U.S. Department of Labor

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

BRB Nos. 16-0565 BLA
and 16-0566 BLA

BRANDT YATES (On behalf of the Estates of PAULINE YATES, deceased Widow of the Miner, and JAMES E. YATES, deceased Miner)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 07/24/2017
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Living Miner's Claim and Survivor's Claim of Colleen A. Geraghty, Administrative Law Judge United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in Living Miner's Claim and Survivor's Claim (2012-BLA-05148, 2012-BLA-05326) of Administrative Law Judge Colleen A. Geraghty, rendered on claims filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] In the miner's claim, the administrative law judge found that the miner worked for at least nineteen years in underground coal mine employment, or on the surface at underground mines. The administrative law judge also determined that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further determined that employer did not rebut the presumption and awarded benefits accordingly. Based on the award of benefits in the miner's claim, the administrative law judge awarded benefits in the survivor's claim pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[3]

On appeal, employer argues that the administrative law judge improperly inferred that the miner had at least fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge applied an incorrect standard

[1] Claimant is the son of the miner and the miner's widow. The miner filed a claim for benefits on May 26, 2009, but he died on March 25, 2011, while his claim was pending. Director's Exhibits 2, 42. The miner's widow indicated she would pursue the miner's claim and also filed a claim for survivor's benefits on July 11, 2011. Decision and Order at 2; Director's Exhibits 35, 41. The miner's widow died on May 13, 2014, while her claim was pending. Director's Exhibit 2. Claimant is pursuing both claims on behalf of the estates of his father and his mother.

[2] Under Section 411(c)(4) of the Act, a miner's total disability or death is presumed to be due to pneumoconiosis if he or she 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[3] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his or her 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); *see Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010).

when addressing rebuttal of the existence of legal pneumoconiosis and did not properly weigh the medical opinions of its experts. Claimant responds, urging affirmance of the award of benefits. In a reply brief, employer reiterates the arguments it raised in its initial brief. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[4]

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

I. The Miner's Claim

A. Invocation of the Presumption – Qualifying Coal Mine Employment

To establish the length and type of coal mine employment sufficient to invoke the Section 411(c)(4) presumption, a claimant must establish that the miner worked for at least fifteen years "in either one or more underground mines or in coal mines other than underground mines in conditions substantially similar to those in underground mines." 20 C.F.R. §718.305(b)(1)(i). Aboveground employment at an underground coal mine is qualifying for purposes of invoking the Section 411(c)(4) presumption, however, without separate proof of substantial similarity. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013); *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011).

The administrative law judge initially noted the parties' stipulation that the miner had three distinct periods of coal mine employment: 1) from January 19, 1976 to January 26, 1977 at Ohio #11; 2) from August 17, 1977 to October 1, 1982 at Hamilton #1; and 3) from January 2, 1986 to March 18, 1999, again at Ohio #11, for a total of "at least"

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23-25.

[5] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

nineteen years of coal mine employment. Decision and Order at 4; Director's Exhibit 5. The administrative law judge also observed, however, that the parties' stipulations "left unresolved" the issue of whether the miner had fifteen years of qualifying coal mine employment under 20 C.F.R. §718.305(b)(1)(i). Decision and Order at 4. She further stated, "[p]artly because neither [the miner] nor [his widow] testified at a hearing, the record is not well-developed on this issue." *Id*.

Regardless, the administrative law judge inferred that both Ohio #11 and Hamilton #1 were underground mines based on employer's records describing the miner's jobs as, respectively, "general inside trainee" and "general inside man." Decision and Order at 4, *quoting* Director's Exhibit 5. The administrative law judge thus concluded that claimant was not required to prove that the miner's work conditions were substantially similar to conditions in an underground mine. Decision and Order at 4. On this basis, the administrative law judge credited the miner with at least nineteen years of qualifying coal mine employment, sufficient to invoke the Section 411(c)(4) presumption. *Id*.

Employer contends that the administrative law judge erred in finding that claimant satisfied his burden of proof under 20 C.F.R. §718.305(b)(1)(i). Employer maintains that according to the administrative law judge's reasoning, the absence of the word "inside" from the miner's job titles during his second stint of employment at Ohio #11 compelled the conclusion that claimant's work during this thirteen-year period did not take place at an underground mine.[6] Employer's Brief in Support of Petition for Review at 9-11. Employer also suggests that the administrative law judge's statement that "the record is not well-developed" as to whether the Ohio #11 remained an underground mine during the miner's second stint of employment required a finding that claimant did not satisfy his burden of proof. Decision and Order at 4; Employer's Brief in Support of Petition for Review at 11.

We disagree. Employer concedes that it was reasonable for the administrative law judge to infer that the miner's initial work at Ohio #11 and all of his work at Hamilton #1 occurred at an underground mine because of the miner's job descriptions. Employer's Brief in Support of Petition for Review at 11. Based on this reasonable inference, and the absence of any contrary evidence in the record, we see no error in the administrative law judge's determination that Ohio #11 remained an underground mine during the miner's

[6] Employer's records indicate that while employed at Ohio #11 from January 2, 1986 to March 18, 1999, the miner worked as a "mechanic," a "plant mechanic," and a "grader operator." Director's Exhibit 5.

last stint of employment.[7] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Moreover, the administrative law judge's determination is consistent with the miner's report on Form CM-911a – "Employment History" that his employment at Ohio #11 from January 1976 to March 1999 involved "coal mining underground." Director's Exhibit 3. Accordingly, we affirm the administrative law judge's finding that the miner worked for at least nineteen years in an underground coal mine or on the surface at an underground mine. 20 C.F.R. §718.305(b)(1)(i); *Ramage*, 737 F.3d at 1058, 25 BLR at 2-468. We further affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. 20 C.F.R. §718.305(b)(1).

B. Rebuttal of the Presumption – Existence of Legal Pneumoconiosis

Once claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[8] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method.

[7] Notably, employer does not actually argue that Ohio #11, which it operated, ceased underground mining activities during the miner's second stint at the mine. Employer's Brief in Support of Petition for Review at 10-11. Instead, employer claims that the underground mine at Ohio #11 may have been closed when the miner returned, although it did not submit any records on the status of Ohio #11. *Id.*

[8] Legal pneumoconiosis is defined as "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 "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.* Clinical pneumoconiosis is defined as "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).

Employer contends that the administrative law judge erred in referring to the preamble to the 2001 regulatory revisions when determining the credibility of the medical opinion evidence on the issue of rebuttal of the existence of legal pneumoconiosis.[9] This argument lacks merit. As part of the deliberative process, an administrative law judge may evaluate expert opinions in conjunction with the discussion by the Department of Labor (DOL) of the prevailing medical science set forth in the preamble. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-492, 25 BLR 2-633, 2-645 (6th Cir. 2014); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801 25 BLR 2-203, 2-210 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012). Furthermore, the administrative law judge did not, as employer suggests, give the preamble "the force and effect of law" in discrediting the opinions of Drs. Selby, Caffrey, Castle, and Tomashefski. Employer's Brief in Support of Petition for Review at 15. Rather, she permissibly consulted the preamble as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include restrictive and obstructive impairments arising out of coal mine employment. *See Adams*, 694 F.3d at 801, 25 BLR at 2-210; *Looney*, 678 F.3d at 314-15, 25 BLR at 2-129-32; Decision and Order at 28-30.

We also reject employer's contention that the administrative law judge erred in finding that Drs. Selby, Caffrey, and Tomashefski excluded coal dust exposure as a causal factor in the miner's emphysema, based on a premise in conflict with the preamble to the 2001 regulatory revisions. The administrative law judge determined correctly that Drs. Selby, Caffrey, and Tomashefski indicated that the existence of a causal relationship between the miner's emphysema and his coal dust exposure depended on the extent to which there was evidence of clinical pneumoconiosis.[10] Decision and Order at 28-29;

[9] We affirm the administrative law judge's finding, based on the parties' stipulation, that the miner had clinical pneumoconiosis arising out of his coal mine employment. *See Skrack*, 6 BLR at 1-711; Decision and Order at 3, 27. This finding alone precludes rebuttal under 20 C.F.R. §718.305(d)(1)(i). However, we address the administrative law judge's determinations concerning rebuttal of legal pneumoconiosis because determining whether employer has satisfied its burden under 20 C.F.R. §718.305(d)(1)(i) "provide[s] a framework for the analysis of the credibility of the medical opinions at 20 C.F.R. §718.305(d)(1)(ii)[.]" *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

[10] Dr. Selby testified at his deposition that "[t]here is a disparate set of evidence here that shows only minimal simple coal workers' pneumoconiosis, and so that is a very strong indicator that the small amount of dust in his lungs did not cause the emphysema." Employer's Exhibit 11 at 24. Dr. Caffrey indicated that he did not believe that "the moderate degree of anthracotic pigment in [the miner's lungs] caused him any discernible

Employer's Exhibits 4, 5, 11 at 24. The administrative law judge permissibly found that the physicians' view is at odds with DOL's recognition that coal mine dust can cause emphysema, even in the absence of clinical pneumoconiosis. 65 Fed. Reg. 79,920, 79,939-43, 79,971 (Dec. 20, 2000); 20 C.F.R. §718.202(a)(4), (b); *see Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); Decision and Order at 28-29. We therefore affirm the administrative law judge's conclusion that the opinions of Drs. Selby, Caffrey, and Tomashefski were not credible on the issue of the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). *See Sterling*, 762 F.3d at 491-92, 25 BLR at 2-645.

We also affirm the administrative law judge's discrediting of Dr. Castle's opinion, as it is rational and supported by substantial evidence. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 29-30. Dr. Castle commented in his medical report that the miner's moderate to severe pure obstruction, with a severe reduction in diffusing capacity, was generally "in keeping with and indicative of tobacco smoke[-]induced bullous emphysema."[11] Employer's Exhibit 7 at 34. The administrative law judge permissibly concluded that Dr. Castle's statements "[are] not sufficient to establish that, *in* [*the miner's*] *particular case*, his severe emphysema was not at all due to coal mine dust exposure."[12] Decision and Order at 29 (emphasis added); *see*

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pulmonary disability . . . . Even if one was to say that there was a mild degree of simple coal workers' pneumoconiosis, which I did not, this would not have caused [the miner] the severe bullous emphysema or the centrilobular emphysema which he had[.]" Employer's Exhibit 4. Dr. Tomashefski concluded that coal dust exposure and simple coal workers' pneumoconiosis did not contribute to the miner's emphysema because "[t]here is no particular spatial relationship between the emphysematous lesions and the rare coal macules present in his lung tissue." Employer's Exhibit 5.

[11] Dr. Castle also explained that "[c]oal workers' pneumoconiosis does not typically cause a reduced diffusing capacity" and "[i]f it does occur, it occurs in the presence of a high degree of profusion of either p or r type opacities on the chest x-ray[,]" which Dr. Castle did not observe in this case. Director's Exhibit 7 at 34.

[12] As we have held that the administrative law judge provided valid reasons for discrediting the opinions of Drs. Selby, Caffrey, Tomashefski, and Castle, we need not address employer's remaining arguments concerning the administrative law judge's weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Consolidation Coal Co. v. Director, OWCP [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Martin*, 400 F.3d at 306-08, 23 BLR at 2-284-87. Accordingly, we affirm the administrative law judge's finding that Dr. Castle's opinion is also not credible on the issue of rebuttal of the existence of legal pneumoconiosis.

Finally, we hold that employer's allegation that the administrative law judge erred in applying a "rule out" standard to the opinions of its medical experts at 20 C.F.R. §718.305(b)(1)(i)(A) is not persuasive under the circumstances of this case.[13] Based on the administrative law judge's rational determination that the opinions of Drs. Selby, Caffrey, Tomashefski, and Castle were not adequately reasoned to support their own conclusions, they could not be credited for the purpose of rebutting the presumed existence of legal pneumoconiosis, regardless of the standard applied. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-447 (6th Cir. 2013). We therefore affirm the administrative law judge's determination that employer is unable to rebut the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

C. Rebuttal of the Presumption – Total Disability Causation

Pursuant to 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge determined that the opinions of Drs. Selby, Caffrey, Tomashefski, and Castle were insufficient to establish that the miner was not totally disabled due to pneumoconiosis because none of the physicians diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. Decision and Order at 32. We affirm this finding as it is in accordance with applicable law. *See Ogle*, 737 F.3d at 1070, 25 BLR at 2-444; *Ramage*, 737 F.3d at 1062, 25 BLR at 2-473. In light of the administrative law judge's finding that employer did not rebut the Section

[13] Employer asserts that the administrative law judge improperly applied a "rule out" standard concerning rebuttal of the presumed existence of legal pneumoconiosis by stating in the following passages: "Dr. Caffrey did not address the broader issue of whether [the miner's] exposure to coal dust *played any role* in the development of his bullous or centrilobular emphysema;" Dr. Castle's opinion "is not sufficient to establish that, in [the miner's] particular case, his severe emphysema was *not at all* due to coal mine dust exposure;" "Dr. Tomashefski's claim . . . is not sufficient *to rule out* coal dust exposure or pneumoconiosis as a factor in [the miner's] disabling emphysema;" and employer "has not met its burden to establish that [the miner's] chronic obstructive pulmonary disease was not due, *at least in part*, to his history of coal mine dust exposure[.]" Employer's Brief in Support of Petition for Review at 11-13, *quoting* Decision and Order at 29-31.

411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i), (ii), we further affirm the award of benefits in the miner's claim.

II. The Survivor's Claim

After concluding that the miner was entitled to benefits, the administrative law judge correctly determined that the miner's widow met the prerequisites for derivative entitlement to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[14] Decision and Order at 31-32. We therefore affirm the administrative law judge's award of survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 32.

[14] To establish entitlement under Section 422(*l*), claimant was required to prove that: the miner's widow filed her claim after January 1, 2005; the miner's widow is an eligible survivor of the miner; the survivor's 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*).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Living Miner's Claim and Survivor's Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge