U.S. Department of Labor

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

BRB No. 14-0350 BLA

GEORGIA S. BROCK (Widow of MARION A. BROCK) Claimant-Respondent v. POWELL MOUNTAIN COAL COMPANY, INCORPORATED and PROGRESS FUELS CORPORATION, c/o WELLS FARGO Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/23/2015 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5314) of Administrative Law Judge Lystra A. Harris rendered on a

survivor's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). On October 19, 2011, the district director issued a Proposed Decision and Order denying benefits on the survivor's claim because claimant did not establish that the miner had pneumoconiosis caused by coal mine employment or that the miner's death was due to pneumoconiosis. On November 22, 2011, the district director issued a Revised Proposed Decision and Order denying survivor's benefits because, while claimant established entitlement to the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), employer rebutted the presumption. Upon claimant's request, a hearing was held before Administrative Law Judge Ralph A. Romano. Following Judge Romano's retirement, the case was reassigned to Administrative Law Judge Lystra A. Harris (the administrative law judge), who issued a decision on the record.

After crediting the miner with sixteen years of qualifying coal mine employment, and determining that the evidence established that the miner was totally disabled by a respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), the administrative law judge found that claimant was entitled to invocation of the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge also found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded survivor's benefits.

[1] Claimant, Georgia S. Brock, is the widow of the miner, Marion A. Brock, who died on December 29, 2009. Director's Exhibit 11. The denial of the miner's lifetime claim for benefits, based on a determination that he did not have pneumoconiosis, was affirmed by the Board in *M.B.* [*Brock*] *v. Powell Mountain Coal Co.*, BRB No. 09-0469 BLA (Feb. 26, 2010)(unpub.). Decision and Order at 2-3. Claimant filed her claim for survivor's benefits on August 16, 2010, which is pending herein on appeal. Director's Exhibit 2.

[2] 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. Relevant to this case, 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 underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4)(2012). 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).

On appeal, employer argues that the administrative law judge improperly and inconsistently weighed the medical opinion evidence on the issue of legal pneumoconiosis,[3] contrary to the requirements of the Administrative Procedure Act (the APA).[4] In particular, employer asserts that the administrative law judge "mechanically" credited the opinions of Drs. Fleenor and Smiddy, the miner's treating physicians, absent a sufficient analysis under 20 C.F.R. §718.104(d), and erroneously found that the opinions of Drs. Rosenberg and Vuskovich conflicted with the preamble on the issue of legal pneumoconiosis. Employer's Brief at 14, 18. Employer further contends that the administrative law judge effectively imposed an irrebuttable presumption of legal pneumoconiosis, and improperly substituted her own opinion for those of the experts. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive 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.[5] 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).

[3] The administrative law judge's findings regarding length of qualifying coal mine employment, total disability at 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), and that claimant is entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), are affirmed, as unchallenged on appeal. Decision and Order at 2 n.2, 6-9, 15-17, 28-29; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Likewise, her finding that employer failed to establish that the miner did not suffer from clinical pneumoconiosis is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[4] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[5] As the miner's last coal mine employment was in Virginia, 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, 1-202 (1989)(en banc); Director's Exhibit 16.

Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have either clinical or legal pneumoconiosis,[6] or by establishing 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)(i), (ii); *see W.Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *see also Minich v. Keystone Coal Mining Corp*., BRB No. 13-0544 BLA, BLR (Apr. 21, 2015)(Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to rebut the presumption by disproving the existence of clinical or legal pneumoconiosis or by establishing that no part of the miner's death was due to pneumoconiosis. Decision and Order at 29.

At the outset, we note that employer's failure to rebut the presumed existence of clinical pneumoconiosis precludes employer from rebutting the presumption by disproving the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Nevertheless, we must address the administrative law judge's legal pneumoconiosis findings in order to determine whether she properly found that employer also failed to rebut the presumption by establishing that no part of the miner's death was caused by pneumoconiosis.[7] 20 C.F.R. §718.305(d)(2)(ii). Consequently, we address the administrative law judge's findings on legal pneumoconiosis, as they are relevant to

[6] The regulation at 20 C.F.R. §718.201(a)(1) provides:

> "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. 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.

Pursuant to 20 C.F.R. §718.201(a)(2), "legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment.

[7] Employer has only tangentially contested the administrative law judge's death causation findings in relation to her legal pneumoconiosis findings. *See* Employer's Brief at 16, 18-19. As such, we would ordinarily consider the issue of death causation waived. *See Cox v. Benefits Review Board*, 791 F.2d 445, 447, 9 BLR 2-46, 48 (6th Cir. 1986). However, since employer's arguments on the issue of legal pneumoconiosis may be relevant to the administrative law judge's evaluation of the medical opinion evidence on the issue of death causation, namely that the miner's death was not due to pneumoconiosis, we will address them.

determining whether employer has rebutted the presumption by establishing that no part of the miner's death was caused by pneumoconiosis. Decision and Order at 27-28.

Employer challenges the administrative law judge's determination that the opinions of Drs. Rosenberg[8] and Vuskovich,[9] that the miner did not have legal pneumoconiosis, were inconsistent with the preamble to the 2001 revised regulations. However, because the administrative law judge permissibly discredited these physicians' opinions on other grounds, we need not address employer's argument with respect to the preamble.

The administrative law judge reasonably discounted Dr. Rosenberg's opinion because he failed to "include an explanation as to why coal mine dust exposure did not contribute" to the miner's impairment, or to his death. Decision and Order at 27-28; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-382-83 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Moreover, in light of Dr. Rosenberg's failure to explain why coal dust exposure was not a cause of the miner's residual, disabling respiratory impairment, the administrative law judge properly assigned his opinion "little weight." Decision and Order at 27-28; *see Cochran*, 718 F.3d at 324, 25 BLR at 2-265; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 355-356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

[8] Dr. Rosenberg, based on his review of medical data, opined that the miner may have had a degree of minimal clinical pneumoconiosis, but attributed his severe obstruction and diffuse emphysematous process to smoking and not to coal dust exposure. He opined that the miner died from respiratory insufficiency from his chronic obstructive pulmonary disease (COPD), but that his disability and death were due to his lifelong smoking habit, and that his death was not caused or hastened by his coal mine dust exposure or his clinical pneumoconiosis. Decision and Order at 21-23, 27-28; Employer's Exhibit 1.

[9] Dr. Vuskovich, based on his review of medical data, opined that the miner did not have clinical or legal pneumoconiosis, and attributed his impairment, disability and death to "smoking-induced giant bullous emphysema, Arnold Chiari malformation, and myocardial infarction." Decision and Order at 23; Employer's Exhibit 2. He stated that the miner's health conditions and death were not caused by, significantly contributed to, or substantially aggravated by, his coal dust exposure. Decision and Order at 23- 24, 28; Employer's Exhibit 2 at 9-13.

Similarly, the administrative law judge permissibly found that Dr. Vuskovich failed to "adequately explain" why the miner's coal dust exposure did not contribute to his respiratory impairment or death.[10] Decision and Order at 23-24, 28. We, therefore, affirm the administrative law judge's determination that Dr. Vuskovich's etiology opinion was "conclusory and not well-reasoned." *Id* at 28; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). Her assignment of "little weight" to his opinion is, therefore, affirmed. *See Cochran*, 718 F.3d at 322-23, 25 BLR at 2-261-63; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336.

Because substantial evidence supports the administrative law judge's determination that the opinions of Drs. Rosenberg and Vuskovich are not well-reasoned or adequately explained, employer has failed to affirmatively establish that claimant does not have legal pneumoconiosis. *See* Decision and Order at 27-29. We, therefore, affirm the administrative law judge's conclusion that, in light of her assignment of "little weight" to the opinions of Drs. Rosenberg and Vuskovich, and her determinations that neither the x-rays, the CT scans, nor the hospitalization and treatment records (which include diagnoses of pneumoconiosis) rebutted the presumptions of legal pneumoconiosis and that pneumoconiosis hastened the miner's death, employer failed to rebut the presumed facts. *Id*. at 29. Additionally, as Drs. Rosenberg and Vuskovich did not diagnose legal pneumoconiosis, her determination to discount their opinions that the miner's death was unrelated to pneumoconiosis was rational. *Id*. at 27-29; *see generally Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir 2015)(opinions that erroneously fail to diagnose pneumoconiosis "may not be credited at all" on [death] causation unless "specific and persuasive reasons" exist demonstrating that a physician's view of causation is independent from finding no pneumoconiosis, and even then may carry only "little weight"); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Toler v. Eastern Associated Coal Co*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge's credibility determinations as to the opinions of Drs. Rosenberg and Vuskovich are supported by substantial evidence and her findings

[10] A Query/Answer section included in Dr. Vuskovich's report reflected, in relevant part:

4. Was the inhalation of coal mine dust a substantially contributing cause of [the miner's] disabling respiratory impairment?

[Response]: No. [The miner] had both upper and lower airway obstruction from a combination of giant bullous emphysema and Arnold Chiari related upper airway neuromuscular dysfunction.

Employer's Exhibit 2 at 12; *see* Decision and Order at 24.

accord with the requirements of the APA.[11] We, therefore, affirm her conclusion that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, and we affirm the award of survivor's benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
RYAN GILLIGAN
Administrative Appeals Judge

[11] As we have affirmed the administrative law judge's weighing of the opinions of Drs. Rosenberg and Vuskovich, the only medical opinions that could support rebuttal, we need not address employer's arguments regarding the opinions of Drs. Fleenor and Smiddy, as any error would be harmless. *See* Employer's Brief at 15-16; Decision and Order at 10-11, 28-29; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).