U.S. Department of Labor

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

BRB No. 16-0201 BLA

ELLEN D. SHAFFER (Widow of CLARENCE E. SHAFFER) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/23/2017 DECISION and ORDER

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

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-5922) of Administrative Law Judge Thomas M. Burke, rendered on claimant's request for modification of the denial of a survivor's claim[1] filed on January 7, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Administrative Law Judge Michael P. Lesniak initially denied the claim in a Decision and Order issued on May 22, 2013. Judge Lesniak found that claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2), and therefore was unable to invoke the presumption that the miner's death was due to pneumoconiosis, as set forth at Section 411(c)(4) of the Act.[2] 30 U.S.C. § 921(c)(4) (2012). Judge Lesniak further determined that claimant failed to establish that the miner had pneumoconiosis, pursuant to 20 C.F.R. §718.202(a) or, assuming the miner had pneumoconiosis, that his death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205. Accordingly, Judge Lesniak denied benefits.

Claimant timely requested modification. *See* 20 C.F.R. §725.310. In his Decision and Order issued on January 5, 2016, Administrative Law Judge Thomas M. Burke (the administrative law judge) credited the miner with twenty-six years of underground coal mine employment,[3] and determined that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. He further found that employer failed to rebut the presumption by establishing that the miner did not have pneumoconiosis, or by establishing that the miner's death was not due to pneumoconiosis. The administrative law judge therefore

[1] Claimant is the widow of the miner, who died on September 20, 2009. Director's Exhibit 9.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where the 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 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 miner's coal mine employment was in West Virginia. Director's Exhibit 4. 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).

found that claimant established a mistake of fact in the previous decision denying benefits. Decision and Order at 24. Accordingly, the administrative law judge granted claimant's modification request, and awarded benefits.[4]

On appeal, employer argues that the administrative law judge erred in finding that employer failed to rebut the presumption by establishing that the miner's death was not due to pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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

Upon claimant's invocation of the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by proving that the miner had neither legal nor clinical pneumoconiosis, or by establishing that the miner's death was not due to pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2); *Copley v. Buffalo Mining Co*., 25 BLR 1-81, 1-89 (2012). Employer does not challenge the administrative law judge's findings that it failed to establish that the miner had neither legal nor pneumoconiosis,[6] and thus

[4] Employer argued before the administrative law judge that claimant's request for modification should be dismissed, on the ground that the evidence claimant submitted in support of her request was available when the previous administrative law judge heard the case. The administrative law judge denied the motion to dismiss, and found that reopening the claim pursuant to claimant's modification request would render justice under the Act. Decision and Order at 3-4. Employer has not challenged those rulings, which are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had twenty-six years of underground coal mine employment and was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and that claimant invoked the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6, 18.

[6] "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

failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i). Decision and Order at 18-21. We therefore affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Consequently, the only issue on appeal is whether the administrative law judge erred in determining that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner's death was not due to pneumoconiosis. To prove that the miner's death was not due to pneumoconiosis, employer must 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).

Employer relied on the opinions of Drs. Oesterling and Swedarsky, who are pathologists, and Dr. Basheda, a pulmonologist.[7] Claimant submitted opinions from Dr. Perper, a pathologist, Dr. Sood, a pulmonologist, and Dr. Rasmussen, who was Board-certified in Internal Medicine.[8]

According greater weight to Dr. Sood's opinion, the administrative law judge found that it outweighed the opinions of Drs. Oesterling and Swedarsky "that the miner did not have a pulmonary condition severe enough to contribute to or hasten his death." Decision and Order at 23. The administrative law judge also found that Dr. Sood's opinion outweighed Dr. Basheda's opinion that coal mine dust exposure did not cause

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that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] Dr. Oesterling opined that the miner did not have clinical pneumoconiosis, while Dr. Swedarsky diagnosed "very mild" clinical pneumoconiosis. Employer's Exhibit 1 at 6; Employer's Exhibit 8 at 16, 28-29. Both physicians also concluded that the miner had mild centrilobular emphysema. Employer's Exhibit 9 at 59-60; Employer's Exhibit 15 at 19. Dr. Oesterling testified that he found very little dust accumulated in the miner's lung, and that he could rule out coal dust as a cause of the miner's emphysema, and as a cause of death. Employer's Exhibit 9 at 36-37, 61-62. Dr. Swedarsky concluded in a report that the autopsy did not show that the miner's pneumoconiosis and emphysema "were qualitatively or quantitatively sufficient to produce significant respiratory or pulmonary impairment," and that coal dust exposure "did not contribute to or hasten his death." Employer's Exhibit 15 at 28.

[8] Drs. Perper, Sood, and Rasmussen opined that the miner suffered from clinical and legal pneumoconiosis, which contributed to his death. Claimant's Exhibits 1, 2, 5; Employer's Exhibits 12, 14.

even part of the miner's pulmonary impairment because, in Dr. Basheda's view, the miner's test results and records showed that he had asthma instead of a chronic obstructive lung disease.[9] *Id.* The administrative law judge therefore found that employer failed to show that the miner's "moderate to severe pulmonary condition was not caused at least in part by coal dust exposure," and failed to rebut the presumption that the miner's death was due to pneumoconiosis.[10] *Id.*

Employer argues that the administrative law judge erred in determining that it failed to rebut the presumption that the miner's death was due to pneumoconiosis. Employer maintains that the "preponderance of the medical opinion evidence" supports a finding that the miner died from the effects of metastatic renal cell carcinoma, and that "pneumoconiosis and emphysematous changes did not cause, hasten, or contribute to" his death. Employer's Brief at 22-23. Employer also contends that the miner's death had a cardiovascular component, unrelated to coal dust exposure, and that pneumonia also may have contributed to his death. *Id*. at 23.

[9] Dr. Basheda noted in his initial report that the pathology results showed "minimal" clinical pneumoconiosis, if any, but concluded in a supplemental report that the miner's x-rays and CT scans showed no evidence of clinical pneumoconiosis, and that there was no evidence that the miner had legal pneumoconiosis. Director's Exhibit 41 at 53-54, 57; Employer's Exhibit 11 at 4. Dr. Basheda maintained that any pneumoconiosis or emphysema would not have hastened or contributed to the miner's death. Employer's Exhibit 11 at 4. Unlike Drs. Oesterling and Swedarsky, Dr. Basheda concluded that the miner had a moderate to severe pulmonary impairment, but he opined that it was related to asthma, not coal mine dust exposure. *Id*. at 2-4; Employer's Exhibit 13 at 29-30.

[10] At times in his decision, the administrative law judge appears to have mistakenly referred to the standard under which a claimant seeking to affirmatively prove that a miner's death was due to pneumoconiosis must establish that pneumoconiosis was "the cause" or "a substantially contributing cause" of the miner's death. *See* 20 C.F.R. §718.205(b)(1), (2). For instance, rather than citing the "no part" standard of 20 C.F.R. §718.305(d)(2)(ii), the administrative law judge concluded that the opinions of Drs. Oesterling, Swedarsky, and Basheda "are insufficient to support Employer's burden of showing that the miner's death was not caused or substantially contributed to by coal dust exposure." Decision and Order at 22. As we explain below, however, the administrative law judge reasonably discredited the opinions of Drs. Oesterling, Swedarsky, and Basheda on the cause of the miner's death. Thus, any error by the administrative law judge in citing an incorrect rebuttal standard was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

Employer's arguments lack merit. As an initial matter, to the extent employer suggests that it was claimant's burden to establish that pneumoconiosis caused, hastened, or contributed to the miner's death, employer is incorrect. Because claimant invoked the Section 411(c)(4) presumption, it was employer's burden to prove that "no part" of the miner's death was due to pneumoconiosis, even if the miner's renal cell carcinoma and cardiovascular issues played a role. 20 C.F.R. §718.305(d)(2)(ii).

With respect to rebuttal of death causation, employer reviews all of the physicians' opinions at length, alleges flaws in the opinions of Drs. Perper, Rasmussen, and Sood, and argues that the administrative law judge erred in crediting those opinions. Employer's Brief at 7-23. Before turning to employer's contentions, we note that, based on the language of published opinions in the Fourth Circuit, the failure of employer's physicians, Drs. Oesterling, Basheda, and Swedarsky, to diagnose the miner with legal pneumoconiosis[11] barred the administrative law judge from according their opinions on death causation any more than "little weight." *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-22 (4th Cir. 2015). On the facts of this case, employer does not explain how its physicians' death causation opinions could carry its rebuttal burden, regardless of the weight accorded claimant's evidence. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 270, 22 BLR 2-372, 2-384 (4th Cir. 2002)(holding that "even a poorly documented [opinion]" merited more weight on causation than opinions from the employer's physicians who did not diagnose pneumoconiosis). Moreover, as we will discuss, employer's arguments constitute harmless error at most, and requests for the Board to reweigh the evidence.

The administrative law judge credited Dr. Sood's opinion over the opinions of all three of employer's physicians. Because Dr. Sood is a pulmonologist, the administrative law judge determined that his opinion on the severity of the miner's pulmonary impairment was "entitled to more credit than the opinions of the pathologists," Drs. Oesterling and Swedarsky. Decision and Order at 23. The administrative law judge also credited Dr. Sood's opinion that the miner had chronic obstructive pulmonary disease (COPD) and emphysema caused by both coal dust exposure and smoking over Dr. Basheda's opinion that the miner had asthma unrelated to coal dust exposure, because of

[11] The administrative law judge found that employer failed to establish that the miner had neither legal nor clinical pneumoconiosis, a finding we have affirmed as unchallenged. Dr. Oesterling did not believe that the miner had either legal or clinical pneumoconiosis; Dr. Basheda concluded that the miner did not have legal pneumoconiosis; and Dr. Swedarksy did not diagnose legal pneumoconiosis. Employer's Exhibits 1, 8, 9, 15.

Dr. Sood's "superior qualifications and because of the research he has done on COPD."[12] *Id*. at 20. The administrative law judge's decision to credit Dr. Sood's opinion over those of the other physicians, based on his superior qualifications and research activities, is unchallenged. It is, therefore, affirmed. *Skrack*, 6 BLR at 1-711.

In light of our affirmance of the administrative law judge's crediting of Dr. Sood's opinion, we need not address employer's arguments about the opinions of Drs. Perper and Rasmussen. Employer's Brief at 13-14, 17, 20, 22. Any errors by the administrative law judge in weighing those opinions would be harmless, because they would not have affected the administrative law judge's determination that Dr. Sood's opinion was more credible than all of the opinions on which employer relied. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference").

Employer, however, contends that Dr. Sood's opinion was not well-reasoned because the doctor "contradicted himself." Employer notes that Dr. Sood first testified that his diagnosis of clinical pneumoconiosis would be incorrect if Dr. Perper was wrong in determining that the miner's lung tissue contained fibrosis. Employer notes that Dr. Sood then testified that, even in the absence of fibrosis, the miner's COPD would meet the definition of legal pneumoconiosis, and that a finding of coal workers' pneumoconiosis would be correct. Employer's Brief at 19; Employer's Exhibit 14 at 37-38. Clinical pneumoconiosis and legal pneumoconiosis are distinct diseases, and the absence of clinical pneumoconiosis does not preclude the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821, 19 BLR 2-86, 2-91-92 (4th Cir. 1995); *Barber v. U.S. Steel Mining Co.*, 43 F.3d 899, 901, 19 BLR 2-61, 2-66 (4th Cir. 1995). Thus, Dr. Sood did not contradict himself in explaining that COPD can be considered legal pneumoconiosis even in the absence of fibrosis or clinical pneumoconiosis. Employer's Exhibit 14 at 38.

[12] The administrative law judge noted that Dr. Sood is Board-certified in Internal Medicine, Pulmonary Medicine, Critical Care Medicine, and Occupational Medicine. Decision and Order at 20; Claimant's Exhibit 6 at 2. He noted further that Dr. Sood is a professor at the University of New Mexico School of Medicine, that Dr. Sood "has been involved in research on COPD for almost nine years," and that Dr. Sood had an abstract on his experience with miners in New Mexico presented at the American Thoracic Society International Conference in May of 2015. Decision and Order at 20-21; Claimant's Exhibit 6 at 1; Employer's Exhibit 14 at 45. The administrative law judge also noted that Dr. Basheda is Board-certified in Internal Medicine and Pulmonary Medicine, and at the time of his deposition, had practiced pulmonary medicine for twenty-three years. Decision and Order at 17; Employer's Exhibit 13 at 4-5.

Employer also takes issue with Dr. Sood's conclusion in his report that "[e]ven if the death itself was not from coal mine dust lung disease, it occurred earlier than it would have without coal mine dust exposure." Claimant's Exhibit 5 at 17. Employer argues that while Dr. Sood cited several studies to support that conclusion, he failed to relate them to the miner's case, and thus merely offered a "conclusory" opinion that was "legally insufficient to meet the regulatory standard for proving death causation." Employer's Brief at 18. This argument lacks merit. First, as we have explained above, it was not claimant's burden to prove that pneumoconiosis was a substantially contributing cause of the miner's death, but employer's burden to prove that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii). Second, even if the administrative law judge erred in not determining that Dr. Sood's opinion on this point was "conclusory," the error was harmless. It would have had no effect on the portions of Dr. Sood's opinion that the administrative law judge relied upon in discrediting the opinions of Drs. Oesterling, Swedarsky, and Basheda — namely, Dr. Sood's opinion that the miner had a totally disabling respiratory impairment, rather than a mild impairment, and that the miner's impairment reflected COPD to which coal dust exposure contributed, rather than asthma. *See Shinseki,* 556 U.S. at 413.

Finally, employer notes that Dr. Sood concluded that coal dust exposure contributed to the miner's coronary artery disease, and that, in Dr. Basheda's opinion, coal dust exposure does not cause the type of coronary artery disease that the miner had. Employer's Brief at 22; Employer's Exhibit 13 at 12-13; Employer's Exhibit 14 at 31-32. Employer therefore argues that the administrative law judge erred by giving more weight to Dr. Sood's opinion on the severity of the miner's pulmonary impairment. *Id.* Weighing the evidence, however, is for the administrative law judge, *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 144-45, 25 BLR 2-689, 2-710-11 (4th Cir. 2015), and as we held above, the administrative law judge reasonably determined that Dr. Sood's superior credentials and research activities made his opinion more credible than Dr. Basheda's. Employer's argument is essentially a request for the Board to reweigh the evidence, which we may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

As employer raises no other arguments, we affirm the administrative law judge's weighing of the evidence as reasonable, and affirm his determination that employer failed to establish that "no part" of the miner's death was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(2)(ii). Because employer failed to rebut the presumption that the miner's death was due to pneumoconiosis, we affirm the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge