U.S. Department of Labor

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

BRB Nos. 17-0450 BLA
and 17-0451 BLA

GALENA L. KNAPP (o/b/o and Widow of JOHN M. KNAPP)	)	
Claimant-Respondent	)	
v.	)	
ISLAND FORK CONSTRUCTION LIMITED	)	DATE ISSUED: 06/06/2018
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
Employer/Carrier-Petitioners	)	
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 in Miner's Claim and Awarding Benefits in Survivor's Claim of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim (2013-BLA-05758 and 2015-BLA-05489) of Administrative Law Judge Adele Higgins Odegard rendered on claims 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 miner's subsequent claim filed on May 23, 2012 and a survivor's claim filed on February 25, 2015.[1]

The administrative law judge found that the miner had more than fifteen years of qualifying coal mine employment[2] and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, she found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4), and established a change in an

[1] The miner, John M. Knapp, filed his initial claim for benefits on August 31, 2009, which was denied by the district director on April 8, 2010, because he failed to establish any of the requisite elements of entitlement. Miner's Claim (MC) Director's Exhibit 1. The miner took no further action until filing the present subsequent claim. The miner died on January 9, 2015. Survivor's Claim (SC) Director's Exhibit 3. Claimant, the miner's widow, is pursuing the miner's claim as well as her survivor's claim.

[2] The administrative law judge found 29.56 years of coal mine employment in conditions substantially similar to those in an underground mine, and alternatively found 21.56 years of surface coal mine employment at the site of an underground mine. *See Kanawha Coal Co. v. Director, OWCP* [*Kuhn*], 539 F. App'x 215, 218 (4th Cir. 2013) (because the miner's "above ground work . . . was carried out at an underground mine site," it constituted "qualifying employment for purposes of the fifteen-year presumption"); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-503-504 (1979); Decision and Order at 10, 13.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes at least fifteen years of underground coal mine employment or coal mine employment in

applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[4] The administrative law judge further found that 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, claimant was automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[5]

On appeal, employer does not challenge the finding that claimant invoked the Section 411(c)(4) presumption,[6] but contends that the administrative law judge did not properly weigh the medical opinions in considering whether it rebutted the presumption. In response, claimant urges affirmance of the awards of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal. In a reply brief, employer reiterates its contentions.

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conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Where 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 any of the elements of entitlement. 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 an element of entitlement. *See* 20 C.F.R. §725.309(c).

[5] Under Section 422(*l*) of the Act, 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).

[6] We therefore affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had more than fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, and that claimant thus invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24.

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.[7] 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).

The 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,[8] or that "no part of the miner's 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). In order to rebut the presumed existence of legal pneumoconiosis,[9] employer must show that the miner did not suffer from 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).

The administrative law judge considered the opinions of Drs. Zaldivar and Castle, who opined that the miner did not have legal pneumoconiosis but suffered from a disabling

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibits 1, 5; Hearing Transcript at 41.

[8] 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 respiratory or pulmonary disease or 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 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 coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[9] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis by a preponderance of the x-ray and CT scan evidence, together with the medical opinion evidence. Decision and Order at 28, 37.

obstructive respiratory impairment caused by smoking-related asthma, and unrelated to coal dust exposure. Employer's Exhibits 1, 4, 13; Decision and Order at 36-39. The administrative law judge discredited the opinions of both physicians as "not well-reasoned or well-documented." Decision and Order at 38.

We disagree with employer's argument that the administrative law judge erred in her consideration of the opinions of Drs. Zaldivar and Castle. Employer's Brief at 6-13. As the administrative law judge found, Dr. Zaldivar opined that the miner suffered from an asthma/chronic obstructive pulmonary disease (COPD) overlap condition and that he "attributed the irreversible component of the [m]iner's obstruction to lung remodeling, which can happen with asthma, especially if the asthma is untreated." Decision and Order at 33, *referencing* MC Employer's Exhibit 4 at 29-31. Dr. Castle similarly opined that the miner had tobacco smoke-induced chronic airway obstruction and "long-standing bronchial asthma with a fixed degree of airway obstruction due to remodeling." Decision and Order at 34-35, *referencing* MC Employer's Exhibit 1 at 15; MC Employer's Exhibit 13 at 24-25, 29.

Contrary to employer's contention, the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Castle because they did not adequately explain why the miner's twenty-nine years of coal mine-dust exposure did not contribute, along with his other conditions, to his disabling obstructive impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order 37-38. Specifically, she found that although the physicians "ascribe[d] the lack of bronchodilator response to lung 'remodeling' due to asthma, they did not address whether such lung 'remodeling' could co-exist with a coal dust-induced impairment" and "neither physician considered the additive effects of coal mine-dust and smoke exposures." Decision and Order at 38, *referencing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (setting forth the Department of Labor's acceptance of the view that smoking and coal mine dust exposure have additive effects on pulmonary and respiratory function).

Thus, the administrative law judge permissibly concluded that neither Dr. Zaldivar nor Dr. Castle adequately explained why the miner's obstructive impairment was not "significantly related to, or substantially aggravated by" coal dust exposure. Decision and Order at 38; *see Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations given by the experts for their

diagnoses, and to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 25 BLR 2-255, 2-257-58 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 315-16, 25 BLR 2-115, 2-130 (4th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to disprove that the miner had legal pneumoconiosis and, therefore, failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[10] *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

The administrative law judge next addressed whether employer established the second method of rebuttal by showing 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). She permissibly discredited the opinions of Drs. Zaldivar and Castle because neither physician diagnosed the miner with legal pneumoconiosis, and there were no "specific and persuasive reasons" for concluding that their opinions on the issue of disability causation were independent of their opinions regarding the existence of legal pneumoconiosis. Decision and Order at 44-47; *see* 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We therefore affirm the administrative law judge's finding that employer failed to establish that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the award of benefits in the miner's claim.

[10] Because the administrative law judge provided valid bases for finding the opinions of Drs. Zaldivar and Castle insufficient to rebut the presumed existence of legal pneumoconiosis, we need not address employer's remaining arguments regarding the weight she accorded their opinions. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*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 48. As the administrative law judge's findings are supported by substantial evidence, and employer raises no specific challenge thereto, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge