U.S. Department of Labor

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

BRB Nos. 15-0248 BLA
and 15-0372 BLA

JOYCE B. McGHEE (Widow of and on behalf of BRADLEY T. McGHEE)	)	
Claimant-Respondent	)	
v.	)	
CARRIE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 06/09/2016
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 – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor, and the Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Kevin M. McGuire and William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the March 12, 2015 Decision and Order – Award of Benefits (2012-BLA-06080) of Administrative Law Judge Daniel F. Solomon, and the May 29, 2015 Order Awarding Survivor's Benefits (2014-BLA-05692) of Associate Chief Administrative Law Judge William S. Colwell, issued pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The Board has consolidated the appeals for purposes of decision only.

The miner filed his subsequent claim on September 13, 2010.[1] Miner's Claim (MC) Director's Exhibit 3. In a Proposed Decision and Order dated September 29, 2011, the district director awarded benefits. MC Director's Exhibit 33. Employer requested a hearing, and while the case was pending before the Office of Administrative Law Judges (OALJ), the miner died on January 30, 2014. MC Director's Exhibit 34. A hearing was held on August 20, 2014, before Administrative Law Judge Daniel F. Solomon (the administrative law judge). Claimant, the widow of the miner, appeared at the hearing and is pursuing the miner's claim on behalf of his estate. Claimant also filed a survivor's claim on February 13, 2014. Survivor's Claim (SC) Director's Exhibit 1.

In his Decision and Order issued on March 12, 2015, the administrative law judge found that the miner had at least fifteen years of underground coal mine employment and also suffered from a totally disabling respiratory or pulmonary impairment. Based on those findings and the filing date of the subsequent claim, the administrative law judge determined that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] and also demonstrated a change in an applicable condition of entitlement

[1] The miner filed an initial claim for benefits on November 15, 1991, which was denied by Administrative Law Judge Charles P. Rippey on November 16, 1994, because the evidence was insufficient to establish any of the elements of entitlement. Miner's Claim (MC) Director's Exhibit 1. The denial of the initial miner's claim was affirmed by the Board on appeal. *McGhee v. Carrie Coal Corp*., BRB No. 95-0809 BLA (Sept. 26, 1995) (unpub.). The miner took no further action with regard to the denial until he filed this subsequent claim. MC Director's Exhibit 3.

[2] Pursuant to Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an

pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer failed to rebut the Section 411(c)(4) presumption. Accordingly, benefits were awarded in the miner's claim.

Following the award of benefits by the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for summary decision with the OALJ, in the survivor's claim, asserting that claimant was automatically entitled to benefits pursuant to Section 932(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[3] Associate Chief Administrative Law Judge William S. Colwell issued his Order Awarding Survivor's Benefits on May 29, 2015, finding that claimant satisfied the eligibility criteria for automatic entitlement to benefits.

On appeal, employer challenges the administrative law judge's finding that it did not rebut the Section 411(c)(4) presumption. Employer argues that the administrative law judge gave improper reasons for rejecting the opinions of Drs. Fino and Rosenberg and confused the standards applicable for disproving the existence of legal pneumoconiosis and disability causation.[4] Employer also argues that because the administrative law judge erred in awarding benefits in the miner's claim, claimant is not entitled to benefits in the survivor's claim under Section 932(*l*). Claimant responds, urging affirmance of the awards of benefits in both claims. The Director has not submitted a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

---

underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] Section 932(*l*) of the Act provides that the 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), as implemented by 20 C.F.R. §718.305.

[4] We affirm, as unchallenged by employer on appeal, the administrative law judge's findings that the miner had at least fifteen years of underground coal mine employment, that he had a totally disabling respiratory or pulmonary impairment, that claimant invoked the presumption at Section 411(c)(4), and that claimant demonstrated 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); MC Decision and Order at 6-7.

and is in accordance with applicable law.[5] 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).

I. The Miner's Claim

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal[6] nor clinical[7] pneumoconiosis, 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 W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

---

[5] The record indicates that the miner's last coal mine employment was in Virginia. Hearing Transcript at 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes 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).

[7] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

Relevant to the presumed fact of clinical pneumoconiosis, the administrative law judge found that the miner suffered from simple, clinical pneumoconiosis and usual interstitial pneumonia/pneumonitis, based on the autopsy evidence.[8] Decision and Order at 9-10. We affirm, as unchallenged on appeal, the administrative law judge's finding that employer is unable to disprove the existence of clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Relevant to the presumed fact of legal pneumoconiosis, the administrative law judge initially noted that it is employer's position that the miner's disabling respiratory impairment is due to "'usual interstitial pneumonitis,' a disease of the general public and unrelated to coal mine dust exposure." *Id*. at 7. The administrative law judge observed that all of employer's experts agree on this diagnosis. *Id*. at 9. However, the administrative law judge rejected the opinions of Drs. Fino and Rosenberg, that claimant's respiratory impairment was unrelated to coal dust exposure, because they did "not account for the more than [fifteen] years of mining exposure." *Id*. at 9. The administrative law judge observed that the United States Court of Appeals for the Fourth Circuit upheld an administrative law judge's award of benefits "when [e]mployer's experts failed to explain 'why no part of [the miner's] disability was due to thirty-three years of coal dust exposure." *Id*. The administrative law judge further considered the diagnoses of an "idiopathic" disease by Drs. Fino and Rosenberg[9] to be insufficient to rebut the Section 411(c)(4) presumption because:

[8] Dr. Hudgens performed the miner's autopsy on January 31, 2014, and diagnosed simple coal workers' pneumoconiosis. MC Claimant's Exhibit 3. Dr. Caffrey reviewed the autopsy slides and prepared a July 3, 2014 report in which he diagnosed usual interstitial pneumonia and mild simple coal workers' pneumoconiosis. He noted that usual interstitial pneumoconiosis is synonymous with interstitial pulmonary fibrosis. MC Employer's Exhibit 4. Dr. Perper also reviewed the autopsy slides and diagnosed "a very severe interstitial fibro-anthracosis with significant and substantial deposits of mixed coal dust containing silica in the fibro-anthracotic areas, typical of [an] interstitial fibrosis type of coal workers' pneumoconiosis." MC Claimant's Exhibit 7.

[9] Dr. Fino performed a physical examination of the miner and prepared a July 11, 2011 report, a July 30, 2014 supplemental report, and was deposed on October 2, 2014. MC Director's Exhibit 19; MC Employer's Exhibits 6, 8. Dr. Fino diagnosed totally disabling idiopathic pulmonary fibrosis, unrelated to coal dust exposure. MC Director's Exhibit 19. Dr. Fino explained that usual interstitial pneumonitis is synonymous with interstitial pulmonary fibrosis. MC Employer's Exhibit 6. Dr. Rosenberg performed a physical examination of the miner and prepared an August 21, 2012 report, and a July 31, 2014 supplemental report. MC Employer's Exhibits 1, 5. Dr. Rosenberg opined that the

> The regulations specifically state that the [Section 411(c)(4)] presumption cannot be rebutted on the basis of evidence demonstrating the existence of a totally disabling pulmonary disease of unknown origin.

Id.; *see* MC Director's Exhibit 19; MC Employer's Exhibits 1, 6.

In considering whether employer was able to rebut the presumed fact of total disability causation under 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge stated:

> I have the discretion to accord less weight to the opinions of examining physicians to the extent that they did not diagnose clinical coal workers' pneumoconiosis, contrary to the determination that the existence of clinical pneumoconiosis was established.

Decision and Order at 11, *citing Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge found that employer's physicians "failed to rule out pneumoconiosis," and he therefore gave "little weight" to their opinions. *Id*. at 11. The administrative law judge then credited Dr. Habre's opinion,[10] that pneumoconiosis contributed to the miner's totally disabling respiratory impairment, and found that the miner's "total disability was substantially caused by pneumoconiosis." Decision and Order at 11-12, *citing* 20 C.F.R. §718.204(c).

We agree with employer that the administrative law judge erred in applying 20 C.F.R. §718.305(d)(3) in his analysis of the issue of legal pneumoconiosis. The administrative law judge misstated the regulation at 20 C.F.R. §718.305(d)(3), which 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

---

miner "likely ha[d] a condition, such as usual interstitial pneumonitis . . . which is not etiologically related to past coal mine dust exposure." MC Employer's Exhibit 1.

[10] Dr. Habre examined the miner on behalf of the Department of Labor on December 29, 2010 and diagnosed chronic bronchitis, respiratory failure, and clinical pneumoconiosis due to coal mine dust exposure. MC Director's Exhibit 15. Dr. Habre opined that "[c]oal mine dust exposure remains a major etiologic factor for [the miner's] clinical symptoms and contributes to his respiratory failure, leading to disabling lung disease." *Id*.

disease of unknown origin." 20 C.F.R. §718.305(d)(3) (emphasis added). In this case, Dr. Fino diagnosed the miner with a "significant restrictive lung disease" and Dr. Rosenberg characterized the miner's impairment as "restrictive." *See* MC Employer's Exhibits 5, 6. Because neither Dr. Fino, nor Dr. Rosenberg, diagnosed an *obstructive* lung disease, the administrative law judge erred in relying on 20 C.F.R. §718.305(d)(3), as a basis for finding that employer's evidence was insufficient to rebut the presumption. *See* 20 C.F.R. §718.305(d)(3).

There is also merit in employer's argument that the administrative law judge erred in requiring it to "rule out" pneumoconiosis. Employer's Brief at 15. The administrative law judge combined his analysis of legal pneumoconiosis and disability causation. In so doing, the administrative law judge did not properly address whether employer disproved the existence of legal pneumoconiosis under the first method of rebuttal by establishing that the miner's respiratory impairment was not significantly related to, or substantially aggravated by, coal dust exposure in coal mine employment.[11] *See* 20 C.F.R. §718.201(a)(2), (b); *Bender*, 782 F.3d at 141; *Minich*, 25 BLR at 1-150; Decision and Order at 9-10.

Lastly, we agree with employer that the administrative law judge failed to discuss relevant evidence. The administrative law judge rejected the opinions of Drs. Fino and Rosenberg on the issue of disability causation, on the ground that they did not diagnose clinical pneumoconiosis. Decision and Order at 10. Although Drs. Fino and Rosenberg initially opined that the miner did not have clinical pneumoconiosis,[12] they later revised their opinions after reviewing the autopsy and x-ray evidence. MC Employer's Exhibits 5, 6. Specifically, Dr. Fino stated:

[11] Employer is unable to disprove the existence of pneumoconiosis under the first rebuttal method, as the administrative law judge found that the autopsy evidence established that the miner had clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). However, the administrative law judge should make findings regarding the existence of legal pneumoconiosis, as employer may also rebut the presumption by establishing that the miner's disability is not due to pneumoconiosis, clinical or legal, as those diseases are defined at 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(ii).

[12] Dr. Fino stated in his July 11, 2011 report that the miner's chest x-ray was "classic for idiopathic pulmonary fibrosis," and was "certainly not classic for a coal dust related condition" because "the presence of only irregular opacities, in the absence of rounded opacities, is inconsistent with the diagnosis of coal workers' pneumoconiosis." MC Employer's Exhibit 19. Dr. Rosenberg noted that the miner's "basilar linear scaring" was not characteristic of clinical pneumoconiosis which is characterized by "micronodule formation (p, q and r opacities) in the upper lung zones." MC Employer's Exhibit 1.

> I am aware that simple coal workers' pneumoconiosis is present. Pathologically the simple coal workers' pneumoconiosis was stated to be mild/minimal [by Dr. Caffrey]. That would not account for [the miner's] significant restrictive lung disease. . . . The simple coal workers' pneumoconiosis is not anything more than an incidental finding in terms of contributing any clinically significant weight to his impairment, to his disability, or certainly to his death.

MC Employer's Exhibit 6. Dr. Rosenberg also supplemented his opinion and stated:

> Any pathologic findings of simple coal workers' pneumoconiosis (CWP) are incidental observations and would not have contributed to any impairment or disability. Changes of simple CWP to this degree would not be expected to be associated with restriction or any gas exchange abnormality. [The miner's] restriction, low diffusing capacity and gas exchange abnormalities simply were not caused in whole or part by past coal mine dust exposure and the presence of clinical CWP. Rather, his impairments were related to [usual interstitial pneumonitis], a disorder of the general public.

MC Employer's Exhibit 5. Because the administrative law judge did not consider the entirety of the opinions of Drs. Fino and Rosenberg relevant to the issue of disability causation, we vacate the administrative law judge's determination that employer did not establish rebuttal under 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998).

On remand, the administrative law judge must reconsider his finding that employer did not rebut the Section 411(c)(4) presumption. The administrative law judge should first consider whether employer is able to disprove the existence of legal pneumoconiosis by establishing that the miner's pulmonary fibrosis is not significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. §718.305(d)(1)(i)(A); 20 C.F.R. §718.201. Once the administrative law judge renders his findings on the issue of legal pneumoconiosis, he must consider whether employer has rebutted the presumed fact of total disability causation at 20 C.F.R. §718.305(d)(1)(ii) by proving that "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). The Fourth Circuit has held that the "no part" standard is valid, and that it requires the party opposing entitlement to "rule out" any connection between clinical or legal pneumoconiosis and the miner's total disability. *Bender*, 782 F.3d at 143; *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Minich*, 25 BLR at 1-159 (To rebut the

presumed causal relationship between pneumoconiosis and total disability, employer must establish that "no part, not even an insignificant part, of claimant's respiratory or pulmonary disability was caused by pneumoconiosis."). Because we have affirmed, as unchallenged on appeal, the administrative law judge's finding that employer failed to rebut the presumed existence of clinical pneumoconiosis, he must specifically consider whether employer can demonstrate that no part of the miner's totally disabling respiratory impairment was due to clinical pneumoconiosis, regardless of any finding he makes concerning rebuttal of the presumed existence of legal pneumoconiosis. If employer proves that no part of the miner's disabling obstructive impairment was caused by legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). In considering the case on remand, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the Administrative Procedure Act, 30 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-161, 1-165 (1985).

II. The Survivor's Claim

In the May 29, 2015 Order Awarding Survivor's Benefits, Judge Colwell found that claimant satisfied all of the eligibility requirements for benefits pursuant to Section 932(*l*). Because we have vacated the award of benefits in the miner's claim, we also vacate Judge Colwell's determination that claimant is automatically entitled to benefits in the survivor's claim pursuant to Section 932(*l*). In this case, it is uncontested that claimant filed her claim after January 1, 2005; that she is an eligible survivor of the miner; and that her claim was pending on or after March 23, 2010. On remand, if benefits are awarded in the miner's claim, the award of survivor's benefits under Section 932(*l*) must be reinstated.[13] However, if benefits in the miner's claim are denied on remand, the burden shifts to claimant to establish that the miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. 20 C.F.R. §§718.202, 718.203, 718.205.

[13] The Office of Administrative Law Judges may consider whether to consolidate the survivor's claim with the miner's claim on remand.

Accordingly, the Decision and Order – Award of Benefits in the miner's claim is affirmed in part and vacated in part, and the miner's claim is remanded for further consideration consistent with this opinion. The Order Awarding Survivor's Benefits is also vacated and the survivor's claim is remanded for further consideration, as discussed in this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge