U.S. Department of Labor

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

BRB No. 15-0228 BLA

JUDY K. NOYES (Widow of JAMES S. NOYES) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/28/2016 DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

Cheryl L Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Emily Goldberg-Kraft (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (2010-BLA-5042) of Administrative Law Judge Paul C. Johnson, Jr., awarding benefits on a claim 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 survivor's claim filed on December 17, 2008, and is before the Board for the third time.[1]

In the initial decision, Administrative Law Judge Richard K. Malamphy credited the miner with twenty-two years of coal mine employment,[2] and found that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). However, Judge Malamphy found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, Judge Malamphy denied benefits.

Pursuant to claimant's appeal, the Board held that Judge Malamphy erred in not considering whether claimant was entitled to the presumption set forth at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). *Noyes v. Consolidation Coal Co.*, BRB No. 11-0405 BLA (Feb. 27, 2012) (unpub.). The Board also vacated Judge Malamphy's finding that the evidence did not establish that the miner's death was due to pneumoconiosis, and remanded the case for further consideration.

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[1] Claimant is the widow of the miner, who died on February 11, 2008. Director's Exhibit 9.

[2] The record reflects that the miner's coal mine employment was in Utah. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(*l*) of the Act provides that 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 establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Claimant cannot benefit from this provision, as the miner did not file a lifetime claim for benefits.

On remand, Judge Malamphy found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and found that employer did not rebut the presumption. Accordingly, Judge Malamphy awarded benefits.

Pursuant to employer's appeal, the Board affirmed Judge Malamphy's finding that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. *Noyes v. Consolidation Coal Co.*, BRB No. 12-0584 BLA, slip op. at 3 n.4 (June 27, 2013) (unpub.). Moreover, because employer conceded that the miner had clinical pneumoconiosis, the Board noted employer was precluded from rebutting the presumption by disproving the existence of pneumoconiosis. *Noyes*, slip op. at 4. However, the Board held that Judge Malamphy erred in finding that employer failed to establish rebuttal by establishing that the coal dust exposure did not cause or contribute to the miner's death. *Noyes*, slip op. at 5. The Board, therefore, vacated Judge Malamphy's finding that employer failed to rebut the Section 411(c)(4) presumption, and remanded the case for further consideration.

On remand for the second time, Administrative Law Judge Paul C. Johnson, Jr. (the administrative law judge) applied the revised regulation set forth at 20 C.F.R. §718.305, which became effective on October 25, 2013. The administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption by proving that pneumoconiosis played no part in the miner's death, 20 C.F.R. §718.305(d)(2)(ii), and awarded benefits.

On appeal, employer asserts that the implementing regulation set forth at 20 C.F.R. §718.305 is impermissibly retroactive and should not have been applied to this case. Employer also contends that the administrative law judge erred in finding that employer failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments concerning application of 20 C.F.R. §718.305. Employer has filed a reply brief, reiterating its arguments on 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 rational, supported by substantial evidence, and in accordance with applicable law. 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).

Employer initially argues that the administrative law judge erred in applying the revised regulation at 20 C.F.R. §718.305. Employer contends that because the survivor's claim was filed in 2008 and the hearing was held in 2010, the administrative law judge erred in retroactively applying the standards set forth in the revised regulation in

determining whether employer rebutted the presumption, pursuant to 20 C.F.R. §718.305(d)(2). Employer's Brief at 7-11. We disagree. The revised regulation at 20 C.F.R. §718.305 applies to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *See* 20 C.F.R. §718.305(a). Because, as the Director asserts, the revised regulation does not change existing law, but merely codifies existing law and clarifies the position of the Department of Labor (DOL), it is not impermissibly retroactive and may be applied to pending claims. *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1341-42, 25 BLR 2-549, 2-563-64 (10th Cir. 2014); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014); Director's Brief at 2-3.

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to rebut the presumption by establishing both that the miner did not have legal and clinical pneumoconiosis,[4] 20 C.F.R. §718.305(d)(2)(i), or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In addressing whether employer established rebuttal of the Section 411(c)(4) presumption, the administrative law judge initially addressed whether employer could disprove the existence of legal pneumoconiosis.[5] The administrative law judge

[4] "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).

[5] In its 2013 Decision and Order, the Board noted that while employer conceded that the evidence established the existence of clinical pneumoconiosis, employer did not concede the existence of legal pneumoconiosis. *Noyes v. Consolidation Coal Co.*, BRB No. 12-0584 BLA, slip op. at 5 (June 27, 2013) (unpub.). The Board further noted that although claimant, by invoking the Section 411(c)(4) presumption, is entitled to a presumption that the miner suffered from legal pneumoconiosis, it is a rebuttable presumption. *Id.* Consequently, the Board held that Judge Malamphy erred in discrediting Dr. Oesterling's opinion on the cause of the miner's death because Dr. Oesterling failed to diagnose legal pneumoconiosis, without first addressing whether employer could disprove the existence of legal pneumoconiosis. *Id.*

considered the medical opinion of Dr. Oesterling, who diagnosed the miner with lung cancer. Dr. Oesterling opined that cigarette smoking was "the primary agent" in producing the miner's lung cancer. Director's Exhibit 21 at 5.

The administrative law judge discredited Dr. Oesterling's opinion regarding the cause of the miner's lung cancer because he found that it was not credible, noting that it was based on generalities, rather than on the miner's specific condition. Decision and Order on Second Remand at 21. The administrative law judge also found that Dr. Oesterling failed to render "an explicit opinion that [the miner's] lung cancer was not caused by exposure to coal dust." *Id.* The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 22.

Employer contends that the administrative law judge erred in his consideration of Dr. Oesterling's opinion. We disagree. Because claimant invoked the Section 411(c)(4) presumption, she was entitled to a presumption that the miner's lung cancer constituted legal pneumoconiosis. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (1980); *see also* 43 Fed. Reg. 36,818, 36,825 (Aug. 18, 1978). Thus, it became employer's burden to establish that the miner's lung cancer did not arise out of his coal mine employment, i.e, explain why the miner's coal mine dust exposure did not contribute, along with his cigarette smoking, to his lung cancer. *Id.* The administrative law judge acted within his discretion as the fact-finder when he accorded less weight to Dr. Oesterling's opinion because he found that it was based "on generalities."[6] Decision and Order on Second Remand at 21; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-4 (7th Cir. 2008); *Knizer v. Bethlehem Mining Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge also permissibly questioned Dr. Oesterling's opinion because the doctor did not explicitly opine that the miner's lung cancer was not caused by his coal mine dust exposure. Decision and Order on Second Remand at 21. Because the administrative law judge's credibility determination is based on substantial evidence, it is affirmed. Moreover, as no other evidence would support a finding to the contrary, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have legal pneumoconiosis.[7]

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[6] The administrative law judge noted that Dr. Oesterling relied upon studies showing (1) that lung cancer is slightly less common among coal miners than the general population; and (2) that ninety-five percent of coal miners with lung cancer were current or former cigarette smokers. Decision and Order on Second Remand at 21; Director's Exhibit 21 at 5.

[7] Because we have affirmed the administrative law judge's finding that employer failed to rebut the presumption that the miner's lung cancer constituted legal

The administrative law judge next addressed whether employer established rebuttal by proving that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). The administrative law judge accurately noted that Drs. Oesterling, Perper, and Hardy agreed that the miner's lung cancer was the primary cause of his death. Decision and Order on Second Remand at 23. The administrative law judge rationally discounted Dr. Oesterling's opinion, that the miner's death was not due to pneumoconiosis, because Dr. Oesterling did not diagnose legal pneumoconiosis (lung cancer attributable in part to coal mine dust exposure), contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See Goodin*, 743 F.3d at 1346 n.20, 25 BLR at 2-579 n.20; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013). As no other evidence would support a finding to the contrary, we affirm the administrative law judge's determination that employer failed to prove that no part of the miner's death was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(2)(ii).

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pneumoconiosis, we need not address employer's contentions of error regarding the administrative law judge's additional determinations that employer failed to establish that the miner's pneumonia and emphysema did not constitute legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge