting his diagnosis of UIP. Further, employer argues that the administrative law judge erred in crediting the medical opinions of Drs. Rasmussen and Cohen, based solely on his belief that they have superior experience in diagnosing coal mine dust-induced lung disease.

As an initial matter, we hold that it was error for the administrative law judge to rely on the absence of the Cockroft, Brichet, and McConnochie studies from the record, to discredit the opinions of Drs. Rosenberg and Basheda. Because the administrative law judge engaged in a relative weighing of the medical opinions to resolve the conflict regarding whether coal dust exposure was a contributing cause of the miner's interstitial fibrosis, he could not penalize employer for failing to put the studies into the record, while finding that the opinions of Drs. Rasmussen and Cohen were supported by the same studies. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); Decision and Order on Remand at 7-8. Further, as employer maintains, the administrative law judge erred in stating that the assertions by Drs. Rosenberg and Basheda are "bare and unsupported," as both physicians explained why they excluded coal dust as a cause of the miner's respiratory impairment.[9] Decision and

[9] Dr. Rosenberg stated that the miner "had linear interstitial lung disease with honeycombing and a basilar predominance, associated with a low diffusing capacity, consistent with the diagnosis of UIP which "progressed[,] developing a superimposed pneumonia" – findings that Dr. Rosenberg determined are not consistent with "a coal mine dust related disorder." Employer's Exhibit 9. Dr. Rosenberg also testified that coal dust exposure does not cause the pattern of interstitial lung disease that characterized UIP and that the pathology evidence also showed findings of UIP. Employer's Exhibit 10 at 16, 18. Dr. Basheda explained that the miner had "the classic pathologic findings of usual interstitial pneumonitis on four pathologic reviews" and that "attempts to treat this disorder with anti-inflammatory therapy . . . are unsuccessful[,]"as they were in the

Order on Remand at 8. In addition, although the administrative law judge may give more weight to the opinions of Drs. Rasmussen and Cohen, based on his determination that they have superior qualifications, employer is correct in stating that the administrative law judge must first determine whether their conclusions are reasoned and documented – a task that he did not fully perform in this case. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Buckley*, BRB No. 13-0193 BLA, slip op. at 7. However, contrary to employer's contention that the administrative law judge may not independently review medical studies, an administrative law judge may review the scientific studies cited by a physician, and may require that they be included in the record, to determine whether the physician's characterization of the studies is accurate. *See Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Therefore, we vacate the administrative law judge's determination that employer did not rebut the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(A). On remand, the administrative law judge must consider the reports of Drs. Oesterling and Bush, and all other relevant evidence, and must reconsider the medical opinions of Drs. Rasmussen, Cohen, Rosenberg and Basheda. When weighing the medical opinion evidence, the administrative law judge must address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. After rendering findings under each pertinent subsection of 20 C.F.R. §718.202(a), the administrative law judge must determine whether all of the evidence, when weighed together, is sufficient to satisfy employer's burden to affirmatively disprove the existence of legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In addition, the administrative law judge must consider whether 20 C.F.R. §718.305(d), which prohibits rebuttal "on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin," is applicable to the current claim. Lastly, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the Administrative Procedure Act, 5 U.S.C. §500 *et seq*., as incorporated into the Act by 30 U.S.C. §932(a).[10] *See Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1985).

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miner's case. Employer's Exhibit 8. At his deposition, Dr. Basheda reiterated that the radiographic and pathologic findings supported that the miner had UIP. Employer's Exhibit 11 at 13.

[10] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), requires that every adjudicatory decision include a

To promote judicial economy, we will further address employer's arguments concerning rebuttal of the Section 411(c)(4) presumption that the miner's death was caused by pneumoconiosis.

II. Rebuttal of Death Causation

The administrative law judge stated that Dr. Rasmussen determined that the miner's coal dust exposure contributed to his death. Decision and Order on Remand at 9. The administrative law judge further found that Dr. Rosenberg attributed the miner's death to advancing interstitial fibrosis, and that Dr. Basheda indicated that interstitial lung disease could have contributed to the miner's death. *Id*. The administrative law judge concluded that "[a]s I have found that the miner's interstitial lung disease was caused by the miner's coal dust exposure, the opinions of Drs. Basheda and Rosenberg on the cause of death are insufficient to establish rebuttal." *Id*.

Employer asserts that, because there are numerous errors in the administrative law judge's analysis of the cause of the miner's interstitial lung disease, his conclusion concerning rebuttal of death causation must also be vacated. We agree that, because the administrative law judge's weighing of the medical opinion evidence on the issue of death causation is based on his findings regarding rebuttal of the presumed existence of legal pneumoconiosis, which we have vacated, his determination, pursuant to 20 C.F.R. §718.305(d)(2)(ii), must also be vacated. We further vacate the award of benefits.

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statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A)

Accordingly, the administrative law judge's Decision and Order Awarding Benefits – On Remand is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge