U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0307 BLA
and 18-0308 BLA

GERALDINE SMITH (Widow of and o/b/o WILLIE J. SMITH) Claimant-Petitioner v. COMMERCIAL TESTING & ENGINEERING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/19/2019 DECISION and ORDER

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

John R. Jacobs and Paisley Newsome (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

Michael D. Crim, Jeffrey D. Van Volkenburg, and Stanley A. Heflin III (McNeer, Highland, McMunn and Varner, L.C.), Clarksburg, West Virginia, for employer.

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

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (2016-BLA-05848, 2016-BLA-05683) of Administrative Law Judge Lystra A. Harris, rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim[1] filed on April 10, 2014, and a survivor's claim[2] filed on December 17, 2015. The Board consolidated the appeals for purposes of decision only.

In the miner's claim, the administrative law judge credited the miner with 29.5 years of qualifying coal mine employment.[3] She found the new evidence establishes a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] The administrative law judge, however, found that employer rebutted the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis[5] under 20 C.F.R.

[1] The miner filed two prior claims, each of which was finally denied. Miner's Claim (MC) Director's Exhibits 1, 2. The most recent claim, filed on July 28, 2008, was denied by the district director because the miner failed to establish any element of entitlement. MC Director's Exhibit 2.

[2] The miner died on March 22, 2015. Survivor's Claim (SC) Director's Exhibit 3. Claimant, the widow of the miner, is pursuing his claim on behalf of his estate. MC Director's Exhibit 30.

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

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

[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

§718.305(d)(1)(i). Turning to whether claimant could establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found the evidence did not establish that the miner had pneumoconiosis, or that he was totally disabled due to pneumoconiosis at 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, she denied benefits.

In the survivor's claim, in light of her denial of the miner's claim, the administrative law judge found that claimant was not entitled to receive benefits under the automatic entitlement provisions of Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[6] She found claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Based on her analysis in the miner's claim, she again found that employer rebutted the presumption by establishing the miner did not have pneumoconiosis at 20 C.F.R. §718.305(d)(2)(i). Turning to whether claimant could establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found the evidence did not establish that the miner had pneumoconiosis, or that his death was due to pneumoconiosis at 20 C.F.R. §§718.202(a), 718.205(b). Therefore she denied survivor's benefits.

On appeal, claimant contends the administrative law judge erred in finding that employer rebutted the Section 411(c)(4) presumption in both claims by establishing that the miner did not have legal pneumoconiosis.[7] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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 Associates, Inc.*, 380 U.S. 359 (1965).

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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] Under Section 422(*l*) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his 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).

[7] We affirm, as unchallenged, the administrative law judge's finding that employer disproved clinical pneumoconiosis in both claims at 20 C.F.R. §718.305(d)(1)(i)(B), (d)(2)(i)(B). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 29-30.

I. The Miner's Claim

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

To prove that the miner did not have legal pneumoconiosis, employer had to establish that he did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered Dr. Goldstein's opinion that the miner did not have legal pneumoconiosis and Dr. O'Reilly's opinion that the miner had legal pneumoconiosis. Decision and Order at 15-20. She assigned greater weight to Dr. Goldstein's opinion because she found he better "integrated all of the objective evidence," including the autopsy evidence, on the issue of legal pneumoconiosis.[8] *Id*. at 26-27.

Claimant argues that the administrative law judge erred in crediting Dr. Goldstein's opinion over that of Dr. O'Reilly.[9] We disagree.

Dr. Goldstein opined that the miner's pulmonary function testing "showed an obstructive defect," Hearing Transcript at 26, and that the testing "suggest[s]" the miner had chronic obstructive pulmonary disease (COPD). Employer's Exhibit 3. He concluded, however, that the miner did not have legal pneumoconiosis because his autopsy results do not support the diagnosis of COPD. *Id*. He noted that the autopsy prosector's description of the miner's lungs did not identify any "obstruction or foreign material in the bronchi." *Id*. He also testified that the prosector's microscopic description did not identify emphysema or chronic bronchitis. Hearing Transcript at 55-56. Further, he noted that the

[8] The administrative law judge also considered Dr. Spagnolo's opinion that the miner did not have legal pneumoconiosis. Decision and Order at 19. She assigned his opinion less weight because she found he did not adequately explain his conclusion. *Id*. at 26.

[9] Noting that Drs. Goldstein and O'Reilly "possess relevant Board-certifications in Internal Medicine and Pulmonary Disease," the administrative law judge found both physicians "well qualified to offer an opinion on whether the [m]iner was totally disabled due to a respiratory impairment." Decision and Order at 20. Because claimant does not challenge the administrative law judge's finding that Drs. Goldstein and O'Reilly are equally qualified, it is affirmed. *See Skrack*, 6 BLR at 1-711.

prosector did not diagnose COPD.[10] *Id*. He testified that the autopsy results reflect "edema in the airways." *Id*. at 57. He noted that the prosector identified "acute bronchopneumonia with congestion of the lungs and a hemorrhagic infarct in the left lower lobe of the lung," along with "[a]nthracotic type pigment" depositions.[11] Employer's Exhibit 3 at 2. In addressing the miner's pulmonary function studies, he explained that the reduced FEV1 value could be explained by the presence of edema of the lungs caused by congestive heart failure, which in turn "causes the [airflow] rate to be reduced" on pulmonary function testing. *Id*.

Dr. O'Reilly diagnosed emphysema and COPD based on the miner's August 20, 2014 x-ray and pulmonary function study. Miner's Claim (MC) Director's Exhibits 12, 14; Claimant's Exhibit 4 at 9-10. He concluded that cigarette smoking was the "primary" cause of the COPD, but opined that coal mine dust exposure "aggravated and materially contributed" to the COPD. MC Director's Exhibit 12. He testified that the miner's shortness of breath, chronic cough, wheezing, and sputum production were consistent with both COPD and congestive heart failure, but disagreed with Dr. Goldstein that the miner's pulmonary function study results could be attributed to his congestive heart failure alone. Claimant's Exhibit 4 at 9, 14-15. He explained that the miner's FEV1 results exhibited "modest improvement after bronchodilators," which he opined means the impairment seen on pulmonary function testing was due partly to an intrinsic lung disease rather than only congestive heart failure.[12] *Id*. at 17.

Contrary to claimant's argument, the administrative law judge permissibly assigned greater weight to Dr. Goldstein's opinion that the miner did not have legal

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[10] Dr. Goldstein acknowledged that, without autopsy results, he would have diagnosed chronic obstructive pulmonary disease (COPD) based solely on the miner's pulmonary function testing. Hearing Transcript at 57. He testified, however, that autopsy results are the "gold standard" for diagnosing lung disease because "you have the tissue in front of you." *Id*. at 54.

[11] Dr. Goldstein stated that the "anthracotic pigment is dust and is not coal dust by definition." Employer's Exhibit 3 at 2.

[12] In discussing the miner's autopsy results, Dr. O'Reilly highlighted that the "microscopic description of the lungs . . . show[ed] increased levels of macrophages, which are inflammatory cells, and some anthracotic pigment as well as . . . acute pneumonia." Claimant's Exhibit 4 at 19. He noted that the microscopic description was consistent with pneumonia and coal mine dust exposure. *Id*. He stated that "anthracotic" is a term "usually taken to mean coal dust or consistent with coal dust," and that the amount of dust was "minimal." *Id*. at 22, 62.

pneumoconiosis.[13] *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); Decision and Order at 27, 28. She rationally found the autopsy results better support Dr. Goldstein's conclusion that the miner did not suffer from COPD, emphysema, or other lung disease, and his pulmonary impairment as evidenced by pulmonary function testing "was due to fluid retention and other problems related to congestive heart failure."[14] Decision and Order at 27.

[13] We disagree with our dissenting colleague's assertion that the administrative law judge did not adequately address whether the miner's "totally disabling impairment reflected on his pulmonary function tests is 'significantly related to, or substantially aggravated by,' dust exposure during his twenty-nine years of coal mine employment." *See infra*. The administrative law judge made the necessary findings of fact in this case and explained why she made them. She noted that Dr. Goldstein opined "that the [m]iner's pulmonary impairment," as evidenced by pulmonary function testing, "was due to fluid retention and other problems related to congestive heart failure and not to any pulmonary disease." Decision and Order at 27. She found this medical conclusion is supported by the autopsy findings and that Dr. Goldstein, in contrast to Dr. O'Reilly, better integrated the objective evidence in rendering his conclusion. *Id*. at 27. Claimant does not dispute this finding is supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013). The findings of fact by an administrative law judge are conclusive if supported by substantial evidence and the Board may not set aside an inference merely because it finds the opposite one more reasonable. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986).

Our dissenting colleague raises a number of additional purported legal errors in the administrative law judge's analysis, none of which were raised by claimant. Review of claimant's brief indicates that she has merely recited the conflicting evidence and set forth her position that this evidence is insufficient to establish rebuttal. A party challenging an administrative law judge's decision, however, must do more than recite evidence favorable to her case, as she must demonstrate with some degree of specificity the manner in which substantial evidence precludes the denial of benefits or why the administrative law judge's decision is contrary to law. *See Cox*, 791 F.2d at 446; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); 20 C.F.R. §802.211(b). Because claimant's Petition for Review fails to meet this bar, vacating the denial of benefits based on the alleged legal errors raised by our dissenting colleague would result in the Board exceeding its scope of review. *Id.*

[14] Contrary to claimant's argument, Dr. Goldstein discussed the bronchoreversibility evidenced by the miner's pulmonary function testing. Claimant's Brief at 17. He

Further, in weighing Dr. O'Reilly's opinion, the administrative law judge noted the autopsy results did not change his opinion that "the [m]iner's pulmonary impairment was due both to congestive heart failure" and COPD which "was due, at least in part, to his history of coal mine dust exposure." Decision and Order at 27. She noted the only basis Dr. O'Reilly cited for his conclusion was the improved values on pulmonary function testing after bronchodilators "which he stated indicates that congestive heart failure was not the only cause" of the miner's pulmonary impairment. *Id*. The administrative law judge permissibly rejected this reasoning because she found Dr. O'Reilly did not explain his "conclusion in light of the fact the autopsy itself included no findings of emphysema" or COPD. *Id*.; *see Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460.

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that Dr. Goldstein's opinion is persuasive and sufficient to carry employer's burden to demonstrate that the miner did not have legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). In light of our affirmance of the administrative law judge's finding that employer disproved the existence of pneumoconiosis, an essential element of entitlement, we must also affirm the denial of benefits under Part 718. *See* 20 C.F.R. §718.202; *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); Decision and Order at 29.

II. The Survivor's Claim

Because claimant invoked the Section 411(c)(4) presumption in the survivor's claim, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis, or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201."[15] 20 C.F.R. §718.305(d)(2)(i), (ii). For the reasons set forth above, we affirm her finding that employer disproved the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(A), (B).[16] In light of our

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acknowledged individuals who have COPD generally exhibit bronchoreversibility, and also observed there is "literature that some patients with congestive heart failure and edema in the airways will also get some reversibility." Hearing Transcript at 59-60

[15] Having denied benefits in the miner's claim, the administrative law judge correctly determined that claimant did not meet the prerequisites for derivative entitlement to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). Decision and Order at 29-30.

[16] Claimant asserts that Dr. Goldstein did not explain how the miner's "lengthy coal mine employment history played no role in his death, despite the finding of athracotic pigment in the [m]iner's lungs at autopsy, and despite bronchopneumonia being a cause of the [m]iner's death." Claimant's Brief at 13. Contrary to claimant's argument, Dr.

affirmance of the administrative law judge's finding that employer disproved the existence of pneumoconiosis, an essential element of entitlement in a survivor's claim, we must also affirm the denial of benefits under Part 718. *See* 20 C.F.R. §718.202(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993); Decision and Order at 29.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of miner's and survivor's benefits. The administrative law judge's finding that the deceased miner

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Goldstein was not required to address whether no part of the miner's death was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(2)(ii), as the administrative law judge already found that employer established rebuttal at 20 C.F.R. §718.305(d)(2)(i) by disproving the existence of clinical and legal pneumoconiosis.

did not have chronic obstructive pulmonary disease (COPD) contains several flaws that require remand.

First, a finding that the miner did not have COPD does not fully answer the question of whether he had legal pneumoconiosis. The proper inquiry is whether the miner's totally disabling impairment reflected on his pulmonary function tests is "significantly related to, or substantially aggravated by," dust exposure during his twenty-nine years of coal mine employment. 20 C.F.R. §718.201(a)(2), (b). A finding of no COPD is not sufficient by itself to defeat an award of benefits, as any respiratory or pulmonary impairment can constitute legal pneumoconiosis if it is related to coal mine dust exposure. *Id*.; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000).

Second, the administrative law judge focused predominantly on why claimant's medical expert, Dr. O'Reilly, was not persuasive without properly placing the burden on employer to credibly disprove a coal mine dust-related impairment. *Oak Grove Resources, LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1287 (11th Cir. 2019); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *Griffith v. Terry Eagle Coal Co.*, 25 BLR 1-223, 1-227-28 (2017); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). Although she stated that employer's medical expert, Dr. Goldstein, offered a well-reasoned opinion that the miner's impairment was not due to "any pulmonary disease," she did not set forth the reasons she found that aspect of his opinion credible. Thus, her finding does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), which requires the administrative law judge to set forth her "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The determination that the miner's impairment was not caused by a pulmonary condition is particularly unexplained in light of the autopsy finding of bronchopneumonia, which Dr. Goldstein described as "pneumonia involving the airways and the tissue[.]" Hearing Transcript at 55. And, as noted above, even if the miner did not have a "pulmonary disease," the administrative law judge must nevertheless examine whether Dr. Goldstein credibly explained why the miner's totally disabling impairment was not related to, or aggravated by, twenty-nine years of coal mine dust exposure. *Ferguson*, 920 F.3d at 1287; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015).

Third, the administrative law judge failed to resolve a significant conflict in the medical opinions regarding the presence of coal mine dust in the miner's lungs. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 531-33 (4th Cir. 1998); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Dr. O'Reilly based his opinion in part on the

autopsy finding of anthracotic pigment in the miner's lungs. Claimant's Exhibit 4 at 20; Employer's Exhibit 5. He stated that this finding constitutes evidence of coal mine dust exposure because anthracotic pigment is "essentially coal dust . . . . This is a term that respiratory physicians and pathologists use all the time to describe dust that's consistent with coal because of its dark, its black coloration." Claimant's Exhibit 4 at 21-22. Dr. Goldstein, on the other hand, stated that "anthracosis is . . . soot in the lungs. So, [it] just means dust. It does not mean a specific dust." Hearing Transcript at 54. Resolution of this apparent disagreement bears directly on the question of whether Dr. Goldstein credibly opined that the miner did not have an impairment related to coal mine dust exposure. *See Hicks*, 138 F.3d at 531-33; *Rowe*, 710 F.2d at 255. The administrative law judge also should consider the credibility of Dr. Goldstein's statements in light of the fact that "coal mine dust" is defined broadly to include any kind of dust generated during coal mine employment, not just coal particles specifically. *See Kennard*, 790 F.3d at 665-66 (rejecting distinction between coal dust and rock dust for invoking the Section 411(c)(4) presumption); *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990) (holding that coal mine dust encompasses "the various dusts around a coal mine").

For these reasons, I would vacate the administrative law judge's denial of miner's and survivor's benefits and remand the claim for reconsideration of whether employer rebutted the Section 411(c)(4) presumption with credible proof that the miner did not have pneumoconiosis or that "no part" of his disability or death was due to pneumoconiosis.[17] 30 U.S.C. §921(c)(4); *Ferguson*, 920 F.3d at 1287; *Smith*, 880 F.3d at 699.

GREG J. BUZZARD
Administrative Appeals Judge

[17] Claimant argues that Dr. Goldstein's opinion "fails to establish that the [m]iner did not have legal pneumoconiosis." Claimant's Brief at 17. Specifically, she states that his opinion is undermined because the autopsy he relied upon "is not conclusive in showing there isn't pneumoconiosis." *Id*. She further asserts that he did not provide "any explanation as to why [he] believes [the autopsy] finding [of athracotic pigment] is definitively not coal dust." *Id*. at 13. Finally, she states that his attribution of the miner's impairment solely to non-pulmonary causes is undermined by the autopsy findings "of both cardiac problems and bronchopneumonia." *Id*. at 17. Claimant thus sufficiently raised the arguments addressed herein. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986) (To invoke the Board's review, a claimant must identify "with some degree of specificity the manner in which substantial evidence precludes the denial of benefits[.]").