

U.S. Department of Labor

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



BRB No. 15-0234 BLA

JUDITH E. TABOR)
(Widow of CLAXTON D. TABOR))
)
Claimant-Respondent)
)
v.)
)
WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)
o/b/o POSTAR COAL COMPANY) DATE ISSUED: 06/08/2016
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Reconsideration – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Reconsideration – Award of Benefits (2006-BLA-05841) of Administrative Law Judge Daniel F. Solomon rendered on a survivor’s claim filed on September 21, 2005 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.

In the initial Decision and Order, Administrative Law Judge Robert B. Rae (Judge Rae) credited the miner with at least twenty-two years of qualifying coal mine employment, and found that claimant¹ established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Judge Rae found that claimant established invocation of the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),² and that employer failed to rebut the presumption. Accordingly, benefits were awarded.

Upon review of employer’s appeal, the Board affirmed Judge Rae’s finding that claimant invoked the Section 411(c)(4) presumption and noted that, because employer stipulated to the existence of clinical pneumoconiosis, it could not rebut the presumption by disproving the existence of pneumoconiosis.³ The Board held, however, that Judge Rae failed to adequately explain why he found that the medical opinions of Drs. Oesterling, Rosenberg, and Bush were not well-reasoned on the issue of death causation. Consequently, the Board vacated Judge Rae’s award of benefits, and remanded the case for further consideration of the evidence relevant to rebuttal of the Section 411(c)(4)

¹ Claimant is the widow of the miner, Claxton D. Tabor, who died on May 26, 2004. Director’s Exhibit 7.

² Relevant to this survivor’s claim, under Section 411(c)(4), if a 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 that he or she had a totally disabling respiratory impairment, there is a rebuttable presumption that the miner’s death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012).

³ In affirming invocation of the Section 411(c)(4) presumption, the Board affirmed the findings of at least twenty-two years of qualifying coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order on Remand at 1-2; *Tabor v. W.Va. CWP Fund*, BRB No. 12-0387 BLA (Mar. 20, 2013) (unpub.), slip op. at 3 n.3, 4.

presumption. *Tabor v. W.Va. CWP Fund*, BRB No. 12-0387 BLA (Mar. 20, 2013) (unpub.).

On remand, the case was reassigned to Administrative Law Judge Daniel F. Solomon (the administrative law judge), as Judge Rae was no longer associated with the Office of Administrative Law Judges. In a Decision and Order on Remand issued on January 15, 2014, the administrative law judge found that employer rebutted the Section 411(c)(4) presumption by establishing that the miner's death was not substantially contributed to or hastened by pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's Motion for Reconsideration of the Decision and Order on Remand, the administrative law judge reconsidered the evidence relevant to rebuttal, noting that employer has the burden of establishing that no part of the miner's death was caused by either clinical or legal pneumoconiosis.⁴ The administrative law judge found that employer successfully established that the miner's death was not caused by clinical pneumoconiosis, but further found that employer failed to establish rebuttal of the Section 411(c)(4) presumption with affirmative proof that no part of the miner's death was caused by legal pneumoconiosis. Accordingly, the administrative law judge awarded survivor's benefits.

In the present appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the presumption of death due to pneumoconiosis. Specifically, employer contends that the administrative law judge erred in failing to address the existence of legal pneumoconiosis, in evaluating the medical opinion evidence relevant to the cause of the miner's death, and in relying on the regulatory provisions at 20 C.F.R. §718.305(d)(3).⁵ Claimant responds, urging affirmance of the

⁴ "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). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment, *i.e.*, 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(a)(2), (b).

⁵ The regulation at 20 C.F.R. §718.305(d)(3) provides that the presumption of death due to pneumoconiosis must not be considered rebutted on the basis of evidence

administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Board to reject employer's contention that the administrative law judge erroneously applied 20 C.F.R. §718.305(d)(3) on rebuttal.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order on Reconsideration, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error.

Initially, we reject employer's argument that the administrative law judge erred by "assuming the existence of legal pneumoconiosis" without assessing the relevant evidence or making an explicit finding that legal pneumoconiosis was established.⁷ Employer's Brief at 13-14. Relevant to the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Oesterling, Rosenberg, and

demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

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 West Virginia. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁷ While employer's stipulation to the existence of clinical pneumoconiosis precludes employer from rebutting the presumption by disproving the existence of pneumoconiosis, it is proper for an administrative law judge to also consider whether employer disproved the existence of legal pneumoconiosis, as both of these determinations are important to provide a framework for the analysis of the credibility of the medical opinions at 20 C.F.R. §718.305(d)(2)(ii). *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

Bush. As summarized by the administrative law judge, Dr. Oesterling's⁸ pulmonary diagnoses included moderate macular coal worker's pneumoconiosis, but did not include legal pneumoconiosis. Rather, Dr. Oesterling opined that the miner suffered from underlying pulmonary fibrosis, that was "likely idiopathic," and pulmonary failure due to extensive pulmonary infection, thromboembolic disease, and extensive hemorrhagic pulmonary infarction, all unrelated to the miner's coal dust inhalation. Decision and Order on Reconsideration at 7-8; Employer's Exhibits 10; 23 at 22, 27-28, 32, 24, 47-78. Dr. Oesterling also considered Dr. Perper's opinion that the miner suffered from legal pneumoconiosis, in the form of anthracosilicotic interstitial lung change with extensive fibrosis. Employer's Exhibit 17. Dr. Oesterling opined that it was "of great interest" that, despite Dr. Perper's use of polarized light to render his diagnosis, Dr. Perper made "no reference to a very obvious encapsulated microorganism which is extensively involving the lung tissue." Employer's Exhibits 17 at 1; 23 at 27-28. Noting that Dr. Perper "missed this very key finding in this case," Dr. Oesterling concluded that nothing in Dr. Perper's report caused him to change his initial opinions. Employer's Exhibit 17 at 2.

Dr. Rosenberg⁹ also diagnosed minimal simple coal workers' pneumoconiosis, but opined that the miner did not suffer from legal pneumoconiosis. Rather, Dr. Rosenberg

⁸ Dr. Oesterling reviewed the autopsy protocol, nine histologic slides from the autopsy, and the death certificate, and diagnosed moderate macular coal workers' pneumoconiosis. With respect to the miner's other pulmonary conditions, he noted that, based on the severity of the infection within the miner's lungs, the miner's "chronic lung disease would appear to be more related to an infectious process than to the relatively modest quantities of black pigment which are present." Employer's Exhibit 10. Dr. Oesterling also noted the presence of "some underlying pulmonary fibrosis" but stated that he did "not believe this is related to [the miner's] very modest quantities of black pigment." Employer's Exhibits 10 at 5.

⁹ Dr. Rosenberg reviewed multiple medical records and reports, and concluded that the miner had a minimal stage of coal workers' pneumoconiosis pathologically. Employer's Exhibit 13 at 8. Relevant to the issue of legal pneumoconiosis, Dr. Rosenberg stated that the miner did not have any airflow obstruction, and that the miner's "normal" FEV₁/FVC ratio correlated with interstitial lung disease, *i.e.*, idiopathic pulmonary fibrosis or nonspecific interstitial pneumonitis, that was not caused or aggravated by the miner's past coal mine dust exposure. *Id.* at 8-9. Dr. Rosenberg opined that the miner's disabling respiratory impairment and associated severe hypoxemia were also related to the miner's underlying non-coal mine dust-related interstitial fibrosis. Employer's Exhibits 13 at 8-9; 24.

opined that the miner suffered from a respiratory impairment associated with severe hypoxemia, attributable to the miner's "idiopathic" pulmonary fibrosis, unrelated to coal mine dust exposure. Decision and Order on Reconsideration at 8-11; Employer's Exhibits 13; 24 at 11-12. Dr. Rosenberg disagreed with Dr. Perper's opinion that the miner's pulmonary fibrosis was due to coal mine dust exposure. Employer's Exhibits 16; 14 at 40-41, 44-46.

Dr. Bush¹⁰ also diagnosed simple clinical pneumoconiosis, but not legal pneumoconiosis. Instead, Dr. Bush concluded that the miner had severe centrilobular emphysema, due to cigarette smoking, complicated by "idiopathic" pulmonary fibrosis. Decision and Order on Reconsideration at 8, 11-12; Employer's Exhibits 11, 15. Dr. Bush also disagreed with Dr. Perper's opinion that the miner's pulmonary fibrosis was due to coal mine dust exposure.

Weighing the medical opinions, the administrative law judge initially considered claimant's argument that Dr. Rosenberg's opinion that the miner suffered from interstitial fibrosis of "idiopathic" or unknown origin, does not credibly exclude coal mine dust as a potential cause. Decision and Order on Reconsideration at 14, 15; Employer's Exhibit 24 at 25-26. Noting that employer bears the burden to disprove the existence of legal pneumoconiosis, the administrative law judge was persuaded by claimant's argument and found that a medical opinion diagnosing "idiopathic" disease, i.e. a disease of unknown origin, is "problematical," because it does not affirmatively establish that coal mine dust was not a contributing factor. *Id.* at 15, *citing with approval Maynard v. Laurel Run Mining Co.*, BRB Nos. 11-0817 BLA-A and 12-0032 BLA (Oct. 31, 2012) (affirming an administrative law judge's rational determination that physicians' opinions diagnosing a pulmonary impairment due to idiopathic pulmonary fibrosis unrelated to coal mine dust exposure were insufficient to rebut the presumption). Thus, in light of the fact that Drs. Oesterling,¹¹ Rosenberg,¹² and Bush¹³ all diagnosed "idiopathic" pulmonary fibrosis, the

¹⁰ Dr. Bush, based on a review of the death certificate, autopsy report of Dr. Beaver, and histologic slides from the autopsy, noted the presence of a minimal degree of simple coal workers' pneumoconiosis. Employer's Exhibits 11, 15. Dr. Bush also diagnosed severe centrilobular emphysema from a long smoking history, complicated by idiopathic pulmonary fibrosis, which he opined may have a familial component since two of the miner's siblings died while suffering from the disease. Employer's Exhibit 15. Dr. Bush reviewed Dr. Perper's opinion, but did not change his conclusions. *Id.*

¹¹ Dr. Oesterling stated that he had considered Dr. Perper's opinion, that the miner suffered from coal mine dust-related interstitial fibrosis, but found it interesting that Dr. Perper made "no reference to a very obvious encapsulated microorganism which is extensively involving the lung tissue." Employer's Exhibit 17 at 1. Dr. Oesterling did

administrative law judge permissibly found that none of the physicians adequately explained why the miner's "manifest pulmonary impairments," were not related to, or aggravated by, coal mine dust exposure, so as to disprove the presumed existence of legal pneumoconiosis. Decision and Order on Reconsideration at 15; *see* 20 C.F.R. §718.201(a)(2); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505, BLR (4th Cir. 2015); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997).

Having found unpersuasive the underlying bases for the physicians' conclusions that the miner's "manifest pulmonary impairments," which they determined were contributing causes of his death, did not constitute legal pneumoconiosis, the administrative law judge rationally found that Drs. Oesterling,¹⁴ Rosenberg,¹⁵ and Bush¹⁶

not elaborate as to whether the presence of this microorganism negated any contribution by coal mine dust to the miner's fibrosis or other pulmonary conditions. *Id.*

¹² Dr. Rosenberg explained that he agreed with Dr. Perper, and the American Thoracic Society, that "in establishing a diagnosis of idiopathic pulmonary fibrosis, environmental exposures need to be excluded" but further opined that "specifically with respect to coal dust exposure, there is no definite evidence that it causes a picture compatible with idiopathic pulmonary fibrosis." Employer's Exhibits 16 at 4; 24 at 25-26, 28, 41.

¹³ Dr. Bush acknowledged the position of Dr. Perper and the American Thoracic Society that before a diagnosis of an "idiopathic" disease is made, "no known cause for the disease should be present," but emphasized that the miner's clinical pneumoconiosis was too minimal to explain the miner's fatal lung disease and he "[did] not have another disease to explain the extensive changes in the lungs resulting in pulmonary failure." Employer's Exhibit 15.

¹⁴ Dr. Oesterling opined that, based on the limited quantities of dust and minimal structural changes due to dust exposure, the miner's moderate macular coal workers' pneumoconiosis appeared to be insufficient to have resulted in respiratory impairment or to have caused, hastened, or contributed to the miner's death. Employer's Exhibits 10 at 5; 23 at 29, 46. Dr. Oesterling concluded, based on his review of all the evidence available to him, that the cause of the miner's death appeared to be multiple organ failure due to severe systemic sepsis, with pulmonary failure due to extensive pulmonary infection and thromboembolic disease, all unrelated to the miner's coal dust inhalation.

did not adequately “account for the [miner’s] 22.18 years of coal mine employment in underground mining.” Decision and Order on Reconsideration 16; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2)(ii); *Epling*, 783 F.3d at 504-505; *see also* *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Big Branch*

Id. Dr. Oesterling explained that the miner’s pulmonary fibrosis contributed to his respiratory distress and death. Employer’s Exhibit 23 at 47-48. Following his review of Dr. Perper’s opinion, Dr. Oesterling stated that he did not find anything in Dr. Perper’s report that would cause him to change his initial opinion. Rather, Dr. Oesterling reiterated his conclusion that the miner’s death was due to his opportunistic infection and embolization, and not due to coal workers’ pneumoconiosis. Employer’s Exhibit 17.

¹⁵ Dr. Rosenberg opined that the miner died “from worsening respiratory failure, which was related to a combination of his underlying interstitial fibrotic lung disease, coupled with superimposed infection, sepsis and pulmonary infarction.” Employer’s Exhibit 13 at 9. Dr. Rosenberg issued two supplemental reports after reviewing additional medical evidence and stated that the additional information did not cause him to change his opinion that the miner had a degree of macular coal workers’ pneumoconiosis, but the predominant pulmonary finding was a non-coal mine dust related interstitial pulmonary fibrosis and that coal mine dust exposure did not cause, hasten or accelerate the miner’s death. Employer’s Exhibits 16, 18. Dr. Rosenberg reiterated these conclusions in a deposition taken on September 1, 2010. Employer’s Exhibit 24.

¹⁶ Dr. Bush opined that the miner’s death resulted from “severe pulmonary disease that apparently resulted from sepsis which may cause hypotension and lung injury from shock – Adult Respiratory Distress Syndrome.” Employer’s Exhibit 11. Dr. Bush opined that the miner’s pulmonary interstitial fibrosis contributed to his Adult Respiratory Distress Syndrome. *Id.* Dr. Bush further concluded that the miner’s death was not caused by, contributed to, or hastened by any chronic dust disease arising from coal mine employment. *Id.* Dr. Bush issued a supplemental report following his review of Dr. Perper’s medical report, and noted that he agreed with Dr. Perper’s diagnosis of simple coal workers’ pneumoconiosis, but disagreed regarding the extent of the disease. Employer’s Exhibit 15. However, he stated that Dr. Perper’s clinical summary supported the conclusions in Dr. Bush’s August 30, 2007 report that the miner had severe centrilobular emphysema from a long smoking history, complicated by idiopathic pulmonary fibrosis, which may have a familial component since two of the miner’s siblings died while suffering from the disease. *Id.*

Res., Inc. v. Ogle, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013). Thus, contrary to employer's contention, the administrative law judge permissibly concluded that the medical opinions of Drs. Oesterling, Rosenberg, and Bush were insufficient to establish that legal pneumoconiosis played no part in the miner's death. Decision and Order on Reconsideration at 16; *see* 20 C.F.R. §718.305(d)(2)(ii); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012).

Lastly, we reject employer's contention that the administrative law judge erred in relying upon 20 C.F.R. §718.305(d)(3) to discount the opinions of Drs. Oesterling, Rosenberg, and Bush that idiopathic pulmonary fibrosis, a disease of unknown origin, was a contributing cause of the miner's death. Employer's Brief at 14-16. The regulation provides that "[t]he presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling **obstructive** respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3) (emphasis added). Employer argues that because none of the physicians diagnosed the miner with an obstructive lung disease, the administrative judge improperly relied upon 20 C.F.R. §718.305(d)(3) to reject their opinions. We disagree. As set forth above, the administrative law judge found that the opinions of Drs. Oesterling, Rosenberg, and Bush were insufficient to establish rebuttal because they failed to persuasively explain why no part of the miner's death was caused by legal pneumoconiosis. Decision and Order on Reconsideration at 16. Thus, as the Director asserts, "[t]here is no basis to conclude that the administrative law judge relied on [20 C.F.R. §718.305(d)(3)] in finding the presumption was not rebutted." Director's Response Letter at 1 n.1.

As substantial evidence supports the administrative law judge's findings, *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000) and the standard he applied on rebuttal is consistent with the statute and regulations, we affirm his finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption with affirmative proof that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Accordingly, the administrative law judge's Decision and Order on Reconsideration – Award of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge