U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0007 BLA

PEGGY P. CANTRELL (Widow of ORIS E. CANTRELL)	)	
Claimant-Respondent	)	
v.	)	
GARDEN CREEK POCAHONTAS COMPANY/CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 02/12/2018
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05096) of Administrative Law Judge Paul R. Almanza on a survivor's claim filed on February

14, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited the miner with 21.564 years of coal mine employment,[1] at least 18.5 years of which took place in underground mines, and found that claimant[2] established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis, set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] He further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it failed to rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

[1] The miner's coal mine employment was in 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, 1-202 (1989) (en banc).

[2] Claimant is the widow of the miner, who died on December 8, 2010. Director's Exhibit 11.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where the miner worked fifteen or more years in underground or substantially similar coal mine employment, and had a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(2).

[4] We affirm the administrative law judge's unchallenged finding that the miner had 21.564 years of coal mine employment, at least 18.5 of which were underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

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

Invocation of the Section 411(c)(4) Presumption — Total Disability

In a survivor's claim, where the miner had more than 15 years of underground coal mine employment, claimant is entitled to the Section 411(c)(4) presumption if she also establishes that the miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment[.]" 20 C.F.R. §718.305(b)(1)(iii). The miner is considered to have been totally disabled if a respiratory or pulmonary impairment, standing alone, prevented him from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function testing evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv).

In considering whether the miner was totally disabled, the administrative law judge noted that the record contained no pulmonary function studies; that all four non-qualifying blood gas studies in the record[5] lack information "establishing that they are an accurate picture of the [m]iner's impairment"; and that Dr. Tuteur was the only physician to offer an opinion on the issue of total disability.[6] Decision and Order at 18. Dr. Tuteur testified that he was "sure" the miner was totally disabled from a pulmonary or respiratory standpoint due to recurrent pneumonia, which made his impairment "chronic . . . during the last year or two of life." Employer's Exhibit 6 at 18-19. Relying on Dr. Tuteur's opinion, the administrative law judge found that claimant established that the miner was totally disabled by a respiratory or pulmonary impairment. Decision and Order at 18.

Employer argues that Dr. Tuteur's opinion is insufficient to establish total disability because it is speculative, unsupported by objective testing, and outweighed by the non-qualifying blood gas studies in the miner's treatment records. Employer's Brief

[5] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[6] There is no evidence in the record of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii).

at 7-9. We disagree. First, employer acknowledges that the administrative law judge properly determined that the non-qualifying blood gas studies, performed while the miner was hospitalized, did not include information to establish that they accurately reflected the degree of the miner's impairment, and thus are not probative in assessing whether he was totally disabled. Employer's Brief at 7 n.2; Decision and Order at 13. Furthermore, a documented and reasoned medical opinion may establish total disability, even in the absence of qualifying objective studies. *See* 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge reasonably credited Dr. Tuteur's opinion because he found that Dr. Tuteur based his disability assessment on a review of the miner's medical records and autopsy reports, and that Dr. Tuteur understood the physical requirements of the miner's usual coal mine work.[7] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (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 18 & n.13.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding, based on Dr. Tuteur's opinion and the absence of any contrary probative evidence, that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Consequently, we also affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[8] 20 C.F.R. §718.305(d)(2)(i), or that "no part of the miner's death was

[7] Dr. Tuteur observed that the miner worked for twenty-two years as a belt shoveler, miner helper and operator, tractor operator, brakeman, shuttle car driver, and motorman. Employer's Exhibit 4 at 2; Decision and Order at 18 n.13. We affirm the administrative law judge's unchallenged determination that Dr. Tuteur had "an adequate understanding" of the exertional requirements of the miner's job duties. *See Skrack*, 6 BLR at 1-711; Decision and Order at 18 n.13.

[8] "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).

caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143, 25 BLR 2-689, 2-708 (4th Cir. 2015); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 19-23.

In determining that employer failed to prove that the miner did not have legal pneumoconiosis,[9] the administrative law judge observed that none of the physicians who provided medical reports — Drs. Bechtel, Crouch, Tomashefski, and Tuteur — specifically concluded that the miner had legal pneumoconiosis, and none diagnosed him with chronic obstructive pulmonary disease (COPD), even though COPD was noted "sporadically" in his treatment records. Decision and Order at 20. However, the administrative law judge also noted that the physicians agreed that the miner had pneumonia, and that none of them "explained why the Miner's pneumonia was not aggravated by his exposure to coal dust as a miner." Decision and Order at 20-21. On that basis, the administrative law judge found that "the medical evidence does not establish that the Miner did not have legal pneumoconiosis[,] and thus legal pneumoconiosis is established by the [Section 411(c)(4)] presumption." *Id*. at 21. The administrative law judge therefore found that employer failed to rebut the presumption by proving that the miner did not have pneumoconiosis. *Id*.

Employer contends that the administrative law judge imposed an improper burden on employer by requiring it to disprove the existence of legal pneumoconiosis, even though, in employer's view, the evidence in the record does not establish the existence of legal pneumoconiosis. Employer's Brief at 10-12. Employer's sole argument is that the administrative law judge "created a straw man of a disease, with no support in the evidentiary record, and then faulted the physicians for failing to explain the cause of this phantom disease. In essence, the Employer was faulted for failing to rebut something the evidence does not establish exists." *Id*. at 11.

We disagree. The administrative law judge did not assign a "phantom" disease to the miner. Instead, he correctly presumed that the miner had legal pneumoconiosis because claimant invoked the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(c)(2), (d)(2)(i); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], F.3d , No. 16-2453, 2018 WL 559784 at *5 (4th Cir. Jan. 26, 2018). Once claimant invoked the

[9] We affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, as employer concedes that the autopsy evidence establishes that the miner had "mild" clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 20; Employer's Brief at 9, 11.

presumption, whether the evidence could affirmatively establish the existence of legal pneumoconiosis was immaterial; the burden shifted to employer to affirmatively prove that the miner did not have the disease. *Smith*, 2018 WL 559784 at *5; *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Indeed, the Fourth Circuit's recent decision in *Smith* rejected essentially the same argument employer is making here — that a claimant who invoked the Section 411(c)(4) presumption was not entitled to benefits because no physician could affirmatively diagnose him with legal pneumoconiosis:

> [T]hat [argument] has the fifteen-year presumption exactly backwards. . . . Indeed, relieving certain claimants of the obligation to come forward with affirmative diagnoses of pneumoconiosis is precisely the point of the Black Lung Benefits Act's fifteen-year presumption: Congress adopted that provision to shift the costs of uncertainty about disease causation away from sick miners seeking benefits and onto their employers, in cases where a miner's length of service makes it reasonable to assume a health impact from coal dust exposure.

Smith, 2018 WL 559784 at *5 (citing *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 141, 25 BLR 2-689, 705 (4th Cir. 2015)).

Legal pneumoconiosis includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). That broad definition covers not only impairments caused by coal mine dust exposure, but also "diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nonetheless been made worse by coal dust exposure." *See Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999).

Because claimant established that the miner's recurrent pneumonia was a totally disabling respiratory or pulmonary impairment, rebutting the presumption of legal pneumoconiosis required employer to prove that the miner's pneumonia was neither caused nor substantially aggravated by the miner's coal mine dust exposure. *See* 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(2)(i)(A). Employer, however, does not challenge the administrative law judge's determination that none of the physicians explained why the miner's pneumonia "was not aggravated by his exposure to coal mine dust as a miner." Decision and Order at 21.[10] We therefore affirm that finding, and consequently

[10] At his deposition, Dr. Bechtel said "I have no idea what was caused and what wasn't caused," when asked if coal mine dust exposure had caused any of the diseases,

affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21.

Finally, because Drs. Bechtel, Crouch, Tomashefski, and Tuteur did not diagnose the miner with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that the miner had the disease, the administrative law judge permissibly discredited the physicians' opinions on the issue of whether legal pneumoconiosis played any part in the miner's death. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-22 (4th Cir. 2015); Decision and Order at 22-23. Consequently, we reject employer's arguments and affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's death was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii).[11] Employer's Brief at 15-21.

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including pneumonia, mentioned in his autopsy report. Employer's Exhibit 3 at 12; Director's Exhibit 12. Dr. Crouch did not address the issue of legal pneumoconiosis in her pathology report. Employer's Exhibit 1. Dr. Tomashefski testified only that, in his opinion, the miner's coal mine employment did not cause any chronic pulmonary impairment. Employer's Exhibit 5 at 24. And although Dr. Tuteur opined that the miner's cardiopulmonary symptoms from pneumonia were "in no way aggravated by" the inhalation of coal mine dust, Employer's Exhibit 6 at 18-19, employer neither challenges nor points to any evidence that would undermine the administrative law judge's finding that Dr. Tuteur and the other physicians *failed to explain why* coal mine dust exposure did not aggravate the miner's pneumonia. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); Decision and Order at 20-21.

[11] Employer points out that the administrative law judge failed to consider a negative x-ray interpretation from Dr. Tarver, and that the error affected the administrative law judge's weighing of the evidence when he found that employer failed to establish that clinical pneumoconiosis played no part in the miner's death. Employer's Brief at 14; Decision and Order at 20, 22. Employer also contends that the administrative law judge failed to reconcile conflicting evidence and determine the severity of the miner's clinical pneumoconiosis. Employer's Brief at 14-20. Any errors in the administrative law judge's determination that employer failed to prove that clinical pneumoconiosis played no part in the miner's death were harmless, however, because he reasonably determined that employer failed to establish that no part of the miner's death

was due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(ii); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge