U.S. Department of Labor

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

BRB No. 16-0598 BLA

THELMA HENSLEY (Widow of TIMOTHY HENSLEY) Claimant-Respondent v. WHITAKER COAL CORPORATION c/o SUN COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/31/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Survivor's Benefits of William J. King, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits (2013-BLA-5763) of Administrative Law Judge William J. King (the administrative law judge)

rendered on a claim 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 survivor's claim filed on August 19, 2009.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited the miner with twenty-eight years of underground coal mine employment and found that the evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant[2] invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge further found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[3]

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,

[1] Relevant to this claim, Section 411(c)(4) provides a rebuttable presumption that a miner's death was due to pneumoconiosis if the evidence establishes that the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] Claimant is the widow of the miner, who died on August 4, 2009. Director's Exhibit 12. The miner's claim for benefits, filed on December 11, 2003, was denied by Administrative Law Judge Adele H. Odegard on April 18, 2011, and the Board affirmed the denial of benefits. *Hensley v. Whitaker Coal Corp.*, BRB Nos. 11-0556 BLA and 11-0556 BLA-A (May 29, 2012) (unpub.).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least fifteen years of qualifying coal mine employment and was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and that claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983).

and in accordance with applicable law.[4] 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).

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

Because claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[5] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

A. Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.[6] The administrative law judge considered the opinions of Drs. Castle and Fino, who both diagnosed an obstructive pulmonary disease but determined that it was not legal pneumoconiosis. Decision and Order at 10-11, 16-18; Director's Exhibit 17A; Employer's Exhibit 1. Dr. Castle prepared a records review dated January 8, 2010. He opined that the miner had a sufficient degree of coal mine employment to have caused him to develop coal workers' pneumoconiosis if he were a susceptible individual. Dr. Castle further opined that "it was

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

[5] "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).

[6] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 13-18. Accordingly, we decline to address employer's contentions of error regarding the administrative law judge's findings on the issue of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

apparent that [the miner had] some degree of obstructive airways disease," but that "this cannot be accurately assessed because of the invalid ventilatory function studies" in the data set that he reviewed. Director's Exhibit 17A-14. Dr. Castle concluded that the miner did not have coal workers' pneumoconiosis and provided no further discussion of the miner's obstructive impairment. *Id.* at 13-15. Dr. Fino prepared a records review dated July 15, 2013, and diagnosed lymphoma in the lungs, pneumonia, and significant chronic obstructive pulmonary disease (COPD) due to smoking. He noted that the miner's pulmonary function studies since 2001 showed a significant obstructive ventilatory defect with a markedly reduced FEV_1/FVC ratio, which is an abnormality "quite consistent with smoking." Employer's Exhibit 1 at 7. Dr. Fino agreed with the preamble that obstruction can occur in coal miners in the absence of a positive x-ray. Citing findings from several published medical studies, Dr. Fino stated that the majority of miners have generally proportionate reductions in FVC and FEV_1 with no real drop in the FEV_1/FVC ratio, while it is a minority of miners who have a significant reduction in the FEV_1/FVC ratio. Dr. Fino concluded that coal dust can cause significant COPD, but that the impact of cigarette smoking is far greater than that of coal dust and far greater than what was described in the various articles referenced in the preamble to the 2001 regulations. *Id.* at 8-11. The administrative law judge discounted the opinions of Dr. Castle and Fino because he found that each was inadequately explained. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 16-18.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Castle and Fino. We disagree. The administrative law judge permissibly discounted the physicians' opinions that the miner's obstructive impairment did not constitute legal pneumoconiosis because he found that neither doctor adequately explained why the miner's twenty-eight years of coal dust exposure did not cause, contribute to, or exacerbate his condition. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 16-18.

Employer argues that the administrative law judge selectively analyzed Dr. Castle's opinion and impermissibly substituted his opinion for that of the doctor. Employer asserts that, contrary to the administrative law judge's finding, Dr. Castle relied on a full array of available data in formulating his opinion and that he explained why the miner's condition was due to smoking, cardiac disease, lymphoma and chemotherapy. Employer's Brief at 13-15.

Contrary to employer's assertions, the administrative law judge specifically noted the many medical tests and records on which Dr. Castle relied in forming his opinion. Decision and Order at 10, 16. The administrative law judge found that although Dr.

Castle acknowledged that the miner had an obstructive airways disease, he did not discuss the possible contribution of coal dust exposure to the obstructive disease or explain why he did not think that coal dust contributed to the miner's condition, beyond "merely noting that [the miner's coal mine employment history] would have placed the miner at risk if he were susceptible." *Id*. at 17; Director's Exhibit 17A-13. Consequently, the administrative law judge permissibly determined that Dr. Castle's opinion was insufficiently reasoned and was entitled to no probative weight. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

Employer also argues that the administrative law judge applied an improper burden of proof and substituted his expertise for that of Dr. Fino. Employer asserts that because Dr. Fino's opinion was uncontradicted by any physician and was found to be well-documented and entitled to some weight by the administrative law judge, it must be considered sufficient as a matter of law to establish rebuttal by a preponderance of the evidence. Employer further contends that Dr. Fino's opinion is not inconsistent with the preamble to the 2001 regulations. Employer's Brief at 8-11, 13-17.

With regard to Dr. Fino's opinion that the miner's COPD was due solely to cigarette smoking and not coal dust exposure, the administrative law judge determined that Dr. Fino relied, in part, on numerous published articles and studies indicating that cigarette smoking characteristically causes a significant reduction in the FEV_1/FVC ratio and that only a small minority of miners has a significant reduction in their FEV_1/FVC ratios. Decision and Order at 17; Employer's Exhibit 1 at 7-11. The administrative law judge permissibly discounted Dr. Fino's opinion as not well-reasoned on the ground that Dr. Fino failed to adequately explain why "*this* miner's coal dust exposure did not significantly relate to or substantially aggravate *his particular* obstructive respiratory impairment." *See* 20 C.F.R. §718.201(a)(2); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-279 (7th Cir. 2001); Decision and Order at 18 (emphasis in original). Because the administrative law judge discredited Dr. Fino's opinion as inadequately reasoned and explained, albeit well-documented, we reject employer's argument that the uncontradicted opinion is sufficient as a matter of law to establish rebuttal by a preponderance of the evidence. The burden of both production and persuasion lies with employer to rebut the Section 411(c)(4) presumption of pneumoconiosis. *See Morrison*, 644 F.3d at 479, 25 BLR at 2-8. As the administrative law judge provided a valid basis for finding Dr. Fino's opinion insufficient to carry employer's burden, we affirm his finding that employer failed to establish rebuttal of the presumed fact of legal pneumoconiosis and failed to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(2)(i).[7]

[7] Because the administrative law judge provided at least one valid reason for according less weight to Dr. Fino's opinion, the administrative law judge's error, if any, in according less weight to his opinion for other reasons constitutes harmless error. *See*

B. Death Causation

Employer argues that the administrative law judge erred in his consideration of whether employer rebutted the presumed fact of death causation. 20 C.F.R. §718.305(d)(2)(ii). In finding that employer failed to show that no part of the miner's death was due to pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Castle and Fino.[8] The administrative law judge discounted the opinions of Drs. Castle[9] and Fino[10] that the miner's death from respiratory failure was unrelated to pneumoconiosis because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the presence of the disease. The administrative law judge therefore found that the opinions of Drs. Castle and Fino did not rebut the presumed fact that the miner's death was due to pneumoconiosis. Decision and Order at 19.

Employer argues that the administrative law judge erred in discounting the uncontradicted opinions of Drs. Castle and Fino, and failed to engage in a complete

---

Kozele v. Rochester & Pittsburgh Coal Co., 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to Dr. Fino's opinion.

[8] The administrative law judge accorded little weight to the death certificate because the physician's credentials were not of record. Decision and Order at 19; Director's Exhibit 12.

[9] Dr. Castle opined that the miner's death was the result of complications from his large B cell lymphoma, including pneumonia and respiratory failure. Dr. Castle further stated that "even if one were to assume that [the miner] did have simple coal workers' pneumoconiosis, my opinion concerning his cause of death would remain unchanged." Director's Exhibit 17A-14.

[10] Dr. Fino opined that the miner died a respiratory death due to smoking-induced chronic obstructive pulmonary disease and lung disease due to lymphoma and pneumonia. Employer's Exhibit 1. Dr. Fino further stated that "even if I were to assume that [the miner] had coal workers' pneumoconiosis, it had not contributed to his disability," and that "coal mine dust inhalation did not cause, contribute to, or hasten [the miner's] death." *Id*. at 11.

analysis of the treatment records which, employer asserts, support the doctors' opinions.[11] Employer maintains that Drs. Castle and Fino both ruled out any contribution from pneumoconiosis and explained their opinions on grounds other than the absence of legal pneumoconiosis. Employer argues that both doctors expressed their opinions even assuming the presence of pneumoconiosis. Employer's Brief at 18-24. Employer's arguments lack merit.

As noted *supra*, the burden of both production and persuasion lies with employer to rebut the Section 411(c)(4) presumption. *See Morrison*, 644 F.3d at 479, 25 BLR at 2-8. Because Drs. Castle and Fino agreed that the miner's death was respiratory in nature, the administrative law judge permissibly gave less weight to their opinions because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-74 (6th Cir. 2013); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004) (Roth, J., dissenting); Decision and Order 19. Moreover, the administrative law judge specifically determined that a doctor's statement that his opinion would not change if he assumed the miner had clinical pneumoconiosis is entitled to no probative weight "because it does not address the possibility of the miner having legal pneumoconiosis, and because it is conclusory." Decision and Order at 19; *see Soubik*, 366 F.3d at 234, 23 BLR at 2-99 (a physician's superficial hypothetical assumption of pneumoconiosis is insufficient to reconcile his contrary opinion with the administrative law judge's finding of the disease, as it is exceedingly difficult for a doctor to properly assess the contribution by pneumoconiosis to a miner's death if he does not believe pneumoconiosis was present).

[11] Employer must affirmatively establish that legal pneumoconiosis was not a contributing cause of the miner's death. 20 C.F.R. §718.305(d)(2); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). As employer has not explained how it was prejudiced by the administrative law judge's failure to discuss the treatment records in conjunction with the opinions of Drs. Castle and Fino, any error by the administrative law judge was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni*, 6 BLR at 1-1278.

Because the administrative law judge has provided sufficient bases for finding the opinions of Drs. Castle and Fino not to be credible, we affirm his finding that employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge