U.S. Department of Labor

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

BRB Nos. 18-0262 BLA
and 18-0263 BLA

SHEILA ASHLEY (Widow of and o/b/o BENNIE ASHLEY) Claimant-Respondent v. WESTMORELAND COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/28/2019 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2011-BLA-05950, 2013-BLA-05539) of Administrative Law Judge Carrie Bland, 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 filed on June 2, 2010, and a survivor's claim[1] filed on December 5, 2012, and is before the Board for a second time.[2] The Board consolidated the appeals for purposes of decision only.

Pursuant to employer's previous appeal, the Board affirmed the findings in the miner's claim by Administrative Law Judge Linda S. Chapman that claimant established 21.71 years of underground coal mine employment,[3] a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Ashley v. Westmoreland Coal Co.*, BRB Nos. 15-0262 BLA, 15-0263 BLA, slip op. at 3-8 (Mar. 30, 2016) (unpub.). Thus the Board affirmed the finding that claimant 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 Board held that Judge Chapman erroneously applied the "no part" standard from 20 C.F.R. §718.305(d)(1)(ii) to her consideration of whether the medical opinions rebutted the presumed fact of legal pneumoconiosis, however. *Ashley*, BRB Nos. 15-0262 BLA, 15-0263 BLA, slip op. at 8-11. It therefore vacated her finding that employer did

[1] The miner died on November 8, 2012. Survivor's Claim (SC) Director's Exhibit 5. Claimant, the widow of the miner, is pursuing the miner's claim on behalf of his estate. SC Director's Exhibit 1.

[2] We incorporate the procedural history of the case as set forth in *Ashley v. Westmoreland Coal Co.*, BRB Nos. 15-0262 BLA, 15-0263 BLA, slip op. at 2 n.1 (Mar. 30, 2016) (unpub.).

[3] The miner's coal mine employment was in Virginia. Miner's Claim (MC) Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth 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 if claimant establishes he 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.

not rebut the presumption and remanded the case for reconsideration of the medical opinions on legal pneumoconiosis and disability causation.[5] *Id*.; 20 C.F.R. §§718.305(d)(1)(i)(A),(d)(1)(ii). In light of the decision to vacate the award of benefits in the miner's claim, the Board also vacated derivative benefits in the survivor's claim. 30 U.S.C. §932(*l*)[6]; *Id*. at 11-12.

On remand, the case was reassigned to Administrative Law Judge Carrie Bland (the administrative law judge). In her Decision and Order on Remand, the subject of the current appeal, the administrative law judge found employer failed to establish that the miner did not have legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A), or that no part of his total disability was caused by legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). Accordingly, she awarded benefits in the miner's claim and derivative benefits in the survivor's claim.[7]

On appeal, employer contends the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. It therefore argues that she also erred in awarding survivor's benefits pursuant to Section 422(*l*). Claimant responds, urging affirmance of the awards. The Director, Office of Workers' Compensation Programs, has not filed a 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

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[5] Although Judge Chapman found that employer did not rebut the presumption of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B), she found employer established it caused no part of the miner's disability at 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 24-25.

[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 his death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[7] Alternatively, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and employer failed to rebut the presumption. 20 C.F.R. §718.305(d)(2)(i), (ii); Decision and Order on Remand at 10.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. 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,[8] 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). The administrative law judge found that employer failed to establish rebuttal by either method.

A. Legal Pneumoconiosis

To prove that the miner did not have legal pneumoconiosis, employer had to establish 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); *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 medical opinions of Drs. Castle, Caffrey, and Rosenberg. Decision and Order on Remand at 6-8. All three doctors diagnosed an obstructive respiratory impairment in the form of pulmonary emphysema. Employer's Exhibits 4, 5, 7, 9, 11. She found the opinions of Drs. Castle and Caffrey that cigarette smoking and not coal mine dust exposure caused the miner's emphysema inadequately explained and insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order on Remand at 6-8. She also found Dr. Castle's opinion contrary to the regulations. *Id*. Moreover, she found Dr. Rosenberg's opinion insufficient to rebut because he conceded that the miner may have had legal pneumoconiosis.[9] *Id*.

[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). "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).

[9] The administrative law judge also weighed Dr. Perper's opinion that the miner's emphysema was significantly related to both his cigarette smoking and coal mine dust exposures and, thus, the miner had legal pneumoconiosis. Decision and Order on Remand at 7-8. She found his opinion well-reasoned and entitled to significant weight. *Id*.

Employer asserts that the administrative law judge erred in finding these opinions insufficient to rebut the presumption of legal pneumoconiosis because, employer contends, she required them to "rule out" coal mine dust exposure as a cause of the miner's respiratory impairment. Employer's Brief at 6-13. To the contrary, she permissibly found their opinions inadequate and therefore unpersuasive.

In weighing the opinions, the administrative law judge noted that the Department of Labor set forth in the preamble that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction . . . . The risk is additive with cigarette smoking." Decision and Order on Remand at 7, *quoting* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). Contrary to employer's argument, she permissibly found Dr. Castle's rationale for excluding legal pneumoconiosis unpersuasive because he "did not address any additive effects from [the miner's] history of coal mine dust exposure" or explain why the miner "did not have a chronic lung disease or impairment significantly related to[,] or substantially aggravated by[,] dust exposure in coal mine employment, i.e., legal pneumoconiosis." Decision and Order on Remand at 6-7; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *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); 20 C.F.R. §718.201(b). She also permissibly found that, even if Dr. Caffrey is correct that the miner's presentation "was consistent with mild tobacco smoke induced pulmonary emphysema," he did not adequately explain why the miner "did not have a chronic lung disease or impairment significantly related to[,] or substantially aggravated by[,] dust exposure in coal mine employment, i.e., legal pneumoconiosis."[10] *Id*.

The administrative law judge further determined that Dr. Castle excluded legal pneumoconiosis because coal mine dust exposure "typically causes a mixed, irreversible

[10] The Fourth Circuit rejected a similar argument in *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n4. (4th Cir. 2017). The court found no merit in employer's argument that the administrative law judge improperly discounted the opinions of its experts because they did not use "magic 'rule out' words." *Id*. at n.4. The court explained that the administrative law judge permissibly found that employer's experts "failed to explain or even address why coal mine dust could not have been a contributing or aggravating factor" in the miner's obstructive respiratory impairment. *Id*. "In other words, these doctors ruled out coal dust exposure as a potential cause simply because they viewed smoking to be the sole cause; however, because they solely focused on smoking, they nowhere addressed why coal dust could not have been an *additional* cause—a fundamental aspect of the legal inquiry." *Id*.

obstructive and restrictive ventilatory defect," not present in the miner's case. Employer's Exhibit 4 at 10; *see* Decision and Order on Remand at 6-7. She concluded that Dr. Castle's view is contrary to the regulations recognizing that legal pneumoconiosis may be purely obstructive in nature. Decision and Order on Remand at 6-7; *see* 20 C.F.R. §718.201(a)(2). We affirm this credibility finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Looney*, 678 F.3d at 314-16.

Further, substantial evidence supports the administrative law judge's finding that Dr. Rosenberg's opinion is insufficient to establish that the miner did not have legal pneumoconiosis. Decision and Order at 7. Dr. Rosenberg initially opined that the miner did not have legal pneumoconiosis because he did not have an obstructive or restrictive lung impairment. Employer's Exhibit 5 at 5. During his deposition, however, Dr. Rosenberg opined that the miner's autopsy results showed he "did have some emphysema" along with "interstitial changes with anthracotic pigment." Employer's Exhibit 10 at 15-16. He stated that coal mine dust "may have been" associated with the emphysema. *Id*. He then specifically testified that he could not "rule out a degree of legal [coal workers' pneumoconiosis] based on the emphysema found" on autopsy. *Id*. Because Dr. Rosenberg testified that he could not exclude a degree of legal pneumoconiosis and did not at that time also address why claimant more likely than not did not have legal pneumoconiosis, the administrative law judge permissibly found his opinion is insufficient to rebut the presumption of legal pneumoconiosis. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); Decision and Order on Remand at 7, 8.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[11]

B. Disability Causation

The administrative law judge next addressed whether employer established that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand at 8-10. She rationally

[11] Because it is employer's burden to establish rebuttal, and the administrative law judge permissibly discredited the opinions of employer's doctors, we need not address employer's arguments regarding Dr. Perper's opinion that the miner had legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 9.

discounted the disability causation opinions of Drs. Castle and Caffrey because neither physician diagnosed legal pneumoconiosis, contrary to her finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order on Remand at 9.

Further, substantial evidence supports her finding that Dr. Rosenberg's opinion is insufficient to establish that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. Decision and Order on Remand at 8-9. Dr. Rosenberg opined that the miner was not totally disabled by any respiratory or pulmonary impairment but was totally disabled "toward the end of his life" by deep venous thrombosis and esophageal cancer, neither of which was related to coal mine dust exposure. Employer's Exhibit 10 at 7-9, 18-19, 25-26. He stated that the esophageal cancer spread to the miner's lungs and resulted in an "ominous prognosis" and concluded the miner's coal mine dust exposure did not contribute to or hasten his death by esophageal cancer. *Id*. at 19-20.

As discussed above, however, the administrative law judge found that the miner's emphysema constitutes legal pneumoconiosis. Concluding that "[n]o physician," including Dr. Rosenberg, "has suggested that [miner's] emphysema was too mild in nature to have resulted in any functional" lung impairment, she permissibly found Dr. Rosenberg's opinion unpersuasive because he "did not address the role of [the miner's] emphysema in his 'obvious' disability toward the end of his life." Decision and Order at 8-9; *Looney*, 678 F.3d at 313-14 (holding that a medical opinion may be discredited where the doctor fails to explain how his findings or underlying data supported his conclusion); *Hicks*, 138 F.3d at 532 n. 9 (noting that an administrative law judge may disregard a medical opinion that does not adequately explain the basis for its conclusion). Thus we affirm her finding that Dr. Rosenberg's opinion is insufficient to establish rebuttal at 20 C.F.R. §718.305(d)(1)(ii). We therefore affirm the administrative law judge's determination 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).

II. 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 entitlement under Section 422(*l*) of the Act: 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 on Remand at 10. Because we have affirmed the award of benefits in the miner's claim, and employer raises no separate error with

regard to the findings in the survivor's claim, *see* 20 C.F.R. §802.211(b), we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*).[12] 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack*, 6 BLR at 1-711.

[12] Because we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*), we need not address employer's argument that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 20-21.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge