U.S. Department of Labor

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

BRB Nos. 18-0053 BLA
and 18-0089 BLA

KATHY D. GRAHAM (Widow of and o/b/o the estate of JOHN H. GRAHAM, JR.)	)	
Claimant-Respondent	)	
v.	)	
DOSS FORK COAL COMPANY INCORPORATED	)	DATE ISSUED: 01/23/2019
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Andrea Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05472, 2016-BLA-05111) of Administrative Law Judge Larry S. Merck, awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim[1] filed on May 15, 2013, and a survivor's claim filed on July 9, 2015.[2] The Board has consolidated these appeals for purposes of decision only.

In the miner's claim, the administrative law judge credited the miner with 19.27 years of underground coal mine employment,[3] and found that new evidence establishes that he had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and invoked 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).[4] The administrative law judge further found that employer did not rebut the presumption and awarded benefits. In the survivor's claim, he found that claimant

[1] The miner's initial claim for benefits was finally denied by Administrative Law Judge Larry W. Price on July 25, 2007, because the evidence did not establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1 at 410.

[2] The miner died on June 7, 2015, while his case was pending before the Office of Administrative Law Judges. Survivor's Claim (SC) Director's Exhibit 2. Claimant, the widow of the miner, is pursuing the miner's claim. Decision and Order at 1.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because the miner's coal mine employment was in West Virginia and Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4, 31; MC Director's Exhibit 4.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis where the evidence establishes 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.

satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 422(*l*) of the Act,[5] 30 U.S.C. §932(*l*) (2012), and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption.[6] Employer therefore argues that the administrative law judge also erred in finding that claimant is automatically entitled to survivor's benefits pursuant to Section 422(*l*). Claimant responds, urging affirmance of the awards. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

I. Miner's Claim

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[7] 20 C.F.R. §718.305(d)(1)(i), or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R.

[5] Under Section 422(*l*) of the Act, 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 without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption and 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).

[7] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is 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).

§718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

A. Legal Pneumoconiosis

To prove that the miner did not have legal pneumoconiosis, employer had to establish that the miner did not suffer from a chronic lung disease or impairment that was "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). In determining that employer failed to meet its burden, the administrative law judge considered the medical opinions of Drs. Spagnolo and Zaldivar. Decision and Order at 14-28.

Both doctors opined that the miner did not have an obstructive respiratory impairment.[8] Miner's Claim (MC) Director's Exhibit 35 at 3; Employer's Exhibits 4 at 13; 14 at 6. They agreed that his arterial blood gas testing evidenced hypoventilation and hypoxemia, however. Miner's Claim (MC) Director's Exhibit 35 at 3; Employer's Exhibits 4 at 13; 14 at 6. Dr. Spagnolo concluded that the miner's "clinical symptoms and respiratory impairments [were] related to [his obesity] and severe cardiac disease[,] likely complicated by his years of cigarette smoking," and were unrelated to coal mine dust exposure. Employer's Exhibit 4 at 13; *see also* Employer's Exhibit 17 at 34-35. Dr. Zaldivar opined that the miner's gas exchange impairments were related to obesity, obstructive sleep apnea, the presence of the tracheostomy tube in the miner's airway, cardiac dysfunction, and cigarette smoking. MC Director's Exhibit 35 at 3-4; Employer's Exhibits 14 at 6-9; 18 at 40-43. He opined that none of these impairments were related to the miner's coal mine dust exposure. *Id*.

[8] With respect to the pulmonary function studies of record, Dr. Spagnolo opined that the testing in 1989 did not evidence an obstructive or restrictive respiratory impairment. Employer's Exhibits 4 at 24; 17 at 26-27. He noted that the miner underwent a tracheostomy in July 2000 to treat severe obstructive sleep apnea. Employer's Exhibits 4 at 24. This involved placing a tube into the miner's trachea to aid in breathing. *Id*. He concluded that any pulmonary function study that was taken after this procedure would not be "representative of [the miner's] actual lung function because of technical difficulties in performing the testing with the tracheostomy tube in place." *Id*. In his initial report, Dr. Zaldivar diagnosed the miner with chronic obstructive pulmonary disease (COPD). MC Director's Exhibit 35. However, Dr. Zaldivar later agreed with Dr. Spagnolo that the pulmonary function testing of record is invalid due to the miner's tracheostomy, and that there is no evidence of COPD. Employer's Exhibits 14 at 6-7; 18 at 41, 50, 57.

The administrative law judge discredited their opinions because he found their reasoning for concluding that the miner did not have legal pneumoconiosis to be inconsistent with the regulatory definition of the disease. Decision and Order at 34-37. Additionally, he discounted their opinions because he found that they were not well-reasoned.[9] *Id*. Employer argues that the administrative law judge erred. Employer's Brief at 16-26. We disagree.

In attempting to rebut the presumption, the physicians failed to account for the distinction between legal and clinical pneumoconiosis. As the administrative law judge noted, when "directly asked if the [m]iner suffered from legal pneumoconiosis, Dr. Spagnolo responded: 'No. Because I don't have a diagnosis clinically . . . or an x-ray that shows me sufficient evidence of pneumoconiosis.'" Decision and Order at 37, *quoting* Employer's Exhibit 17 at 35. Dr. Zaldivar testified that he was able to exclude coal mine dust exposure as causing the miner's gas exchange impairments because the miner did not "have clinical pneumoconiosis." Employer's Exhibit 18 at 42. He noted that the miner's CT scans and x-rays "for the most part have shown that he [did] not have enough deposition of dust within the lungs to have produced any kind of damage by the content of the mineral dust within the lungs." *Id*. at 42-43. Because clinical pneumoconiosis and legal pneumoconiosis are distinct diseases, the administrative law judge permissibly discounted their opinions. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (Traxler, C.J., dissenting) ("[The] regulations make clear that the absence of clinical pneumoconiosis cannot be used to rule out legal pneumoconiosis."); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1995); *Barber v. U.S. Steel Mining Co.*, 43 F.3d 899, 901 (4th Cir. 1995); 20 C.F.R. §718.201(a)(1),(2); Decision and Order at 34-37.

Moreover, the administrative law judge permissibly found that their opinions were not well-reasoned because neither physician "adequately [explained] why the [m]iner's 19.27 years of coal mine employment [are] eliminated as a significant co-contributing factor or a substantially aggravating factor in the [m]iner's totally disabling respiratory or pulmonary condition." Decision and Order at 37-38; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §718.201(b).

The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence,

[9] The administrative law judge also found that neither physician persuasively explained why the miner did not suffer from an obstructive respiratory impairment that was significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order at 34-37.

we affirm the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[10]

B. Clinical Pneumoconiosis

Employer argues that the administrative law judge erred in weighing the x-rays, CT scans, and medical opinions on the issue of clinical pneumoconiosis.[11] Employer's Brief at 7-13. We disagree.

1. X-Rays

The administrative law judge weighed ten readings of four x-rays dated June 19, 2013, October 23, 2013, May 22, 2014, and June 20, 2014. Decision and Order at 8. Dr. Forehand, a B reader, and Dr. DePonte, a dually-qualified Board-certified radiologist and B reader, interpreted the June 19, 2013 x-ray as positive for pneumoconiosis; Dr. Shipley, also dually-qualified, interpreted it as negative.[12] MC Director's Exhibits 16, 30, 34. Dr. Alexander, a dually-qualified radiologist, interpreted the October 23, 2013 x-ray as positive for pneumoconiosis; Dr. Shipley, and Dr. Seaman, also dually-qualified, interpreted it as negative. Claimant's Exhibit 3; Employer's Exhibits 1, 2. Dr. Alexander interpreted the May 22, 2014 x-ray as positive for pneumoconiosis; Dr. Meyer, a dually-qualified radiologist, interpreted it as negative. Claimant's Exhibit 2; Employer's Exhibit 11. Dr. Alexander interpreted the June 20, 2014 as positive for pneumoconiosis; Dr. Meyer interpreted it as negative. Claimant's Exhibit 1; Employer's Exhibit 9.

Giving more weight to the x-ray interpretations of physicians who are dually-qualified as B readers and Board-certified radiologists, the administrative law judge found the June 19, 2013, May 22, 2014, and June 20, 2014 x-rays inconclusive, based on the conflicting interpretations of equally qualified readers. Based on the two negative readings by Drs. Shipley and Seaman, the administrative law judge found the October 23, 2013 x-ray to be negative for pneumoconiosis. Decision and Order at 39-41. He further noted,

[10] Because we affirm the administrative law judge's decision to discredit the opinions of Drs. Spagnolo and Zaldivar on the issue of legal pneumoconiosis for the reasons set forth above, we need not address employer's additional challenge to the administrative law judge's weighing of these opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 16-26.

[11] The administrative law judge accurately found that the record contains no biopsy evidence. Decision and Order at 42-43.

[12] Dr. Gaziano reviewed the June 19, 2013 x-ray to assess its film for quality purposes only. MC Director's Exhibit 13.

however, that "both Drs. Seaman and Shipley rated the quality [of the October 23, 2013 x-ray] as '3,' or poor, due to overexposure, [and that] Dr. Shipley [noted] poor contrast."[13] *Id*. at 41. While noting that a "poor" film quality rating does not necessarily make a chest x-ray unacceptable for interpretation, the administrative law judge found that "the fact that both Dr. Seaman and Dr. Shipley rated the quality of the negative film as 'poor' detracts from the credibility of that chest x-ray overall." *Id*. Thus, the administrative law judge assigned diminished weight to the October 23, 2013 negative x-ray,[14]and found that the preponderance of the x-ray evidence was inconclusive on the issue of clinical pneumoconiosis. *Id*.

Employer solely argues that the administrative law judge failed to give proper consideration to the academic and clinical experience of Drs. Shipley, Seaman, and Meyer. Employer's Brief at 7-9. Contrary to employer's argument, although an administrative law judge may give greater weight to the x-ray interpretation of a physician based upon his or her academic qualifications, he is not required to do so. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003). Here, the administrative law judge considered the physicians' radiological qualifications, along with their academic and clinical expertise, and permissibly assigned equal weight to the readings by the dually-qualified physicians. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 39-41. Because he performed both a qualitative and quantitative review of the x-ray evidence, taking into consideration the number of x-ray interpretations, the readers' qualifications, the dates of the films, and the nature of the readings when resolving the conflict in the x-ray readings, we affirm his finding that the x-ray evidence is inconclusive and insufficient to rebut the presumed fact of clinical pneumoconiosis. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins*, 958 F.2d at 52.

[13] The administrative law judge noted that "the chest x-ray which the physicians agree is of 'good' quality, the May 22, 2014 chest x-ray, is inconclusive for pneumoconiosis as are the remaining chest x-rays, though there are differences of opinion as to their film quality." Decision and Order at 41.

[14] Employer does not challenge the administrative law judge's finding that the credibility of the October 23, 2013 negative x-ray was diminished by the poor quality of its film, as rated by Drs. Seaman and Shipley. That finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

2. CT scans

The administrative law judge next addressed the CT scan evidence. He noted that the record contains a June 1, 2013 CT scan, which was read as positive for bibasilar atelectatic changes. Decision and Order at 42-43; Employer's Exhibit 13 at 155. He also noted that Drs. Spagnolo and Zaldivar referenced multiple CT scan readings from the miner's hospital records, none of which were read as positive for clinical pneumoconiosis. Decision and Order at 42-44; MC Director's Exhibit 35; Employer's Exhibits 4, 14, 17. The administrative law judge found that the CT scan evidence is insufficient to establish that the miner did not have clinical pneumoconiosis because "the Department of Labor rejected the view that a CT scan, by itself, 'is sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis.'" Decision and Order at 43, *quoting* 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000). Because this finding is unchallenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Webber v. Peabody Coal Co.*, 23 BLR 1-123, 135-136 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); 20 C.F.R. §718.107(b). Thus, we affirm the administrative law judge's finding that the CT scan evidence does not rebut the presumed fact of clinical pneumoconiosis.

3. Medical Opinions

The administrative law judge next weighed the medical opinions of Drs. Spagnolo and Zaldivar that the miner did not have clinical pneumoconiosis, finding them not well-reasoned or documented. Decision and Order at 42-44; MC Director's Exhibit 35; Employer's Exhibits 4, 14, 17. Employer argues that the administrative law judge erred in weighing their opinions. Employer's Brief at 9-12. We disagree.

The administrative law judge noted that both doctors excluded clinical pneumoconiosis because they assumed that the miner's x-rays were consistent with atelectasis and negative for clinical pneumoconiosis. Decision and Order at 42-44. Contrary to employer's argument, the administrative law judge permissibly rejected their opinions because they based their diagnoses on their belief that the x-rays of record are negative for clinical pneumoconiosis, inconsistent with the administrative law judge's findings that the x-ray evidence is inconclusive. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 42-44. Thus, we affirm the administrative law judge's determination that the medical opinion evidence does not support employer's burden to disprove clinical pneumoconiosis.[15] We therefore affirm the administrative law judge's

[15] Because we affirm the administrative law judge's decision to discredit the opinions of Drs. Spagnolo and Zaldivar on the issue of clinical pneumoconiosis for the reasons set forth above, we need not address employer's additional challenge to the

finding that employer did not rebut the presumed fact of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B).[16]

C. Disability Causation

The administrative law judge next addressed whether employer established that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 45-46. The administrative law judge rationally discounted the disability causation opinions of Drs. Spagnolo and Zaldivar because neither physician diagnosed legal or clinical pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the diseases. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 45-46. We therefore affirm the administrative law judge's determination that employer failed to establish that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

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administrative law judge's weighing of these opinions. *See Kozele*, 6 BLR at 1-382-83 n.4; Employer's Brief at 9-12.

[16] Employer argues that the administrative law judge erred by failing to weigh the miner's hospital and treatment records on the issue of clinical pneumoconiosis. Employer's Brief at 12-13. Contrary to employer's argument, the administrative law judge found that the miner's "hospital and treatment records often included a past medical history of [coal workers' pneumoconiosis] or noted that the [m]iner had pneumoconiosis, but did not further distinguish it as clinical or legal or provide the basis of those assertions." Decision and Order at 42 n. 26. He further found that these records do not aid employer "in rebuttal as they do not affirmatively establish that the [m]iner did not suffer from clinical pneumoconiosis." *Id.*; *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

II. 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 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 was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order at 47-48. Because we have affirmed the award of benefits in the miner's claim, and employer raises no separate error with regard to the findings in the survivor's claim, *see* 20 C.F.R. §802.211(b), we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order awarding benefits in both claims is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge