U.S. Department of Labor

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

BRB Nos. 18-0581 BLA
and 19-0158 BLA

BRENDA J. DENTON (o/b/o and Widow of DAVID L. DENTON) Claimant-Respondent v. LITTLE J COAL COMPANY, INCORPORATED and WEST VIRGINIA CWP FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/29/2020 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits on Remand of Dana Rosen and the Decision and Order Awarding Benefits of Timothy J. McGrath, Administrative Law Judges, United States Department of Labor.

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

Andrea L. Berg and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Anne Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2015-BLA-05061) of Administrative Law Judge Dana Rosen and the Decision and Order Awarding Benefits (2017-BLA-06170) of Administrative Law Judge Timothy J. McGrath rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a miner's subsequent claim[2] filed on November 13, 2013, which is before the Board for a second time, and a survivor's claim filed on July 26, 2017. The Board has consolidated these appeals for purposes of decision only.

In the initial decision in the miner's claim, Judge Rosen credited the miner with eleven years and 27.72 days of coal mine employment and therefore found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] *Denton v. Little J Coal Co., Inc.*, BRB No. 17-0565 (September 5, 2018) (unpub.). Addressing whether the miner could establish entitlement without the presumption, Judge Rosen found the new evidence established a totally disabling respiratory or pulmonary impairment and a change in an applicable condition of

[1] Claimant is the widow of the miner, who died on December 29, 2016 while his subsequent claim was pending. Survivor Director's Exhibit 8. In addition to pursuing her claim for survivor's benefits, claimant is pursuing the miner's claim on behalf of his estate.

[2] The miner filed two prior claims, each of which was finally denied. Miner Director's Exhibits 1-2. The district director denied the miner's most recent prior claim because the miner did not establish any element of entitlement. Miner Director's Exhibit 2.

[3] Pursuant to Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or surface 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); *see* 20 C.F.R. §718.305.

entitlement.[4] *Id*. Considering the claim on its merits, she found the miner had clinical and legal pneumoconiosis,[5] and that his total disability was due to pneumoconiosis and awarded benefits.

On appeal, the Board affirmed, as unchallenged, Judge Rosen's findings that the miner established total disability and a change in an applicable condition of entitlement. The Board vacated her determination the evidence established pneumoconiosis and disability causation, however, and remanded the case for additional consideration. *See Denton v. Little J Coal Co., Inc*., BRB No. 17-0565 (September 5, 2018) (unpub.).

In her Decision and Order Awarding Benefits on Remand dated December 6, 2018, the subject of the current appeal in the miner's claim, Judge Rosen again found the miner totally disabled due to legal pneumoconiosis arising out of coal mine employment and awarded benefits.

In a separate Decision and Order Awarding Benefits in the survivor's claim, Judge McGrath granted claimant's motion for summary decision,[6] finding claimant automatically

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[4] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the miner's prior claim was denied for failure to establish any element of entitlement, claimant had to establish one element of entitlement to obtain review of the merits of his claim.

[5] 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). 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). This definition encompasses 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).

[6] On July 20, 2018, claimant moved for a summary decision, arguing there was no genuine issue of material fact concerning whether she was automatically entitled to benefits

entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), based on the award of benefits in the miner's claim.[7]

In the present appeal in the miner's claim, employer asserts Judge Rosen erred in not making a specific finding concerning clinical pneumoconiosis and in finding claimant established legal pneumoconiosis and total disability causation. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, did not file a response brief in the miner's claim.

On appeal in the survivor's claim, employer argues Judge McGrath erred in awarding benefits under Section 422(*l*) before the award of benefits in the miner's claim became final. Employer disagrees with the holding in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014) and asks the Board to reconsider its decision. Claimant responds in support of the award of benefits. Employer also challenges the constitutionality of Section 422(*l*) because it was passed as part of the Affordable Care Act (ACA) which it asserts is unconstitutional. The Director filed a response brief, urging the Board to reject employer's argument that Section 422(*l*) is unconstitutional and inapplicable.

The Board's scope of review is defined by statute. We must affirm the administrative law judges' decisions and orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[8] 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).

The Miner's Claim

To be entitled to benefits, claimant must establish pneumoconiosis, the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and the totally disabling respiratory or pulmonary impairment was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203,

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pursuant to Section 422(*l*). Employer opposed claimant's motion, asserting the claim should be held in abeyance pending a final resolution in the miner's claim.

[7] Under Section 422(*l*) of the Act, the 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).

[8] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner Director's Exhibit 5.

718.204. Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Legal Pneumoconiosis

Employer argues Judge Rosen erred in finding the medical opinion evidence established legal pneumoconiosis. In order to establish legal pneumoconiosis, claimant must prove the miner had a "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).

Judge Rosen considered the opinions of Drs. Forehand, Raj, and Green, who diagnosed the miner with legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to a combination of coal dust exposure and cigarette smoking. Miner Decision and Order on Remand at 50-55; Miner Director's Exhibits 13, 24; Miner Claimant's Exhibits 1-2. Judge Rosen also considered the opinions of Drs. Fino and Basheda diagnosing an obstructive and restrictive impairment due to causes other than coal dust exposure. Miner Decision and Order on Remand at 55-63; Miner Director's Exhibit 33; Miner Employer's Exhibits 3-4, 7-8. Judge Rosen credited the opinions of Drs. Forehand, Raj, and Green and discredited the opinions of Drs. Fino and Basheda to find claimant established legal pneumoconiosis. Miner Decision and Order on Remand at 62.

We reject employer's assertion that Judge Rosen erred in discrediting Dr. Fino's opinion. *See* Miner Decision and Order on Remand at 56-58; Miner Employer's Brief at 22-24. Dr. Fino agreed the miner had a sufficient coal mine dust exposure history to cause a coal mine dust induced pulmonary disease in a susceptible individual. Miner Employer's Exhibit 8 at 8. He excluded coal dust as a cause of the miner's respiratory impairment, however, based in part on the significant reduction in the miner's diffusing capacity which he stated "would be unlikely in a coal dust related abnormality and more likely in a smoking related abnormality." Miner Director's Exhibit 33; *see* Miner Decision and Order on Remand at 56-58. Contrary to employer's contention, Judge Rosen permissibly discredited Dr. Fino's opinion because he did not persuasively explain, given the miner's sufficient exposure history, why coal dust did not also significantly contribute to the miner's respiratory impairment even if it was unlikely. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); Miner Decision and Order on Remand at 56, 58.

Similarly, we reject employer's contention that Judge Rosen erred in finding Dr. Basheda's opinion entitled to little weight. *See* Miner Decision and Order on Remand at

59-62; Miner Employer's Brief at 16-17. Dr. Basheda agreed the miner's dust exposure was sufficient to cause a coal mine dust-induced pulmonary disease in a susceptible individual, that occupational exposure to coal mine dust can cause COPD, and that the contributions from coal dust and cigarette smoking can be additive. Miner Employer's Exhibit 7 at 12, 32-33. While Dr. Basheda explained the miner's significant change in pulmonary function over a short period of time argued against the fixed-type of airway obstruction associated with coal dust exposure, he conceded the miner's impairment was only partially reversible.[9] Miner Employer's Exhibit 7 at 33-34. Dr. Basheda nonetheless concluded the miner's hypoxemia and obstructive lung disease were due to causes other than coal dust based on "a sense" he has developed after treating people for the past twenty-five years. Miner Employer's Exhibit 7 at 33; *see also* Miner Employer's Exhibit 4. Judge Rosen permissibly found that beyond "sensing" that other factors "could" account for the miner's impairment, Dr. Basheda failed to persuasively explain how he excluded coal mine dust exposure as a significant contributing cause of the miner's respiratory impairment. Miner Decision and Order on Remand at 61; *see Looney*, 678 F.3d at 316-17; *Compton*, 211 F.3d at 211. Consequently, we affirm Judge Rosen's determinations to discredit the opinions of Drs. Fino and Basheda concerning legal pneumoconiosis.[10]

We next address employer's arguments regarding Judge Rosen's consideration of claimant's physicians' opinions. In evaluating the opinions of Drs. Forehand, Raj and Green, Judge Rosen provided detailed and accurate summaries of their credentials and opinions.[11] *See* Miner Decision and Order on Remand at 11-13, 17-45. We reject, as

[9] Dr. Basheda stated it was "possible" the miner's fixed airways obstruction was due to the absence of respiratory therapy. Miner Employer's Exhibit 4 at 25.

[10] Because Judge Rosen provided valid bases for discrediting the opinions of Drs. Fino and Basheda, we need not address employer's remaining arguments regarding the weight she accorded them. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). In addition, contrary to employer's contention, the administrative law judge was aware of their credentials. *See* Miner Decision and Order on Remand at 11. She permissibly discredited their reasoning as unpersuasive and not on the basis of their credentials. *Id*. at 56-62.

[11] Despite employer's allegations, Judge Rosen never indicated Dr. Forehand is Board-certified or Board-eligible in pulmonary disease. *See* Miner Employer's Brief at 17. Rather, she accurately stated Dr. Forehand "completed a pulmonary fellowship and has practiced pulmonary medicine for [twenty-four] years." Miner Decision and Order on Remand at 53; Miner Director's Exhibits 13, 24 at 5. In addition, she did not give Dr. Forehand's opinion additional weight based on his impartiality. Rather, she stated as a factual matter that his experience includes performing "thousands of impartial

unsupported, employer's assertion that Judge Rosen erred in finding their opinions consistent with the treatment records when they did not review such records.[12] Miner Employer's Brief at 19-20. Further, contrary to employer's argument, Judge Rosen permissibly credited Dr. Forehand's opinion as well-reasoned and well-documented because she found he adequately considered claimant's exposure histories, based his opinion on objective evidence demonstrating a severe obstructive impairment, and persuasively explained the basis for his conclusions.[13] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Miner Decision and Order on Remand at 17-25; 51-53. Moreover, because Dr. Forehand specifically opined the miner's coal mine dust exposure substantially contributed to his obstructive impairment, we affirm Judge Rosen's conclusion that his opinion is sufficient to satisfy claimant's burden of proof. *See* 20 C.F.R. §718.201(a)(2), (b); Director's Exhibit 13.

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examinations" for the Department of Labor. She ultimately credited his opinion for being "thorough, well-supported by the medical evidence, well-reasoned, well-documented, consistent with the treatment records in evidence, consistent with the medical evidence in the record, and [] highly persuasive." *See* Miner Decision and Order on Remand at 53. Even had she credited him in part based on his impartiality, the case on which employer relies, *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991), is distinguishable as it states greater weight may not be accorded on that basis *alone*.

[12] An administrative law judge is not required to discredit a physician who did not review all of a miner's treatment records particularly where, as here, the physicians were found to have provided well-reasoned and well-documented opinions based on their own examinations of the miner and objective test results. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). Nor is it inherently erroneous to find that such physicians' opinions are "consistent with" other evidence in the record, such as treatment records. Employer concedes the opinions of Drs. Forehand and Raj are consistent with the treatment records to the extent they diagnosed the miner with an obstructive impairment. *See* Miner Employer's Brief at 19-20.

[13] Dr. Forehand examined the miner and noted he had eleven years of underground coal mine employment. Miner Director's Exhibit 13. Dr. Forehand attributed the miner's obstructive respiratory impairment to "the combined effects" of cigarette smoking and coal dust exposure, explaining that both cause similar lung damage. Miner Director's Exhibit 24 at 54-55.

Judge Rosen also credited the opinions of Drs. Raj and Green, finding them well-reasoned, well-documented, and consistent with the medical evidence in the record including their own examinations of claimant. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark*, 12 BLR at 1-155; Miner Decision and Order on Remand at 25-29, 53-55. While employer asserts Judge Rosen erred by not specifically addressing whether their reliance on fifteen rather than approximately eleven years of coal mine employment impacted the credibility of their opinions, remand is not required on this basis. *See* Miner Employer's Brief at 20-21; Claimant's Exhibits 1, 2. Even assuming this constitutes a significant difference that could impact the credibility of their opinions, any error in the administrative law judge's crediting of their opinions in this regard is harmless due to our affirmance of the administrative law judge's finding that Dr. Forehand, who relied on an accurate coal mine employment history, provided a reasoned diagnosis of legal pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As there are no contrary credible opinions on this issue, claimant has met her burden of proof with Dr. Forehand's opinion.

Judge Rosen also found all of the evidence of record, when weighed together, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[14] *Compton*, 211 F.3d 203, 208-11 (4th Cir. 2000); Miner Decision and Order on Remand at 62. We affirm this finding as supported by substantial evidence.[15]

Total Disability Causation

Employer next argues Judge Rosen erred in finding the evidence established the miner's total disability was due to pneumoconiosis. *See* 20 C.F.R. §718.204(c). Employer's contention lacks merit.

To establish the miner was totally disabled due to pneumoconiosis, claimant must establish pneumoconiosis was a "substantially contributing cause" of the miner's totally

[14] As employer notes, Judge Rosen did not make an independent finding concerning clinical pneumoconiosis. *See* Miner Employer's Brief at 8-9. Remand is not required on this basis, however, based on our affirmance of her finding legal pneumoconiosis sufficiently caused claimant's disability. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[15] Because she found the medical opinion evidence established legal pneumoconiosis, Judge Rosen was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as her finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Drs. Fino and Basheda opined claimant does not have legal pneumoconiosis and his disabling respiratory impairment is caused entirely by smoking and asthma. Director's Exhibit 33; Employer's Exhibits 4, 7, 8. Having determined claimant established the existence of legal pneumoconiosis, Judge Rosen rationally found their opinions not well-reasoned and entitled to very little weight. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (a doctor's opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding her view on causation is independent of her mistaken belief that the miner did not have pneumoconiosis); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Miner Decision and Order on Remand at 76. In contrast, for the same reasons she credited Dr. Forehand's opinion on legal pneumoconiosis, the administrative law judge permissibly credited his opinion regarding the etiology of claimant's disabling respiratory impairment.[16] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Consequently, we affirm the administrative law judge's determination that claimant established total disability due to pneumoconiosis. We, therefore, affirm Judge Rosen's award of benefits in the miner's claim.

The Survivor's Claim

Judge McGrath found claimant automatically entitled to survivor's benefits under Section 422(*l*).[17] Survivor Decision and Order at 4-5. Citing *Texas v. United States*, 340 F.Supp.3d 579, *decision stayed pending appeal*, 352 F.Supp.3d 665, 690 (N.D. Tex. 2018), employer contends the ACA, which reinstated the automatic entitlement provisions of Section 422(*l*), is unconstitutional. Survivor Employer's Brief at 13-14. On appeal, the United States Court of Appeals for the Fifth Circuit held one aspect of the ACA (the individual responsibility to maintain health insurance) unconstitutional, but vacated and remanded the district court's determination the remainder of the ACA must also be struck down as inseverable. *Texas v. United States*, No. 19-10011, 2019 WL 6888446, at *27-28 (5th Cir. Dec. 18, 2019) (King, J., dissenting). Moreover, as the Director also correctly

[16] Dr. Forehand opined that coal mine dust exposure substantially contributed to the miner's respiratory disability. Director's Exhibits 13; 24 at 64. As Dr. Forehand's opinion is sufficient to meet claimant's burden of proof, any error in the administrative law judge's additional crediting of Drs. Raj and Green is harmless. *Larioni*, 6 BLR at 1-1278; Miner Decision and Order on Remand at 76.

[17] Judge McGrath found claimant satisfied each element of entitlement: 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); Survivor's Decision and Order at 4-5.

points out, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject employer's argument that Section 422(*l*) is unconstitutional and inapplicable to this case, and we decline to hold this case in abeyance. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

Employer next contends Judge McGrath's application of Section 422(*l*) was erroneous because the miner's award was not yet final. Survivor Employer's Brief at 4-13. As employer recognizes, however, the Board has rejected that argument and held that an award of benefits in a miner's claim need not be final for a claimant to receive benefits under Section 422(*l*). *Rothwell*, 25 BLR at 1-145-47. We decline employer's request to reconsider the Board's holding in *Rothwell*.

Because we have affirmed the award of benefits in the miner's claim, we affirm Judge McGrath'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).

Accordingly Judge Rosen's Decision and Order Awarding Benefits on Remand in the miner's claim and Judge McGrath's Decision and Order Awarding Benefits in the survivor's claim are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge