U.S. Department of Labor

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

BRB No. 15-0377 BLA

BETTY L. KIRK (Widow of PAUL KIRK) Claimant-Petitioner v. LAUREL RUN MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/08/2016 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-5465) of Administrative Law Judge Richard A. Morgan, rendered on a survivor's claim filed on March 29, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended,

30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited the miner with 38.85 years of coal mine employment, of which 26.6 years were spent in underground mines.[2] The administrative law judge also found that the miner suffered from a totally disabling respiratory or pulmonary impairment. Based on these findings, and the filing date of the claim, the administrative law judge determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further determined, however, that employer rebutted the presumption, and he denied benefits accordingly.

On appeal, claimant asserts that the administrative law judge erred in finding that employer rebutted the Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the

[1] Claimant is the widow of the miner, who died on March 16, 2011. Decision and Order at 4. The miner filed three prior claims for benefits, each of which was denied. The miner's last claim, filed on July 28, 2008, was denied by Administrative Law Judge Ralph A. Romano in a Decision and Order issued on March 7, 2011. There is no indication in the record that the miner took any action with regard to that denial.

[2] The administrative law judge noted that Judge Romano found that the miner established 26.6 years of underground coal mine employment and adopted his finding. Decision and Order at 3, *citing* March 7, 2011 Decision and Order at 4, 7.

[3] Under Section 411(c)(4), the miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[4] The record indicates that the miner's last coal mine employment was in West Virginia. Hearing Transcript at 19-20. 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, 1-202 (1989) (en banc).

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, the burden shifted to employer to rebut the presumption by affirmatively establishing that the miner had neither legal[5] nor clinical[6] pneumoconiosis, 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); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). The administrative law judge found that employer was unable to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(2)(i), the first method of rebuttal, as "[a]ll the physicians agree that the miner suffered from clinical pneumoconiosis." Decision and Order at 25.

With regard to the second method of rebuttal under 20 C.F.R. §718.305(d)(2)(ii), the administrative law judge considered the death certificate, prepared by Dr. Hanna, the miner's treatment records, the autopsy report of Dr. Caffrey, and the opinions of Drs. Abraham, Rasmussen, Rosenberg and Swedarsky. Decision and Order at 26-27. The administrative law judge found that there was no evidence establishing whether Dr.

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[5] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes 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) (emphasis added).

[6] Clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

Hanna "was familiar with [the miner's] condition prior to his death."[7] *Id*. at 27; *see* Director's Exhibit 7. The administrative law judge also stated:

> Weighing the medical opinions on the cause of death, all doctors attribute the miner's cause of death to carcinoma of the lung. All the physicians opined that carcinoma is not related to coal mine dust exposure. Dr. Abraham noted that lung diseases limiting oxygen would limit death, but does not adequately link the interstitial fibrosis he observed to the miner's coal mine employment. Dr. Rasmussen opined that pneumoconiosis contributed to the miner's death, but Drs. Rosenberg and Swedarsky opined it did not. Dr. Caffrey reasonably declined to link the cause of death to pneumoconiosis without further evidence. Although the death certificate lists [chronic obstructive pulmonary disease (COPD)] and [coal workers' pneumoconiosis (CWP)] as underlying causes, the other medical records from March 2011 do not adequately link the COPD to coal mine employment and there is inadequate evidence that the physician who signed the death certificate had personal knowledge of the miner upon which to assess the cause of death. *I therefore find that the employer has established that the miner's death is unrelated to coal mine employment because carcinoma is unrelated to coal mine employment*.

Decision and Order at 27 (citations omitted) (emphasis added). Based on his finding that employer disproved the presumed fact of death causation, the administrative law judge found that employer successfully rebutted the Section 411(c)(4) presumption.

Claimant asserts that the administrative law judge did not properly place the burden of proof on employer in weighing the evidence and did not apply the correct legal standard. Claimant further argues that the administrative law judge did not rationally explain the weight he accorded the medical opinions in finding that employer disproved death causation. Claimant's assertions of error have merit.

Although the administrative law judge concluded that pneumoconiosis did not cause the miner's carcinoma, the administrative law judge did not properly consider whether employer affirmatively "ruled out" pneumoconiosis as contributing to the miner's *death* in any way. *See Copley*, 25 BLR at 1-89. The fact that pneumoconiosis

[7] The death certificate identified small cell carcinoma as the immediate cause of the miner's death, and also listed "acute exacerbation of chronic obstructive pulmonary disease" and "coal workers' pneumoconiosis" as significant conditions contributing to death. Director's Exhibit 7.

did not contribute to the miner's lung cancer does not prove that pneumoconiosis played no role in the miner's death, and does not satisfy the rebuttal standard. 20 C.F.R. §718.305(d)(2)(ii); *Copley*, 25 BLR at 1-89; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Bender*, 782 F.3d at 134-35; *Minich v. Keystone Mining Coal Mining Corp*., 25 BLR 1-149, 1-156 (2015) (Boggs, J., concurring and dissenting).

Furthermore, after concluding that Dr. Abraham's opinion did not adequately address the etiology of the miner's interstitial fibrosis, the administrative law judge summarily stated that Dr. Rasmussen's opinion that the miner's death was due to pneumoconiosis[8] was outweighed by the two contrary opinions of Drs. Rosenberg and Swedarsky. Decision and Order at 26. The administrative law judge, however, specifically found Dr. Rosenberg's opinion to be "inconsistent and poorly reasoned," insofar as Dr. Rosenberg "attributed the miner's death from lung cancer to the miner's '*long* smoking history,'" but "noted in his opinion that he did not know the miner's smoking history."[9] *Id*. *quoting* Employer's Exhibit 10 (emphasis added). The administrative law judge also considered Dr. Swedarsky's diagnosis of large cell neuroendocrine carcinoma to be "at odds with the other diagnoses of small cell carcinoma." Decision and Order at 26. The administrative law judge stated that Dr. Swedarsky's opinion on the cause of the miner's death was "somewhat poorly documented" and entitled to "slightly less weight." *Id*. Thus, we hold that the administrative law judge's determination that employer disproved the presumed fact of death causation is not rationally explained, in light of his specific credibility findings with regard to each of employer's physicians. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-

[8] Claimant maintains that the administrative law judge erred in failing to address whether Dr. Rasmussen's opinion was reasoned and documented, prior to finding that it was outweighed. We agree, in part. An administrative law judge is generally tasked with determining the credibility of each of the medical opinions of record. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-151 (1989) (en banc). However, because claimant invoked the Section 411(c)(4) presumption, and employer bears the burden of proof, the administrative law judge must specifically determine whether the opinions of Drs. Rosenberg and Swedarsky are reasoned and documented to disprove that the miner's death was due to pneumoconiosis, regardless of the weight accorded Dr. Rasmussen's opinion. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 479-480, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

[9] The administrative law judge adopted Judge Romano's finding that the miner had a six pack-year smoking history. Decision and Order at 4; March 7, 2011 Decision and Order at 3 n.9.

162, 1-165 (1989); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-151 (1989) (en banc).

Additionally, we agree with claimant that the administrative law judge mischaracterized Dr. Abraham's opinion. The administrative law judge observed that, while Dr. Abraham indicated that the miner's interstitial fibrosis would have hastened his death, he "did not attribute the interstitial fibrosis to coal mine employment." Decision and Order at 26. However, in his August 20, 2014 report, Dr. Abraham reviewed the miner's autopsy slides and opined that "[t]he lung tissue, as noted shows extensive CWP with considerable interstitial fibrosis. This is consistent with the radiological findings." Claimant's Exhibit 2. Dr. Abraham identified coal dust exposure as the cause of the miner's coal workers' pneumoconiosis and further stated, "[t]he finding of significant interstitial fibrosis *related to the pneumoconiosis* is consistent with some degree of impairment." *Id*. (emphasis added).

Because the administrative law judge misstated the evidence and did not adequately explain the weight accorded the conflicting medical opinions, as required by the Administrative Procedure Act (APA),[10] we vacate the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(ii). *See Wojtowicz,* 12 BLR at 1-165. We therefore vacate the administrative law judge's denial of benefits.

Although the administrative law judge correctly found that employer was unable to establish rebuttal under the first method, because employer failed to disprove the existence of clinical pneumoconiosis, the administrative law judge should consider nonetheless whether employer has established that the miner did not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A), (B); *see Minich,* 25 BLR at 1-150. Performing the rebuttal analysis in the order set forth in the regulation satisfies the statutory mandate to consider all relevant evidence, and provides a necessary framework for considering whether employer established 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)(ii). *See Minich*, 25 BLR at 1-150.

[10] 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Once the administrative law judge has rendered findings on the issue of legal pneumoconiosis, he must reconsider whether employer has rebutted the presumed fact of death causation at 20 C.F.R. §718.305(d)(2)(ii). Employer can accomplish this only by affirmatively 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)(ii). In considering whether employer's evidence is sufficient to rebut the presumption, the administrative law judge must address whether the physicians' opinions are reasoned and documented, taking into consideration the physicians' explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.[11] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark*, 12 BLR at 1-155. In reaching his credibility determinations on remand, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

[11] On remand, the administrative law judge is instructed to address claimant's assertion that, because Dr. Swedarsky opined only that "it is unlikely that coal worker's pneumoconiosis contributed significantly to or hastened [the miner's] death," his opinion does not satisfy employer's burden to affirmatively establish that no part, *not even an insignificant* part, of the miner's death was caused by pneumoconiosis. Claimant's Brief at 7 (emphasis added), *quoting* Employer's Exhibit 5; *see Minich v. Keystone Mining Coal Mining Corp*., 25 BLR 1-149, 1-156 (2015) (Boggs, J., concurring and dissenting). The administrative law judge is further instructed to address claimant's argument that Dr. Rosenberg's opinion is insufficient to rebut the Section 411(c)(4) presumption because he "did not specifically address why the miner's coal mine dust exposure would have played no part in his death." Claimant's Brief at 8, *citing* Employer's Exhibits 7, 10. Additionally, employer contends that the administrative law judge improperly accorded Dr. Caffrey's opinion less weight because "he purportedly did not review the clinical evidence of record." Employer's Response Brief at 16. In support of its argument, employer cites to sections of Dr. Caffrey's June 19, 2013 supplemental report, and his deposition, wherein Dr. Caffrey identified the evidence he reviewed in "formulating his death causation opinion." *Id*., *citing* Employer's Exhibits 4 at 3, 8 at 9. As the administrative law judge found that Dr. Caffrey "reasonably declined to link the cause of death to pneumoconiosis without further evidence," it is not clear whether the administrative law judge accorded Dr. Caffrey's opinion less weight on that basis. Decision and Order at 27. Therefore, we instruct the administrative law judge on remand to address employer's argument with respect to Dr. Caffrey's opinion.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge