U.S. Department of Labor

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

BRB Nos. 15-0166 BLA
and 15-0170 BLA

JOAN STREET (o/b/o and as Widow of HAROLD STREET)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 03/30/2016
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 Awarding Benefits of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

MacKenzie Fillow (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05895

and 2011-BLA-06370) of Administrative Law Judge Christine L. Kirby, rendered on a miner's subsequent claim filed on November 25, 2009[1] and a survivor's claim filed on May 26, 2010,[2] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on the parties' stipulation, and the evidence of record, the administrative law judge credited the miner with twenty-four years of underground coal mine employment. The administrative law judge also accepted employer's concession that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and was entitled to invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012).[3] Thus, the administrative law judge found that a change in an applicable condition of entitlement was established in the miner's subsequent claim 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, as employer conceded that the miner had simple clinical pneumoconiosis, and the weight of the evidence was insufficient to establish that his total disability was not caused by pneumoconiosis. Accordingly, the administrative law judge awarded benefits in the miner's subsequent claim. Based on the award of benefits in the miner's claim, the administrative law judge concluded that claimant was derivatively entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*)(2012),[4] commencing in March 2010, the month in which the miner died.

[1] The miner filed an initial claim for benefits on June 6, 2007. Miner's Director's Exhibit 1. On February 21, 2008, the district director issued a proposed decision and order denying benefits, finding that the miner failed to establish any of the requisite elements of entitlement under 20 C.F.R. Part 718. *Id*. The miner took no further action until filing the current subsequent claim on November 25, 2009. Miner's Director's Exhibit 4.

[2] Claimant is the widow of the miner, Harold Street, who died on March 5, 2010. Miner's Director's Exhibit 15; Widow's Director's Exhibit 9. Claimant is pursuing both the miner's claim and her survivor's claim. Widow's Director's Exhibit 1.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen years or more of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4)(2012), as implemented by 20 C.F.R. §718.305.

[4] 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 or her death is automatically entitled to receive survivor's benefits without having to separately establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*)(2012).

On appeal, employer contends that the administrative law judge erred in finding the evidence insufficient to establish rebuttal of the presumed fact of disability causation in the miner's claim. Employer also contends that the administrative law judge erred in failing to render a specific finding regarding the date from which benefits commence in the miner's claim.[5] In light of its challenge to the administrative law judge's award of benefits in the miner's claim, employer asserts that claimant is not automatically entitled to survivor's benefits, and that this case should be remanded for further findings in both claims.

In response, claimant urges affirmance of the administrative law judge's award of benefits in the miner's claim, as supported by substantial evidence. Claimant also acknowledges error in the administrative law judge's determination of the commencement date of benefits, but asserts that the case need not be remanded, as benefits are payable from November 2009, the month in which the miner filed his subsequent claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging the Board to affirm the administrative law judge's award of benefits in the miner's claim. However, the Director contends that the case must be remanded for the administrative law judge to render a specific finding regarding the date from which benefits commence in the miner's claim.[6]

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

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[5] In a reply brief, employer reiterates its arguments regarding the administrative law judge's weighing of the medical opinion evidence on rebuttal.

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-four years of qualifying coal mine employment; total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2); invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4); and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Decision and Order at 3-4, 12; Employer's Brief at 3; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] The record indicates that the miner's last coal mine employment was in Virginia. Miner's Director's Exhibit 4. Accordingly, the Board will apply the law 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).

The Miner's Claim

Once the presumption of total disability due to pneumoconiosis has been invoked, the burden shifts to the party opposing entitlement to affirmatively prove that the miner did not have clinical and legal pneumoconiosis, or that no part of the miner's total disability was caused by pneumoconiosis, as defined in 20 C.F.R. §718.201. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(d)(1); *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149 (2015)(Boggs, J., concurring and dissenting).

As employer conceded that it could not rebut the presumption by disproving the existence of clinical pneumoconiosis, the administrative law judge reviewed the evidence of record relevant to the issue of disability causation. Decision and Order at 4-12. Weighing the relevant autopsy and medical opinion evidence, the administrative law judge concluded that: "[e]mployer has failed to rebut the presumption that [the] [m]iner was totally disabled due to [coal workers' pneumoconiosis]."[8] Decision and Order at 15.

Employer contends that the administrative law judge erred in finding that the autopsy reports of Drs. Swedarsky and Oesterling were insufficient to establish rebuttal of the presumed fact that the miner's total respiratory disability was due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Employer further contends the administrative law judge erred in finding that the medical opinions of Drs. Tuteur and Hippensteel, that the miner's total disability was due to idiopathic pulmonary fibrosis or usual idiopathic pneumonitis, were not well-reasoned and likewise insufficient to establish rebuttal.

In reviewing the autopsy evidence relevant to rebuttal of the Section 411(c)(4) presumption,[9] the administrative law judge determined that Dr. Swedarsky's report was

[8] The administrative law judge further found that it was unnecessary to address the issue of the existence of complicated coal workers' pneumoconiosis in light of her finding that claimant established entitlement to benefits in the miner's claim under Section 411(c)(4). Decision and Order at 15 n.9.

[9] The administrative law judge also considered the autopsy reports of Drs. Dennis and Perper. The administrative law judge found that Dr. Dennis diagnosed coal workers' pneumoconiosis, in the form of progressive massive fibrosis and, therefore, implicitly found that the miner was totally disabled due to pneumoconiosis. Miner's Director's Exhibit 17; Miner's Employer's Exhibit 3. She further found that Dr. Perper diagnosed a

internally inconsistent, as the physician initially noted evidence of black carbon pigment, as well as extensive fibrosis and chronic inflammation, or emphysematous changes, but subsequently noted that there was no evidence of pigment or coal nodules. Dr. Swedarsky concluded that "a diagnosis of coal workers' pneumoconiosis cannot be made." Miner's Employer's Exhibit 1. Dr. Swedarsky diagnosed the presence of diffuse alveolar damage (DAD) of unknown etiology and stated that he was unable to determine whether this respiratory condition was disabling. *Id*. Dr. Swedarsky concluded that "[w]ithout a complete evaluation of the subject's medical history, further clarification of [the miner's] pulmonary disease process, its etiology, duration, whether it was disabling and its part in his death is not possible." *Id*.

The administrative law judge reasonably exercised her discretion in according Dr. Swedarsky's opinion little probative value on the issue of disability causation, as the physician's conclusions regarding the existence of both pneumoconiosis and total respiratory disability were contrary to employer's concessions and the administrative law judge's findings. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir. 2015); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 13.

The administrative law judge also considered the autopsy report of Dr. Oesterling, wherein the physician noted very limited dust deposition, with a finding of only one macule of at least 1 millimeter in size. Miner's Employer's Exhibit 2. Dr. Oesterling opined that there were no nodular changes and, thus, no evidence of progressive massive fibrosis. *Id*. at 6. Rather, he found that the miner had evidence of significant destruction of the miner's alveolar membranes caused by "some agent which may represent Amiodarone, a drug that is often used in patients with passive congestion due to irregular rhythms." *Id.* at 7. Thus, Dr. Oesterling opined that the medication used by the miner must be considered a significant factor in the miner's demise. *Id*. Dr. Oesterling concluded that "clearly coal dust was in no way a factor in producing lifetime symptomatology." *Id*.

The administrative law judge permissibly exercised her discretion, as trier-of-fact,

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severe interstitial pulmonary fibrosis type of coal workers' pneumoconiosis. While he disagreed with Dr. Dennis that the miner had progressive massive fibrosis, he opined that the miner was totally disabled due to coal workers' pneumoconiosis. Claimant's Exhibit 4. Consequently, the administrative law judge found that these opinions do not assist employer in rebutting the presumption of total disability due to pneumoconiosis. Decision and Order at 13.

in finding that Dr. Oesterling's report was not well-reasoned. She found that the physician's opinion was speculative because his hypothesis, that the miner's use of Amiodarone caused the destruction of his alveolar membranes, was made without a showing that the miner was taking the drug in quantities that would cause such damage. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). Moreover, the administrative law judge rationally found that Dr. Oesterling's statement, that "clearly coal dust was in no way a factor in producing lifetime symptomatology[,]" was conclusory and failed to explain why the miner's twenty-four years of underground coal mine employment played no part in the miner's respiratory disability. *Epling*, 783 F.3d at 505; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335.

As substantial evidence supports the administrative law judge's findings, we affirm her conclusion that the autopsy reports of Drs. Swedarsky and Oesterling were insufficient to establish rebuttal of the presumed fact of disability causation at Section 411(c)(4). 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

Employer next challenges the administrative law judge's finding that the medical opinions of Drs. Tuteur and Hippensteel, that the miner's total disability was due to usual interstitial pneumonitis and not coal workers' pneumoconiosis, were not well-reasoned. Employer argues that the administrative law judge erroneously discounted these opinions on the ground that the physicians' conclusions were not in accord with the Department of Labor's (DOL) position, that pneumoconiosis is a latent and progressive disease. Employer's Brief at 25-32.

We note that the administrative law judge may properly consider whether a medical opinion is based on premises that conflict with the prevailing view of medical science underlying the current regulations, as determined by the DOL and set forth in the preamble to the revised regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). The administrative law judge reasonably accorded diminished weight to the opinions of Drs. Tuteur and Hippensteel, as both physicians opined that the miner's respiratory impairment could not be due to coal dust exposure because of the long latency period between the miner's last coal dust exposure and the development of his respiratory impairment.[10] Decision and Order at 14; Miner's Employer's Exhibit 11 at 22-23;

[10] As the administrative law judge provided a valid reason for discounting the opinions of Drs. Tuteur and Hippensteel, we need not address employer's remaining

Miner's Employer's Exhibit 12 at 11, 21; *see* 20 C.F.R. §718.201(c) ("'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure"); 65 Fed. Reg. at 79,937, 79,971; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); *Barnes v. Mathews*, 562 F.2d 278, 279 (4th Cir. 1977) (pneumoconiosis is a slow, progressive disease often difficult to diagnose at early stages).

As the trier-of-fact, the administrative law judge has broad discretion to assess the credibility of the medical opinions and assign them appropriate weight. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See 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); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988).

As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that employer failed to prove that no part of the miner's totally disabling impairment was caused by pneumoconiosis as defined in 20 C.F.R. §718.201.[11] 20 C.F.R. §718.305(d)(1)(ii); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. We, therefore, affirm the administrative law judge's findings that employer failed to establish rebuttal of the Section 411(c)(4) presumption, and that claimant is entitled to benefits in the miner's subsequent claim. *See Bender*, 782 F.3d at 137-40.

Commencement Date of Benefits in the Miner's Claim

Employer contends that the administrative law judge erred in failing to make a determination regarding the proper commencement date of benefits in the miner's

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challenges to her weighing of these opinions. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

[11] Because employer bears the burden of proof on rebuttal, and we have affirmed the administrative law judge's credibility determinations with respect to employer's evidence, we need not address employer's arguments regarding the weight accorded claimant's evidence, *i.e.*, the opinions of Dr. Dennis and Dr. Perper. *See generally Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

subsequent claim. In a miner's claim, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis. 20 C.F.R. §725.503. If the medical evidence does not establish the date that a miner became totally disabled due to pneumoconiosis, benefits are payable as of the filing date of the claim, unless credited medical evidence indicates that the miner was not totally disabled at some point after that date. 20 C.F.R. §725.503; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *see also Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Moreover, in a subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(d). As the administrative law judge did not make the requisite finding regarding the commencement date of benefits in the miner's claim, we remand this case for the administrative law judge to make such a determination.

The Survivor's Claim

The administrative law judge correctly determined that claimant met the filing prerequisites for derivative entitlement contained in Section 932(*l*): she filed her survivor's claim after January 1, 2005; she is an eligible survivor of the miner; and her claim was pending after March 23, 2010. Decision and Order Awarding Benefits at 15. Accordingly, based on our affirmance of the award of benefits in the miner's claim, we hold that claimant has met all of the criteria for derivative entitlement, and we affirm the administrative law judge's finding that claimant is entitled to benefits under Section 932(*l*). 30 U.S.C. §932(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed and, consistent with our opinion, this case is remanded for the administrative law judge to determine the commencement date of benefits in miner's claim.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge