U.S. Department of Labor

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

BRB No. 16-0244 BLA

BARBARA A. COLEMAN (Widow of BARNEY E. COLEMAN) Claimant-Respondent v. RBM ENTERPRISES, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/24/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Modification (2012-BLA-05297) of Administrative Law Judge Lee J. Romero, Jr., rendered on a survivor's claim filed on March 29, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] In a previous Decision and Order issued on December 6, 2010, Administrative Law Judge Richard T. Stansell-Gamm found that the miner worked for thirty-three years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine.[2] Judge Stansell-Gamm also found that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Based on those findings and the filing date of the claim, Judge Stansell-Gamm concluded that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] However, Judge Stansell-Gamm found that employer

[1] Claimant is the surviving spouse of the miner, who died on March 20, 2007. Director's Exhibit 10. The miner filed a claim for benefits on May 21, 2001, which was pending at the time of his death. Director's Exhibit 1 at 916. On October 6, 2008, Administrative Law Judge Joseph E. Kane denied benefits in the miner's claim, because the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 1 at 151. Claimant timely requested modification of the denial of the miner's claim and submitted a medical report from Dr. Perper. Director's Exhibits 1 at 29; 10. The district director denied modification on June 17, 2010, and claimant took no further action on the miner's claim. Director's Exhibit 1 at 8. Because the miner's claim for benefits was denied, claimant is not derivatively entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. 932(*l*) (2012).

[2] The record reflects that the miner's coal mine employment was in Kentucky. Decision and Order at 7; Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if he or she 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

established that the miner had neither legal nor clinical pneumoconiosis[4] and, therefore, found that employer rebutted the presumption.

Claimant timely requested modification. In a Decision and Order issued on February 5, 2016, which is the subject of this appeal, Administrative Law Judge Lee J. Romero, Jr. (the administrative law judge), considered the evidence that was before Judge Stansell-Gamm. The administrative law judge agreed with Judge Stansell-Gamm that the miner worked for at least fifteen years in qualifying coal mine employment, that the miner was totally disabled, and that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. However, the administrative law judge found that employer failed to establish that the miner did not have pneumoconiosis, or establish that no part of the miner's death was due to pneumoconiosis. Therefore, he determined that employer did not rebut the Section 411(c)(4) presumption. Based on that finding, the administrative law judge concluded that claimant established a mistake in a determination of fact pursuant to 20 C.F.R §725.310. The administrative law judge further found that granting modification would render justice under the Act. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it 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 brief in this appeal. Employer filed a reply brief, reiterating its contentions.

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, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

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impairment at the time of his or her death. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[4] "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).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). The administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, the burden of proof shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[5] or by establishing 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)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge determined that employer disproved the existence of clinical pneumoconiosis by a preponderance of the x-ray, CT scan, biopsy, and medical opinion evidence. Decision and Order at 18. However, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis. Specifically, the administrative law judge discounted the opinions of employer's

[5] Employer argues that, because the existence of pneumoconiosis was not established in the miner's finally denied claim, and claimant "was a party to that claim," the doctrine of collateral estoppel should have been applied to preclude consideration of the issue of pneumoconiosis in the survivor's claim. Employer's Brief at 24; *see* n.1, *supra*. We disagree. The doctrine does not bar relitigation of factual issues where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than in the second, or where his or her adversary has a heavier burden in the second action than in the first. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-394, 2-401 (4th Cir. 2006); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988). Since the presumption of pneumoconiosis was not available to the miner in his lifetime claim, the miner had the affirmative burden of proving the existence of pneumoconiosis, whereas, in the survivor's claim the burden shifted to employer to affirmatively disprove the existence of pneumoconiosis. Thus, the doctrine of collateral estoppel is not applicable under the facts of this case.

physicians, Drs. Rosenberg and Jarboe, that the miner did not suffer from a chronic lung disease or impairment that was related to coal mine employment. *Id*. at 18-21. In addition, the administrative law judge found that Dr. Perper's opinion that the miner suffered from legal pneumoconiosis was well-reasoned and documented, and was at least "equally persuasive" to Dr. Rosenberg's contrary opinion.[6] *Id*. at 19-20.

Employer contends that the administrative law judge did not properly address whether Dr. Rosenberg's opinion was sufficient to disprove the existence of legal pneumoconiosis, as defined in 20 C.F.R. §718.201. Employer argues that the administrative law judge erroneously required Dr. Rosenberg to "rule out" coal mine dust as a cause of the miner's obstructive respiratory impairment. Employer's Brief at 17-18. Employer asserts that Dr. Rosenberg "explained in detail why [the miner's] coal dust exposure was not the source of his particular obstructive lung disease." *Id*. Employer's argument lacks merit.

Before beginning his analysis of the medical evidence on rebuttal, the administrative law judge correctly stated that employer must prove that the miner "did not have *either* clinical *or* legal pneumoconiosis," and he noted that legal pneumoconiosis "includes 'any chronic [restrictive or obstructive] pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 15-16, *quoting* 20 C.F.R. §718.201(b). Moreover, the administrative law judge did not reject Dr. Rosenberg's opinion as insufficient to meet a "rule out" standard. Decision and Order at 20-21. The administrative law judge considered the explanations given by Dr. Rosenberg for excluding a diagnosis of legal pneumoconiosis, and concluded that his opinion was not persuasive on the etiology of the miner's respiratory impairment. *Id*. For example, the administrative law judge discounted Dr. Rosenberg's opinion that the miner's severe obstruction was unrelated to coal mine dust exposure, because Dr. Rosenberg stated that coal mine dust would not cause severe obstruction in the absence of complicated pneumoconiosis. Additionally, the administrative law judge found that Dr. Rosenberg did not adequately explain why, more likely than not, the miner's severe obstruction was not significantly related to, or substantially aggravated by, coal mine dust, which can act in combination with smoking. Because the administrative law judge correctly stated that it was employer's burden to establish that the miner did not have legal pneumoconiosis, and found that Dr. Rosenberg's opinion was not credible, we reject employer's argument

[6] The administrative law judge discounted Dr. Baker's opinion that the miner suffered from legal pneumoconiosis because he found that Dr. Baker provided "no reasoning or explanation" for his diagnosis. Decision and Order at 18.

that the administrative law judge applied an improper "rule-out" rebuttal standard on the issue of legal pneumoconiosis. *See Minich*, 25 BLR at 1-154-56.

Furthermore, we reject employer's argument that the administrative law judge erred in finding that Dr. Rosenberg's opinion was not persuasive on the issue of legal pneumoconiosis. Employer's Brief at 18-20. In a November 26, 2001 report, Dr. Rosenberg opined that the miner suffered from severe airflow obstruction related to cigarette smoking. Director's Exhibit 60 at 12. He explained that "[c]oal dust exposure does not cause this severe form of obstruction, without the presence of the complicated form of [coal workers' pneumoconiosis]." *Id*. In subsequent reports, Dr. Rosenberg reiterated that the miner suffered from severe airflow obstruction unrelated to coal mine dust exposure, without retracting his statement that coal dust would not cause severe obstruction in the absence of complicated pneumoconiosis. *Id*. at 25, 329.

The administrative law judge rationally found that Dr. Rosenberg's opinion "that coal dust exposure cannot cause severe obstruction in the absence of complicated pneumoconiosis . . . is not consistent with the Act and the [r]egulations." Decision and Order at 20 n. 4; *see A&E Coal Co. v. Adams*, 694 F.3d 798, 801, 25 BLR 2-203, 2-210 (6th Cir. 2012); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121-22 (6th Cir. 2000) (holding that fibrosis is not a required element of legal pneumoconiosis); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 108, 12 BLR 2-305, 2-308-309 (3d Cir. 1989); 65 Fed. Reg. 79,920, 79,951 (Dec. 20, 2000) ("The statute contemplates an award of benefits based upon proof of pneumoconiosis as defined in the statute (which encompasses simple pneumoconiosis), and not just upon proof of complicated pneumoconiosis.").[7]

Further, the administrative law judge considered Dr. Rosenberg's opinion that the miner's severe obstructive impairment was more consistent with a smoking-related condition. Decision and Order at 20 & n.4. In light of the definition of legal pneumoconiosis, the administrative law judge permissibly found that Dr. Rosenberg did

[7] We reject employer's argument that, in evaluating the credibility of the medical opinion evidence, the administrative law judge erred in relying on the studies credited by the Department of Labor in the preamble to the 2001 regulatory revisions. *See A&E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

not adequately explain why the miner's severe obstruction was not caused by both smoking and coal mine dust.[8] *See* 20 C.F.R. §718.201(a)(2)(b)(including within legal pneumoconiosis "any chronic . . . respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment"); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

We also reject employer's argument that the administrative law judge erred in his weighing of Dr. Jarboe's opinion. Dr. Jarboe excluded coal mine dust exposure as a cause of the miner's obstructive respiratory impairment based partly on the fact that the miner's CT scans revealed "no evidence of any fibrosis associated with dust deposition" and "no nodulation or irregular opacities . . . ." Director's Exhibit 60 at 246. Contrary to employer's argument, the administrative law judge permissibly found that "Dr. Jarboe's conclusions on legal pneumoconiosis [were] inappropriately derivative of his findings on the radiological evidence of clinical pneumoconiosis." Decision and Order at 19; *see Adams*, 694 F.3d at 801, 25 BLR at 2-210; *Cornett*, 227 F.3d at 576, 22 BLR at 2-121-22; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. at 79,945.

As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis[9] and, therefore, did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i).

[8] As the administrative law judge provided valid reasons for assigning less weight to Dr. Rosenberg's opinion with respect to whether the miner's obstructive respiratory impairment constituted legal pneumoconiosis, we need not address employer's additional arguments concerning the administrative law judge's weighing of this opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

[9] Employer argues that the administrative law judge erred in crediting Dr. Perper's opinion that the miner suffered from legal pneumoconiosis. Employer's Brief at 14-17, 19-20. However, because Dr. Perper's opinion does not assist employer in establishing

Pursuant to 20 C.F.R. §718.305(d)(2)(ii), contrary to employer's argument, the administrative law judge permissibly determined that the opinions of Drs. Rosenberg and Jarboe were not sufficiently credible to establish that no part of the miner's death was caused by legal pneumoconiosis, as neither physician diagnosed the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004) (Roth, J., dissenting); Decision and Order at 23. Thus, we affirm the administrative law judge's finding that employer did not establish rebuttal at C.F.R. §718.305(d)(2)(ii).

Additionally, we affirm the administrative law judge's finding that claimant established a basis for modification under 20 C.F.R. §725.310 because claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis and employer failed to rebut the presumption. *See Mullins v. ANR Coal Co.*, 25 BLR 1-49, 1-52-53 (2012); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008). Finally, because it is unchallenged by employer, we affirm the administrative law judge's finding that granting modification would render justice under the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24.

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rebuttal of the Section 411(c)(4) presumption, any error committed by the administrative law judge in weighing his opinion is harmless. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge