U.S. Department of Labor

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

BRB Nos. 17-0244 BLA and
17-0294 BLA

MARY ANDERSON, o/b/o the Estate of and Widow of RAYMOND CARL ANDERSON	)	
Claimant-Respondent	)	
v.	)	
CLINTWOOD-ELKHORN MINING COMPANY, c/o TECO COAL COMPANY	)	DATE ISSUED: 02/28/2018
and	)	
self-insured through GATLIFF COAL COPMANY	)	
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 Awarding Benefits and Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, 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 and Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act (2011-BLA-5505, 2011-BLA-5994), rendered by Administrative Law Judge Steven D. Bell on a miner's subsequent claim and a survivor's claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1]

The administrative law judge credited the miner with at least twenty-seven years of coal mine employment and determined that at least fifteen years were in conditions substantially similar to those in an underground coal mine. He further found that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thus establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and invoking the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge then determined that employer did not rebut the presumption

[1] The miner filed an initial claim for benefits on July 12, 2002, which was denied by the district director on December 4, 2003, because the miner did not establish that he had a totally disabling respiratory or pulmonary impairment. Miner Director's Exhibit 1. The miner filed a request for modification on August 25, 2004. *Id.* The district director denied the request on December 15, 2004, because the miner did not establish a change in his condition or a mistake in a determination of fact. *Id.* The miner filed the current claim for benefits on June 24, 2010. Miner Director's Exhibit 3. The miner died on March 5, 2011, while his claim was pending. Miner Employer's Exhibit 11; Survivor Director's Exhibit 11. Claimant is the widow of the miner and filed her claim for survivor's benefits on April 29, 2011. Survivor Director's Exhibit 4. The miner's claim and the survivor's claim were consolidated before the Board for decision purposes only. *Anderson v. Clintwood*-[*Elkhorn*] *Mining Co.*, BRB Nos. 17-0244 BLA and 17-0294 BLA (Aug. 4, 2007)(Order). Claimant is pursuing the miner's claim on behalf of the miner's estate.

[2] Under Section 411(c)(4) of the Act, a miner's total disability 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. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

and awarded benefits in the miner's claim. Based on the outcome of the miner's claim, the administrative law judge awarded claimant survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[3]

On appeal, employer argues that the administrative law judge erred in finding that the miner's coal mine employment was qualifying for purposes of invoking the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge erred in finding that it did not rebut the presumed existence of pneumoconiosis or disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a 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).

I. Miner's Claim

A. Invocation of the Presumption – Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in

[3] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least twenty-seven years of coal mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22-23, 27.

[5] The record reflects that the miner's last coal mine employment was in Kentucky. Hearing Transcript at 12. Accordingly, we 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).

an underground mine." 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Employer generally asserts that claimant is not entitled to the Section 411(c)(4) presumption because "[t]he record did not establish any underground employment or conditions substantially similar to underground employment." Employer's Brief at 14. We disagree.

In rendering a finding regarding the miner's coal mine employment, the administrative law judge noted the parties' stipulation to at least twenty-seven years of coal mine employment and stated, "[f]inding that assertion corroborated by the documentary evidence of record, I find that the [m]iner has established the requisite fifteen years of qualifying coal mine employment." Decision and Order at 23; *see* Hearing Transcript at 12.

The record contains the miner's Employment History Form, and under "Type of Industry," the miner indicated "underground" for his work with Bane Mining Company from April 1974 until April 1988, and for his work with employer from April 1998 until January 2002. Miner Director's Exhibit 4. Additionally, at the March 15, 2016 hearing, claimant testified that the miner worked outside at an underground mine. Hearing Transcript at 17. Employer does not contest the credibility of this evidence.

The U.S. Court of Appeals for the Sixth Circuit and the Board have held that an aboveground worker at an underground mine is not required to show comparability of environmental conditions in order to invoke the Section 411(c)(4) presumption, as it is the type of mine (underground or surface), rather than the location of the particular worker (below ground or aboveground), which determines whether a claimant is required to show comparability of conditions. *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee at an underground coal mine); *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011). Thus, contrary to employer's argument, claimant was not required to show comparability of environmental conditions in order to invoke the Section 411(c)(4) presumption because the uncontradicted evidence shows that the miner worked underground or aboveground at an underground mine. *See Muncy*, 25 BLR at 1-28-29; *Alexander v. Freeman United Coal Mining Co*., 2 BLR 1-497, 1-501 (1979) (Smith, Chairman, dissenting). We therefore affirm the administrative law judge's finding that the miner had "the requisite fifteen years of qualifying coal mine employment." Decision and Order at 23; *see Martin v. Ligon*

Preparation Co., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Muncy*, 25 BLR at 1-27-28.

In light of our affirmance of the administrative law judge's findings that claimant established that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, we further affirm his determination that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

B. Rebuttal of the Presumption – Legal Pneumoconiosis

Once the Section 411(c)(4) presumption is invoked, the burden of proof shifts to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[6] or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8 (6th Cir. 2011). The administrative law judge found that employer rebutted the presumption that the miner had clinical pneumoconiosis[7] but failed to establish that the miner did not have legal pneumoconiosis or that his totally disabling respiratory impairment was due to legal pneumoconiosis.

Employer submitted the medical opinions of Drs. Rosenberg and Jarboe in support of its contention that the miner did not have legal pneumoconiosis. Miner Director's

[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*. 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] Employer argues that the administrative law judge erred in weighing the autopsy evidence as he should have determined that it supports rebuttal of the presumed existence of clinical pneumoconiosis. However, given that the administrative law judge ultimately found that employer established that the miner did not have clinical pneumoconiosis, we need not address employer's contention. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

Exhibit 13; Miner Employer's Exhibits 1-4, 13, 14. The administrative law judge determined that Dr. Rosenberg's opinion was not well-reasoned because he did not adequately explain why the miner's "multiple whole person disorders" excluded the existence of legal pneumoconiosis. Decision and Order at 35, *quoting* Miner Employer's Exhibit 1. The administrative law judge found that Dr. Jarboe's opinion was also unreasoned because he made comments contrary to the regulation recognizing that pneumoconiosis is a latent and progressive disease. *Id.* at 37, *citing* 20 C.F.R. §718.201(c). The administrative law judge also discredited both opinions due to the physicians' reliance on the unavailability of valid pulmonary function studies to support their conclusion that the miner did not have legal pneumoconiosis. *Id*. at 35, 37.

Employer generally argues that the administrative law judge erred in rejecting the opinions of Drs. Rosenberg and Jarboe because they are well-reasoned and documented and sufficient to rebut the presumed existence of legal pneumoconiosis. We disagree.

Dr. Rosenberg opined that the miner was unable to perform pulmonary function studies "in a complete and valid fashion" due to the amputation of his right leg below the knee, as well as his diabetes, left-sided congestive heart failure and renal failure. Miner Employer's Exhibit 1. Dr. Rosenberg acknowledged that the miner had a restrictive impairment and oxygenation abnormalities, but attributed these to the miner's heart and vascular diseases and diabetes. *Id*.; Miner Director's Exhibit 13. However, as the administrative law judge permissibly found, Dr. Rosenberg did not explain how he excluded any contribution from coal dust exposure. *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 35.

Dr. Jarboe diagnosed the miner with "a significant ventilatory and gas exchange impairment due to progression of severe ischemic cardiomyopathy." Miner Employer's Exhibit 3. He opined that no part of the miner's respiratory impairment was due to coal dust exposure because when the miner was examined several months after leaving the mines, he had normal ventilatory and gas exchange function. *Id.* As the administrative law judge permissibly found, Dr. Jarboe's reasoning is inconsistent with the regulations, which recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739, 25 BLR 2-675, 2-685-86 (6th Cir. 2014); Decision and Order at 37.

Because the administrative law judge permissibly rejected the opinions of Drs. Rosenberg and Jarboe, we affirm his determination that employer did not rebut the

existence of legal pneumoconiosis and, therefore, did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i).[8] *See Minich*, 25 BLR at 1-154-56.

C. Rebuttal of the Presumption – Disability Causation

Pursuant to 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge determined that the opinions of Drs. Rosenberg and Jarboe are insufficient to establish that no part of the miner's totally disabling respiratory or pulmonary impairment was due to pneumoconiosis because neither physician diagnosed legal pneumoconiosis, contrary to his finding that employer did not rebut the presence of the disease. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-452; *Ramage*, 737 F.3d at 1062, 25 BLR at 2-474; Decision and Order at 39. Employer raises no separate allegations of error with respect to the administrative law judge's finding that it failed to disprove the presumed causal relationship between claimant's total disability and legal pneumoconiosis. We therefore affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law judge's award of benefits in the miner's claim.

II. Survivor's Claim

After concluding that the miner was entitled to benefits, the administrative law judge correctly determined that claimant met the prerequisites for derivative entitlement to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[9] Decision and Order Awarding Continuing Benefits Under the Automatic Entitlement Provisions of the Black Lung Benefits Act at 4; *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013). Because employer raises no specific challenge to claimant's derivative

[8] We need not address the arguments that employer raises concerning the administrative law judge's weighing of the opinions of Drs. Gaziano and Perper, as both physicians diagnosed legal pneumoconiosis and therefore do not aid employer in rebutting the presumption. Miner Director's Exhibit 11; Miner Claimant's Exhibit 2. The administrative law judge also considered the medical opinions of Drs. Hussain and Mahmood from the miner's prior claim but found that neither opinion aided employer in rebutting the presumption. Decision and Order at 37. This finding is affirmed, as it is unchallenged by employer. *See Skrack*, 6 BLR at 1-711.

[9] To establish entitlement under Section 422(*l*), claimant must prove that: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*).

entitlement to benefits, we affirm the administrative law judge's award of survivor's benefits. *See Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge