U.S. Department of Labor

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

BRB No. 17-0233 BLA

DOVIE SIMMONS (Widow of JAMES SIMMONS) Claimant-Respondent v. RAIDER MINING, INCORPORATED and EMPLOYERS INSURANCE OF WAUSAU Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/28/2018 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Office, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2013-BLA-05276) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a survivor's claim filed on April 9, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge noted that the parties stipulated that the miner had twenty-five years of underground coal mine employment. He also found that claimant[1] established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, 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).[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in determining that it did not rebut the Section 411(c)(4) presumption.[3] Claimant responds, urging

---

[1] Claimant is the widow of the miner, James Simmons, who died on January 23, 2005. Director's Exhibit 11. There is no evidence in the record that the miner was awarded benefits or had a claim pending at the time of his death. Therefore, Section 422(*l*) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, is not applicable in this case. 30 U.S.C. §932(*l*) (2012).

[2] Under Section 411(c)(4) of the Act, a miner's death is presumed to be due to pneumoconiosis if he had at least fifteen years of underground or substantially similar coal mine employment, and 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).

[3] Employer also generally alleges that the administrative law judge erred in finding claimant disabled by a pulmonary rather than a cardiac impairment. Employer Brief at 6-7. Employer's unsupported conclusory assertion, however, is not raised with sufficient specificity to allow the Board to address it. *See* 20 C.F.R. §§802.211(b) (listing requirements for an issue to be adequately briefed), 802.301(a) (Board not empowered to conduct de novo review of record); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP,* 6 BLR 1-107, 1-109 (1983). We therefore affirm the administrative law judge's finding that the miner had a totally disabling respiratory impairment and that the Section 411(c)(4) presumption is applicable in this case.

affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief 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 rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To rebut the presumption of death due to pneumoconiosis under Section 411(c)(4), employer must establish that the miner had neither legal nor clinical[6] pneumoconiosis, or that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201."[7] 20 C.F.R. §718.305(d)(2)(i), (ii); *Copley v. Buffalo Mining Co.*, 25

---

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had twenty-five years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The miner's last coal mine employment was in Kentucky. Director's Exhibits 3, 6. Accordingly, the Board will apply the law 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).

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

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).

[7] We reject employer's contention that "[c]laimant has failed to prove the existence of the disease pursuant to 20 C.F.R. §718.202(a)(4)[,]" as employer has the burden of proof on rebuttal to disprove the existence of pneumoconiosis. Employer's Brief at 5; *see* 20 C.F.R. §718.305(d)(2)(ii); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], F.3d , No. 16-2453, 2018 WL 559784 at *5 (4th Cir. Jan. 26, 2018).

BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.[8]

With respect to legal pneumoconiosis, the administrative law judge determined that the opinions of Drs. Castle and Rosenberg, the only opinions supportive of employer's burden on rebuttal, are insufficient to establish that the miner did not have legal pneumoconiosis. Decision and Order at 18-21. Employer generally argues that the administrative law judge erred in discrediting their opinions.

Contrary to employer's contentions, however, the administrative law judge permissibly discredited Dr. Castle's opinion because, although he attributed the miner's hypoxemia to pneumonia, congestive heart failure, and sleep apnea, he did not explain why the miner's coal dust exposure also could not have contributed to his respiratory impairment.[9] *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 20-21. In addition, the administrative law judge noted that Dr. Rosenberg opined that claimant's "persistent cough and sputum production through the remainder of his life" was due to smoking and not coal dust exposure, because those symptoms "would be expected to dissipate within a year or so after one leaves the mines." Employer's Exhibit 1 at 3; Decision and Order at 21. The administrative law judge permissibly found Dr. Rosenberg's rationale to be unpersuasive in light of the regulations which state that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R.

---

[8] Employer contends that the administrative law judge erred in concluding that employer did not rebut the presumed fact that the miner's totally disabling respiratory impairment was due to pneumoconiosis. However, this is not a method of rebuttal in a survivor's claim. 20 C.F.R. §718.305(d)(2).

[9] Dr. Castle stated that the miner "most likely did not have legal coal workers' pneumoconiosis." Employer's Exhibit 5. Dr. Castle found that because there were "no physiologic studies in the data set which I reviewed[,]" "it is not possible to accurately determine whether or not he had any respiratory impairment or the severity thereof including [chronic obstructive pulmonary disease (COPD)] and coal workers' pneumoconiosis." *Id*. Dr. Castle was unaware of the miner's coal mine employment history but assumed that it "was significant enough to have possibly caused him to develop coal worker[s'] pneumoconiosis if he were a susceptible host." *Id*. Dr. Castle concluded that the miner had "evidence of significant hypoxemia associated with acute pneumonia, acute and episodic congestive heart failure, and obstructive sleep apnea syndrome." *Id*.

§718.201(c); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738, 25 BLR 2-675, 2-684-85 (6th Cir. 2014); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 869 (D.C. Cir. 2002); *see also* 65 Fed. Reg. at 79,937-79,945, 79,968-79,977. Thus, we affirm the administrative law judge's finding that employer did not establish rebuttal by proving that the miner did not have legal pneumoconiosis.[10] Decision and Order at 21.

Employer also argues that the administrative law judge erred in his consideration of whether employer rebutted the presumed fact of death causation. 20 C.F.R. §718.305(d)(2)(ii). In finding that employer failed to show that no part of the miner's death was due to legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Castle, Rosenberg, and Johnson. Decision and Order at 22. Employer argues that the administrative law judge improperly discredited Drs. Castle and Rosenberg and mischaracterized Dr. Johnson's opinion. We reject employer's contentions.

The administrative law judge permissibly discounted the opinions of Drs. Castle[11] and Rosenberg[12] that the miner's death was unrelated to legal pneumoconiosis because

---

[10] Employer spends a large portion of its brief discussing Dr. Johnson's opinion that the miner had chronic bronchitis and COPD due to his coal dust exposure and smoking history. Employer's Exhibit 2 at 14-15; Employer's Brief at 3-4. However, because Dr. Johnson's opinion does not aid employer in rebutting the presumed existence of legal pneumoconiosis, we need not address employer's assertions concerning her opinion. In addition, because the administrative law judge provided valid rationales for discrediting the opinions of Drs. Castle and Rosenberg, we need not address employer's additional arguments concerning the administrative law judge's weighing of their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Further, it is not necessary to address employer's contentions concerning the administrative law judge's weighing of the evidence relevant to rebuttal of the existence of clinical pneumoconiosis, as 20 C.F.R. §718.305(d)(2)(i) requires employer to establish that the miner had neither legal *nor* clinical pneumoconiosis.

[11] In his initial report, Dr. Castle concluded that "[b]ased upon the data that I have reviewed, it is not possible to accurately determine the specific cause of death in this individual." Director's Exhibit 12. In his supplemental opinion, Dr. Castle acknowledged that COPD was listed under "other conditions" on the miner's death certificate. Employer's Exhibit 5. However, Dr. Castle concluded, without explanation, that the miner's "death was unrelated to any lung disease including COPD and/or legal coal workers' pneumoconiosis." *Id.*

neither physician diagnosed the disease, contrary to the administrative law judge's finding. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-74 (6th Cir. 2013); *Skukan v. Consolidation Coal Co.,* 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *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 22.

The administrative law judge further permissibly found that Dr. Johnson's opinion[13] did not support employer's burden to rebut the presumption of death causation. Employer argues that in so finding, "[t]he administrative law judge ignored Dr. Johnson's statement that she could not say that pneumoconiosis hastened the miner's death[,]" as "Dr. Johnson "quite clearly testified to precisely this statement in her deposition testimony." Employer's Brief at 6, *citing* Employer's Exhibit 2 at 17. Employer further asserts that "[a]lthough Dr. Johnson initially stated in a 'check the box' questionnaire that the [m]iner's death was hastened due to pneumoconiosis, she later admitted she had no basis for saying that [pneumoconiosis] hastened [the miner's] death." Employer's Brief at 6. Employer's characterizations of the evidence are inaccurate.

As the administrative law judge rationally found, there is no evidence in the record that Dr. Johnson stated that pneumoconiosis did not hasten the miner's death. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 22. On a questionnaire, Dr. Johnson checked "yes" in response to whether pneumoconiosis contributed to or hastened the miner's death, explaining that "[h]is chronic hypoxia from severe [chronic obstructive pulmonary disease] contributed to the deterioration of his congestive heart failure. His coronary artery disease played a major role as well." Claimant's Exhibit 1. At her subsequent deposition, Dr. Johnson testified:

> [W]hen you're looking at someone who's dying from a respiratory death, you take in all the factors that contribute to that. And, of course, he had a

---

[12] Dr. Rosenberg stated that the miner died of heart disease and found that "there is no evidence of any respiratory impairment caused by past coal mine dust exposure which strained his heart and contributed to his death." Employer's Exhibit 1.

[13] Dr. Johnson indicated that pneumoconiosis contributed to or played a hastening role in the miner's death. Claimant's Exhibit 1; Employer's Exhibit 2 at 16-17.

> very bad heart, so of course, that contributed. He had bad lungs that contributed. So all that together then, of course, hastened his death.

Employer's Exhibit 2 at 16-17. In response to the question of whether it was likely that the miner would have died just as soon if he had not been exposed to coal mine dust, Dr. Johnson responded "[i]nteresting postulation. Definite --- I think as far as his cause of death, I think his coronary disease was the primary factor there." *Id*. at 17. As the administrative law judge found, Dr. Johnson did not state that the miner would have died when he did if he had not been exposed to coal dust. Decision and Order at 22. Her opinion is not sufficient to rebut the presumption that the miner's death was due to pneumoconiosis.

Because the administrative law judge considered all relevant evidence and provided sufficient bases for not crediting the opinions of Drs. Castle and Rosenberg, and for determining that Dr. Johnson's opinion does not support employer's burden on rebuttal, we affirm his finding that employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(ii), and further affirm the award of benefits. *Copley*, 25 BLR at 1-89; *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge