U.S. Department of Labor

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

BRB Nos. 18-0503 BLA
and 18-0513 BLA

WILMA J. MEADE, o/b/o and Widow of HAROLD V. MEADE	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 07/25/2019
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 of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05252 and 2014-BLA-05885), of Administrative Law Judge Carrie Bland rendered 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 filed on January 10, 2013, and a survivor's claim filed on May 5, 2016.[1]

Adjudicating the miner's claim, the administrative law judge found he had 29.78 years of underground coal mine employment and accepted employer's concession that he suffered from a totally disabling respiratory or pulmonary impairment. She therefore found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] She further found employer did not rebut the presumption and awarded benefits. In the survivor's claim, the administrative law judge found that because the miner was entitled to benefits at the time of his death,

[1] Claimant, the miner's widow, is pursuing the miner's claim as well as her survivor's claim. Survivor's Claim (SC) Director's Exhibit 3. The miner's prior claim, filed on August 12, 2010, was denied by the district director on October 11, 2011 because the miner failed to establish total respiratory disability. Miner's Claim (MC) Director's Exhibit 1. The miner took no further action until filing the current subsequent claim on January 10, 2013. MC-Director's Exhibit 3. He died on April 17, 2016 and claimant requested that her claim be consolidated with the miner's claim for adjudication on the merits of entitlement. SC-Director's Exhibit 2, 6.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he 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); *see* 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The miner's prior claim was denied because he did not establish total disability. MC-Director's Exhibit 1. Consequently, to obtain review on the merits of the miner's current claim, claimant had to submit new evidence establishing total disability. *See* 20 C.F.R. §725.309(c). The administrative law judge noted employer conceded that the miner suffered a totally disabling respiratory impairment and, therefore, "effectively conceded" that claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Decision and Order at 4.

claimant is automatically entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[4]

On appeal, employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Based on the errors alleged in the miner's claim, employer argues the award of benefits in the survivor's claim should also be vacated. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.[5]

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.[6] 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).

Miner's Claim: Rebuttal of the Section 411(c)(4) Presumption

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,[7] or that

[4] Under Section 422(*l*) of the Act, the survivor of a miner who was 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).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had 29.78 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment and, therefore, claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-5.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); MC-Director's Exhibit 4.

[7] 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). This definition encompasses 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). Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions

"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). The administrative law judge found that employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must demonstrate the miner 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 the opinions of Drs. Rosenberg and Fino that the miner did not have legal pneumoconiosis but had disabling chronic obstructive pulmonary disease (COPD)/emphysema due entirely to cigarette smoking. Miner's Claim (MC) Director's Exhibit 13; Survivor's Claim (SC) Employer's Exhibits 1, 5, 6. She discredited their opinions as inadequately explained and inconsistent with the medical science relied upon by the Department of Labor (DOL) in the preamble to the 2001 regulations. Decision and Order at 26.

We reject employer's assertions that the administrative law judge improperly required Drs. Rosenberg and Fino to "rule out" any contribution of coal mine dust exposure to claimant's respiratory impairment and provided invalid reasons for discrediting their opinions. Employer's Brief at 9-10, 13. The administrative law judge correctly stated that in order to rebut the presumption, employer must "demonstrate, by a preponderance of the evidence" that the miner did not have legal pneumoconiosis, as defined in the regulations. Decision and Order at 7-8, *citing* 20 C.F.R. §718.201(a), 718.305(d). Contrary to employer's contention, she did not find the opinions of Drs. Rosenberg and Fino insufficient to disprove the existence of legal pneumoconiosis because they failed to rule out coal mine dust exposure as a cause of the miner's respiratory impairment. Decision and Order at 24-26. Rather, she found their opinions not credible, taking into consideration the rationales provided by each physician for why *they* excluded coal mine dust exposure as a cause of the miner's impairment.[8] *Id.*

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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).

[8] Dr. Rosenberg opined the miner's obstruction was "entirely related" to cigarette smoking and coal dust exposure did not play "any role." Employer's Exhibits 1 at 8; 6 at 21. Dr. Fino similarly opined the miner's obstructive impairment was "all due to smoking" and coal dust exposure did not play "any role." Director's Exhibit 13 at 9; Employer's

Specifically, the administrative law judge accurately noted Drs. Rosenberg and Fino each attributed the miner's disabling obstructive impairment entirely to cigarette smoking. Decision and Order at 24-26; Director's Exhibit 13; Employer's Exhibits 1, 5, 6. She found, however, that neither physician adequately accounted for the DOL's recognition that the risks associated with smoking and coal mine dust exposure are additive.[9] Decision and Order at 24-25. Nor did they adequately address whether the miner had concurrent coal mine dust- and smoking-related impairments that, "affecting him simultaneously," caused the patterns of impairment demonstrated. Decision and Order at 24-26. Thus she permissibly discredited their opinions because they failed to adequately explain why the miner's nearly thirty years of coal mine dust exposure did not significantly contribute, along with cigarette smoking, to his disabling obstructive impairment. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); Decision and Order at 24-26.

The administrative law judge also considered Dr. Rosenberg's opinion that the miner's pulmonary function studies demonstrated a "marked bronchodilator response" which is not indicative of a coal dust induced-impairment. SC-Employer's Exhibit 6 at 14. She permissibly found that, in relying on the partial reversibility of the miner's obstructive impairment to conclude it is due solely to smoking, Dr. Rosenberg did not credibly explain why the irreversible portion of his impairment was not due to coal mine dust exposure. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-279 (7th Cir. 2001); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 25.

Further, Dr. Fino opined that when coal mine-dust exposure causes obstruction, the general pattern is a reduced FEV1, with a corresponding reduction of the FVC, preserving

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Exhibit 5 at 20. He emphasized he was able to "rule out" any contribution by dust. Employer's Exhibit 5 at 26.

[9] The administrative law judge permissibly found that in asserting that coal mine dust and cigarette smoke exposure are not always additive, or are not equally additive, Dr. Rosenberg failed to adequately explain why they are not additive in this miner's case. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 25; Employer's Exhibit 1 at 9.

the FEV1/FVC ratio. Director's Exhibit 13 at 13-14. Because the miner's FEV1/FVC ratio was "quite reduced," Dr. Fino concluded the pattern of his impairment was consistent with cigarette smoking, not coal mine dust exposure. *Id*. at 15. Consistent with the law of the United States Court of Appeals for the Fourth Circuit, the administrative law judge permissibly discredited this aspect of Dr. Fino's opinion because his reasoning conflicts with the DOL's recognition that coal mine dust exposure can cause clinically significant obstructive disease which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order at 25. Moreover, employer raises no specific challenge to this determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Fino,[10] we affirm her finding that employer failed to establish the miner did not have legal pneumoconiosis, precluding a rebuttal finding that the miner did not have pneumoconiosis.[11] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next addressed whether employer established rebuttal by proving that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Contrary to employer's contention, she permissibly discredited Drs. Rosenberg and Fino because neither physician diagnosed legal pneumoconiosis, contrary to her finding that employer did not disprove the existence of the disease.[12] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-

[10] Because the administrative law judge provided valid reasons for discounting the opinions of Drs. Rosenberg and Fino, we need not address employer's remaining arguments regarding the weight she accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 10-11, 13-14.

[11] In light of our affirmance of the administrative law judge's finding that employer failed to disprove legal pneumoconiosis, we need not address its challenges to her determination that it also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[12] The administrative law judge further found neither Dr. Rosenberg nor Dr. Fino offered an opinion on disability causation independent of his belief that the miner did not

721 (4th Cir. 2015), *quoting Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); Decision and Order at 28; Employer's Brief at 14-17. We, therefore, affirm the administrative law judge's determination that employer failed to rebut disability causation. *See* 20 C.F.R. §718.305(d)(1)(ii).

Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found claimant established each element necessary to demonstrate her entitlement under Section 422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her 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*) (2012); Decision and Order at 28. Because we have affirmed the award of benefits in the miner's claim and employer raises no specific challenge to the survivor's claim, we affirm the administrative law judge's determination that claimant is entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); 20 C.F.R. §802.211(b); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack*, 6 BLR at 1-711; Decision and Order at 28.

have legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order at 28.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge