U.S. Department of Labor

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

BRB Nos. 17-0216 BLA
and 17-0217 BLA

RUBY FAY MAGGARD (Widow of and o/b/o of JAMES MAGGARD, deceased)	)	
Claimant-Respondent	)	
v.	)	
BLACK MOUNTAIN RESOURCES	)	DATE ISSUED: 01/24/2018
and	)	
CHARTIS CASUALTY COMPANY	)	
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 of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05961, 2012-BLA-05462) of Administrative Law Judge Christopher Larsen, rendered on a miner's claim and a survivor's claim[1] filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that the miner had at least thirty years of underground coal mine employment. The administrative law judge determined that the miner was totally disabled, and thus found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer failed to rebut the presumption and he awarded benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge concluded that claimant was entitled to derivative benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[3] Accordingly, the administrative law judge also awarded survivor's benefits.

On appeal, employer contends that the administrative law judge erred in finding the evidence insufficient to rebut the presumption and in awarding benefits in both claims. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.

[1] The miner filed a claim on May 18, 2011. Miner's Claim (MC) Director's Exhibit 2. The miner subsequently died on June 6, 2012, and claimant, the miner's widow, is pursuing her husband's claim on his behalf. She also filed a survivor's claim on June 15, 2012. Survivor's Claim (SC) Director's Exhibits 2, 4, 6.

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

[3] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his or her 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).

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.[4] 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. The Miner's Claim - Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption,[5] the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[6] or by establishing 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." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

A. Legal Pneumoconiosis

In order to establish that claimant does not suffer from legal pneumoconiosis, employer must demonstrate that claimant does not have a chronic dust disease or

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[4] As the miner's last coal mine employment was in Kentucky, 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); Decision and Order at 3; MC Director's Exhibit 3.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings in the miner's claim that claimant established: at least thirty years of underground coal mine employment; total disability pursuant to 20 C.F.R. §718.204(b)(2); and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 14.

[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 is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). Employer contends that the administrative law judge erred in finding that it did not disprove that the miner had legal pneumoconiosis. We disagree.

There are three medical opinions relevant to the issue of legal pneumoconiosis. Dr. Mettu opined that the miner had chronic obstructive pulmonary disease (COPD) caused primarily by smoking and substantially aggravated by coal dust exposure. Miner's Claim (MC) Director's Exhibit 14; Employer's Exhibit 3. Dr. Broudy opined that the miner had severe respiratory impairment due to COPD caused by smoking and unrelated to coal dust exposure. Employer's Exhibit 1. Dr. Rosenberg did not diagnose chronic bronchitis or COPD. Employer's Exhibit 7. He indicated that the miner had a totally disabling respiratory impairment caused by metastatic lung cancer. *Id.*

The administrative law judge rejected Dr. Rosenberg's opinion to the extent it conflicted with the findings of Drs. Mettu and Broudy that the miner suffered from COPD in addition to lung cancer. Decision and Order at 19. The administrative law judge noted that to the extent he considered the opinions of Drs. Mettu and Broudy to be in equipoise, employer was unable to disprove the existence of legal pneumoconiosis. The administrative law judge ultimately found, however, that Dr. Mettu's diagnosis of legal pneumoconiosis was more credible because it was consistent with the Department of Labor's position in the preamble that coal dust exposure and smoking "*may* cause indistinguishable forms of COPD."[7] *Id.* (emphasis added); *see* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000). Thus, the administrative law judge concluded that employer was unable to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

Employer asserts that the administrative law judge improperly substituted his medical judgment for that of Dr. Rosenberg in finding that the miner had COPD. Contrary to employer's assertion, we see no error in the administrative law judge's rejection of Dr. Rosenberg's opinion. *See Snorton v. Zeigler Coal Co.*, 9 BLR 1-106, 1-107 (1986) (An administrative law judge may reasonably question the validity of a physician's opinion that varies significantly from the remaining medical opinions of record). The administrative law judge permissibly concluded that the opinions of Drs.

[7] Dr. Mettu indicated that he was unable to differentiate the percentage of the miner's obstructive respiratory impairment caused by smoking versus coal dust exposure, but explained that the combined effects of both exposures caused a "worse" impairment than exposure to either single cause alone. MC Director's Exhibit 14.

Mettu and Broudy diagnosing COPD outweighed Dr. Rosenberg's contrary opinion. *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); Decision and Order at 19.

Employer's only remaining argument regarding legal pneumoconiosis is that the opinion of Dr. Broudy is well reasoned and the opinion of Dr. Mettu is not. Because the Board is not empowered to engage in a de novo proceeding, however, we must limit our review to specific contentions of error raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. As employer does not specifically challenge the administrative law judge's rationale for crediting Dr. Mettu's diagnosis of legal pneumoconiosis, nor the administrative law judge's alternate finding that the evidence is in equipoise,[8] they are affirmed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Thus, we affirm the administrative law judge's determination that employer did not satisfy its burden to disprove the existence of legal pneumoconiosis. Decision and Order at 19. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i).

B. Disability Causation

The administrative law judge also found that employer failed to rebut the presumption by disproving the presumed fact of disability causation. Decision and Order at 21. Contrary to employer's contention, the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Jarboe regarding the cause of the miner's respiratory disability as neither physician diagnosed legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order at 21; Employer's Exhibits 1, 7. We therefore affirm the administrative law judge's determination that employer failed to establish that no part of

[8] Because employer bears the burden of proof, employer must disprove the existence of legal pneumoconiosis by a preponderance of the evidence, and when the evidence is equally balanced, employer has not satisfied its burden. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

[9] Because we affirm the administrative law judge's findings on legal pneumoconiosis, it is not necessary that we address employer's assertions of error with regard to the administrative law judge's findings on clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). As employer is unable to rebut the Section 411(c)(4) presumption, we affirm the award of benefits in the miner's claim.

II. The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 422(*l*) of the Act: 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 had been determined to be eligible to receive benefits at the time of his death.[10] 30 U.S.C. §932(*l*); Decision and Order at 21. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[10] Employer does not challenge the administrative law judge's findings regarding claimant's eligibility for derivative survivor's benefits, and asserts only that if the miner's claim is denied, the survivor's claim must be considered on its merits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge