U.S. Department of Labor

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

BRB No. 14-0306 BLA

SHELBY M. CLISSO (Widow of FRANK CLISSO) Claimant-Respondent v. ELRO COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/17/2015 DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (09-BLA-5889, 12-BLA-5813) of Administrative Law Judge Linda S. Chapman denying benefits on a miner's claim and

awarding benefits on a survivor's claim, each of which was 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 filed on February 9, 2004 and a survivor's claim filed on March 23, 2012.

In regard to the miner's claim, the administrative law judge credited the miner with at least twenty years of underground coal mine employment,[1] and found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the miner was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Although the administrative law judge also found that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), she found that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits in the miner's claim.

Considering the survivor's claim, the administrative law judge noted that she credited the miner with over fifteen years of underground coal mine employment, and found that the evidence established that the miner suffered from a totally disabling respiratory impairment. The administrative law judge, therefore, determined that claimant[2] invoked the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[3] 30 U.S.C.

[1] The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[2] Claimant is the surviving spouse of the miner, who died on January 24, 2012. Director's Exhibit 5.

[3] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. (The amendments do not apply to the miner's claim in this case, because it was filed before January 1, 2005.) Relevant to the survivor's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

§921(c)(4).[4] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Employer specifically contends that the administrative law judge applied an incorrect rebuttal standard. Claimant responds in support of the administrative law judge's award of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that any error committed by the administrative law judge in applying an incorrect rebuttal standard is harmless. In a reply brief, employer reiterates its previous contentions.

On April 9, 2015, the Board requested supplemental briefing from the Director seeking his position on the issues raised on appeal, including his position on whether the administrative law judge considered x-ray evidence that was not properly admitted in the survivor's claim.[5] Thereafter, the Board summarily denied employer's motion for reconsideration of the briefing order, but granted employer and claimant twenty days from receipt of the Director's brief in which to file a reply brief. The Director filed his Supplemental Brief on May 29, 2015. Employer filed its reply brief on June 26, 2015. Claimant has not filed a reply brief.

[4] The amendments also revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Claimant cannot benefit from this provision, as the miner's claim for benefits was denied. Claimant has not appealed the administrative law judge's denial of the miner's claim.

[5] In an Order dated April 9, 2015, the Board requested that the Director, Office of Workers' Compensation Programs, address (1) whether the administrative law judge's Decision and Order could be affirmed; (2) whether the administrative law judge relied upon x-ray evidence not properly admitted into the record of the survivor's claim when she found that employer failed to establish that the miner did not have pneumoconiosis and, if so, whether that reliance affected the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption; and (3) whether the administrative law judge's analysis of the CT scan evidence was erroneous.

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 Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption.[6]

In finding that the medical opinion evidence established the existence of a totally disabling respiratory impairment,[7] the administrative law judge credited the opinions of Drs. Rosenberg and Fino, that claimant was totally disabled, noting that these physicians "most recently reviewed [the miner's] medical records."[8] Decision and Order at 25, 27. The administrative law judge, therefore, found that the medical opinion evidence established the existence of a totally disabling respiratory impairment. *Id.*

Employer initially argues that the administrative law judge relied upon medical opinion evidence that was not properly admitted in the survivor's claim. Specifically, employer argues that the administrative law judge erred in considering Dr. Rasmussen's May 15, 2004 medical report, and Dr. Rosenberg's October 20, 2008 medical report. We disagree. In the survivor's claim, claimant designated Dr. Rasmussen's May 15, 2014 report as one of her two affirmative medical reports. 20 C.F.R. §725.414(a)(2)(i); Claimant's Evidence Summary Form (Survivor's Claim). Similarly, employer designated Dr. Rosenberg's October 20, 2008 report as one of its two affirmative medical reports. 20 C.F.R. §725.414(a)(3)(i); Employer's Evidence Summary Form (Survivor's Claim). The administrative law judge, therefore, properly admitted this evidence in

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least twenty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 23-24.

[8] The administrative law judge accurately noted that Dr. Rasmussen reached the same conclusion, opining that the miner did not have the respiratory capacity to perform his usual coal mine employment. Decision and Order at 25, 27.

regard to the survivor's claim.[9] Hearing Transcript at 21, 23.

Employer next argues that the administrative law judge erred in relying upon Dr. Fino's opinion to support a finding of a totally disabling respiratory or pulmonary impairment. We disagree. In a January 16, 2006 medical report, Dr. Fino opined that, from a respiratory standpoint, the miner was disabled from returning to his last coal mine job. Employer's Exhibit 1. In a September 4, 2013, supplemental medical report, Dr. Fino reiterated his opinion that the miner "had a mild, disabling respiratory impairment." Employer's Exhibit 4. During a September 12, 2013 deposition, Dr. Fino again opined that, prior to his death, the miner suffered from a totally disabling respiratory impairment. Employer's Exhibit 5 at 46. After considering Dr. Fino's medical report, along with his deposition testimony, the administrative law judge reasonably found that Dr. Fino's opinion supported a finding of a totally disabling respiratory impairment.[10] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

We also reject employer's contention that Dr. Rosenberg's opinion does not support a finding of a totally disabling respiratory impairment. The administrative law judge accurately noted that Dr. Rosenberg, in his November 7, 2008 report, opined that the miner was "disabled from a respiratory perspective." Decision and Order at 24; Director's Exhibit 1. In a supplemental report dated September 6, 2013, Dr. Rosenberg noted that, based upon his earlier examination of the miner in 2008, he opined that the miner was "disabled from a respiratory perspective." Employer's Exhibit 6. Although

[9] Employer's contention that the administrative law judge considered only the earlier reports of Drs. Fino and Rosenberg, and not their later, supplemental reports, is without merit. The administrative law judge specifically summarized the physicians' 2013 reports, and Dr. Fino's 2013 deposition testimony, as part of her summary of the medical evidence. Decision and Order at 16-19. Thus, the administrative law judge considered all of the relevant evidence in determining that the opinions of Drs. Fino and Rosenberg supported a finding of total disability from a respiratory impairment.

[10] Citing Dr. Fino's deposition testimony, employer notes that "Dr. Fino did not believe that [the miner] was disabled from a respiratory standpoint if he took his bronchodilators." Employer's Brief at 12, citing Employer's Exhibit 5 at 48-49. Dr. Fino did, in fact, testify that the miner would have the necessary lung function to perform his last coal mine job if he "would take his bronchodilators." Employer's Exhibit 5 at 49. However, the administrative law judge accurately noted that Dr. Fino also opined that the miner would be totally disabled from a respiratory standpoint without the assistance of a bronchodilator. Decision and Order at 18; Employer's Exhibit 5 at 48. The administrative law judge, therefore, permissibly found that Dr. Fino's opinion supported a finding of a totally disabling respiratory impairment. Decision and Order at 25, 27.

Dr. Rosenberg reviewed additional evidence, he did not indicate that this additional evidence caused him to change his opinion regarding the extent of the miner's respiratory impairment.[11] *Id.* The administrative law judge, therefore, permissibly found that Dr. Rosenberg's opinion supported a finding of a totally disabling respiratory impairment. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that claimant established over twenty years of underground coal mine employment, and the existence of a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both legal and clinical pneumoconiosis,[12] 20 C.F.R. §718.305(d)(2)(i), or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer argues that the administrative law judge erred in finding that employer failed to disprove the existence of pneumoconiosis. Specifically, employer asserts that the administrative law judge improperly based her finding on x-ray evidence admitted in the miner's claim, but not the survivor's claim. We agree. The administrative law judge found that employer could not disprove the existence of pneumoconiosis based on her finding, in the miner's claim, that the x-ray and medical opinion evidence established the

[11] Contrary to employer's contention, the administrative law judge considered Dr. Rosenberg's September 6, 2013 supplemental report. Decision and Order at 19.

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

existence of clinical pneumoconiosis.[13] Decision and Order at 27. In adjudicating the miner's claim, the administrative law judge considered twelve readings of five x-rays performed between 2004 and 2010. Decision and Order at 20. The administrative law judge summarized all of the x-ray readings in the miner's claim, and determined that the x-rays taken on April 28, 2004, September 29, 2004, December 1, 2005, and October 20, 2008 supported a finding of clinical pneumoconiosis, based on the superior qualifications of the physicians.[14] *Id.* Because the May 22, 2010 x-ray was read as positive and negative by the best qualified physicians, the administrative law judge found that this x-ray was in equipoise.[15] *Id.* at 21. Having found that four of the five x-rays were positive for pneumoconiosis, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis. *Id.*

[13] In the miner's claim, the administrative law judge determined that the opinions of Drs. Castle, Fino, and Rosenberg, who did not diagnose clinical pneumoconiosis, were entitled to little weight because they conflicted with the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis. Decision and Order at 22. By contrast, the administrative law judge credited the opinions of Drs. Baker and Rasmussen, who diagnosed both clinical and legal pneumoconiosis. *Id.* at 22-23. Consequently, the administrative law judge determined that the medical opinion evidence, as well as the evidence as a whole, established the existence of pneumoconiosis. *Id.* at 23.

[14] While Dr. Wiot, a B reader and Board-certified radiologist, interpreted the April 28, 2004 x-ray as negative for pneumoconiosis, two equally qualified physicians, Drs. Alexander and Patel, interpreted the x-ray as positive for the disease. Director's Exhibit 1; Claimant's Exhibit 1. While Dr. Castle, a B reader, interpreted the September 29, 2004 x-ray as negative for pneumoconiosis, and Dr. Fino, a B reader, interpreted the December 1, 2005 x-ray as negative for pneumoconiosis, Dr. Alexander, a dually qualified physician, interpreted each of these x-rays as positive for the disease. Director's Exhibit 1; Claimant's Exhibits 3, 4. While Dr. Rosenberg, a B reader, interpreted the October 20, 2008 x-ray as negative for pneumoconiosis, Dr. Poulos, a dually qualified physician, interpreted this x-ray as positive for the disease. Director's Exhibit 1.

[15] While Dr. Meyer, a B reader and Board-certified radiologist, interpreted the May 22, 2010 x-ray as negative for pneumoconiosis, Dr. Alexander, an equally qualified physician, interpreted the x-ray as positive for the disease. Claimant's Exhibit 8; Employer's Exhibit 1. Dr. Baker, a B reader, also interpreted the x-ray as positive for pneumoconiosis. Claimant's Exhibit 5.

All of the x-ray readings that were considered by the administrative law judge in the miner's claim were properly designated by the parties and admitted into evidence for the purposes of that claim. In the survivor's claim, claimant designated only Dr. Patel's positive reading of the April 28, 2004 x-ray and Dr. Alexander's positive reading of the May 22, 2010 x-ray. *See* Claimant's Evidence Summary Form; Hearing Transcript at 20-21. Employer designated Dr. Rosenberg's negative reading of the October 20, 2008 x-ray and Dr. Meyer's negative reading of the May 22, 2010 x-ray.[16] *See* Employer's Evidence Summary Form; Hearing Transcript at 22. We agree with employer and the Director that the medical evidence from the prior living miner's claim must be designated by one of the parties in order for it to be included in the record relevant to the survivor's claim.[17] *See* 20 C.F.R. §§725.414, 725.456(b)(1); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2006) (en banc). Thus, by using her findings in the miner's claim to determine that employer failed to disprove clinical pneumoconiosis in the survivor's claim, the administrative law judge improperly considered evidence outside of the record.[18] *Id.*

Employer also contends that the administrative law judge, in addressing the issue of the existence of clinical pneumoconiosis, erred in her consideration of the CT scan evidence. Although the administrative law judge did not address the CT scan evidence in regard to employer's burden to establish rebuttal of the Section 411(c)(4) presumption, she considered this evidence in her adjudication of the miner's claim.

In adjudicating the miner's claim, the administrative law judge considered eight readings of five CT scans taken on January 8, 2004, March 31, 2006, January 24, 2008,

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[16] We note that neither party exhausted its allowance under the evidence limitations provided in 20 C.F.R. §725.414 in the survivor's claim. Claimant did not submit any rebuttal x-ray readings, and employer submitted only one affirmative x-ray reading.

[17] If evidence exceeding the limitations applicable to the survivor's claim is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

[18] Employer also argues that the administrative law judge erred because "she did not explain why the multiple x-rays taken during the course of treatment did not establish the absence of [pneumoconiosis]." Employer's Brief at 20. We disagree. While an administrative law judge may conclude that treatment x-rays not diagnosing pneumoconiosis are probative of its absence, she is not required to do so. *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Whether such x-rays establish the absence of pneumoconiosis is a question of fact committed to the discretion of the factfinder. *Id.* at 1-219.

February 18, 2010, and August 14, 2010. Decision and Order at 14-15, 21-22. Dr. Tarver, a Board-certified radiologist and B reader, concluded that none of the five CT scans showed findings consistent with pneumoconiosis.[19] Employer's Exhibit 3. Conversely, Dr. Hallo read the January 8, 2004 CT scan as consistent with coal workers' pneumoconiosis. Director's Exhibit 1-86. Dr. Ramakrishnan interpreted the January 24, 2008 CT scan as showing findings suggestive of coal workers' pneumoconiosis. Director's Exhibit 1-85. Dr. Ramakrishnan also read the February 18, 2010 CT scan, reporting findings suggestive of congestive heart failure or superimposed pneumonia.[20] Claimant's Exhibit 6 at 46.

After summarizing the CT scan evidence, the administrative law judge found that "at most, the CT scan evidence is in equipoise on the issue of pneumoconiosis, with [the miner's] physicians reporting findings consistent or compatible with pneumoconiosis, and Dr. Tarver reporting no such findings." Decision and Order at 22. We agree with employer and the Director that the administrative law judge did not explain how she resolved the conflict in the CT scan evidence before her and determined that it was "in equipoise." Thus, this aspect of the administrative law judge's decision does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that an administrative law judge set forth the rationale underlying her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In light of the administrative law judge's errors in weighing the x-ray and CT scan evidence, we vacate her determination that employer failed to disprove the existence of clinical pneumoconiosis, and remand the case for further consideration. On remand, the administrative law judge is instructed to reconsider the x-ray and CT scan evidence and address whether it assists employer in disproving the existence of clinical pneumoconiosis. Should the administrative law judge, on remand, determine that employer has disproved the existence of clinical pneumoconiosis, she must next address whether employer has also disproved the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Employer next argues that the administrative law judge applied the wrong rebuttal standard, because she required employer to "establish that [the miner's] death was not

[19] Dr. Tarver was the only physician to read the August 14, 2010 CT scan.

[20] Dr. Ramakrishnan also reviewed the March 31, 2006 CT scan. The administrative law judge accurately noted that Dr. Ramakrishnan determined the scan to be suggestive of congestive heart failure. Decision and Order at 11; Director's Exhibit 1-86. However, the administrative law judge did not discuss Dr. Ramakrishnan's reading of this CT scan in her analysis and weighing of the CT scan evidence. *See* Decision and Order at 21-22.

due in part to his disabling respiratory impairment, and in turn, that his disabling respiratory impairment was not related to his history of coal mine dust exposure." Employer's Brief at 15, quoting Decision and Order at 27. The applicable regulation requires that employer establish that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). The Director responds, asserting that the administrative law judge's statement of the rebuttal standard "is unclear and does not easily mesh with the controlling regulation," but that any error is harmless because the administrative law judge permissibly discredited all of employer's evidence relevant to rebutting the miner's presumed cause of death. Director's Brief at 3. In light of our decision to remand this case for further consideration, we instruct the administrative law judge, on remand, to apply the rebuttal standard set forth in 20 C.F.R. §718.305(d)(2).

In summary, the administrative law judge, on remand, should consider only the evidence designated in the survivor's claim, including the x-rays, CT scans, and medical opinion evidence, to determine whether employer has rebutted the presumption by (1) establishing both that the miner did not have legal pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2), and (2) clinical pneumoconiosis as defined in 20 C.F.R. §718.201(a)(1), arising out of coal mine employment. 20 C.F.R. §718.305(d)(2)(i)(A)-(B). The administrative law judge should then make a determination as to whether employer has rebutted the presumption by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201."[21] 20 C.F.R. §718.305(d)(2)(ii); *see also Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

[21] Employer also asserts that the administrative law judge erred in requiring employer to "rule out" coal dust exposure as a factor in the miner's death. Employer's Brief at 16 n.3. We reject employer's argument that such a requirement violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). As the Director asserts, employer is not required to disprove the miner's presumed cause of death by more than a preponderance of the evidence. Rather, the regulatory rebuttal standard merely establishes the fact which must be proved by a preponderance of the evidence - that pneumoconiosis played no role in a miner's death. *See* 78 Fed. Reg. 59,107 (Sept. 25, 2013).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge