U.S. Department of Labor

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

BRB Nos. 17-0634 BLA
and 18-0054 BLA

MARTHA A. JOHNSON (o/b/o and Widow of RAYMOND L. JOHNSON)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 03/15/2019
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decisions and Orders Awarding Benefits of Thomas M. Burke and Richard A. Morgan, Administrative Law Judges, United States Department of Labor.

John A. Bednarz, Jr., Wilkes-Barre, Pennsylvania, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05790) of Administrative Law Judge Thomas M. Burke and the Decision and Order Awarding Benefits (2015-BLA-05770) of Administrative Law Judge Richard A. Morgan, rendered on claims filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a miner's claim filed on August 27, 2012 and a survivor's claim filed on January 15, 2015. The Board has consolidated these appeals for purposes of decision only.

In the miner's claim, Judge Burke (the administrative law judge) found that the miner had thirty years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, thus invoking the presumption that he was totally disabled due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He further found that employer did not rebut the presumption and awarded benefits. In the survivor's claim, Judge Morgan found claimant entitled to derivative benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*)(2012).[3]

On appeal, employer challenges the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption in the miner's claim. Claimant responds in support of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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[1] The miner, Raymond L. Johnson, and his widow, Martha A. Johnson, are deceased. Hearing Transcript at 49. Their daughters, Jennifer R. Bane, Donna L. Johnson, and Amy B. Haines, are pursuing their respective claims. Miner's Claim (MC) Director's Exhibit 2; Survivor's Claim (SC) Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability or death was due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his 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); *see Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-200 (2010).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established that the miner had thirty years of underground coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and

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.[5] 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).

I. Miner's Claim

A. 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,[6] 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. Miner's Claim (MC) Decision and Order at 20, 24, 25.

After finding employer disproved clinical pneumoconiosis, 20 C.F.R. §§718.201(a)(1), 718.305(d)(1)(i)(B), the administrative law judge addressed whether employer disproved legal pneumoconiosis. To disprove legal pneumoconiosis, employer must establish that the miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v.*

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therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 15-16.

[5] Because the miner's last coal mine employment was in West Virginia, 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); MC Director's Exhibit 3; Hearing Transcript at 51.

[6] 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 includes, but is not limited to, 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 dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Keystone Coal Mining Co., 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge considered the medical opinions of Drs. Bellotte, Ghio, Veraldi, and Allen. Dr. Bellotte examined the miner and opined he had "multiple pulmonary and non-pulmonary diagnoses," none of which "ha[ve] been caused by, contributed to, or substantially aggravated by coal mine dust exposure."[7] *Id*. At deposition, he added that the miner also had interstitial fibrosis and, although coal dust is one of the causes of interstitial fibrosis, it was not the cause in this case. MC Employer's Exhibit 8 at 24-25. Dr. Ghio conducted a records review and opined that the miner "can be diagnosed to have idiopathic pulmonary fibrosis" but "is not diagnosed to have any disease which would be included in legal pneumoconiosis." MC Employer's Exhibits 6, 19.

In contrast, Dr. Veraldi, who treated the miner at the University of Pittsburgh Medical Center, opined the miner had legal pneumoconiosis in the form of diffuse interstitial fibrosis related to his thirty years of coal mine dust exposure.[8] MC Claimant's Exhibit 7. Dr. Allen, who examined the miner as part of the Department of Labor-sponsored complete pulmonary evaluation, opined that the miner had a disabling moderate restrictive defect related to coal mine dust exposure, but could not offer an opinion on whether the miner had usual interstitial pneumonia (UIP) without further information. MC Director's Exhibit 16; MC Employer's Exhibit 5 at 28, 31, 32, 33, 34. Weighing the medical opinions, the administrative law judge gave "controlling weight" to Dr. Veraldi's opinion because of her superior qualifications and status as the miner's treating physician. MC Decision and Order at 23-24. He therefore found that employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i). *Id*. at 24.

We initially reject employer's argument that the administrative law judge applied an incorrect rebuttal standard by requiring employer's medical experts to establish that "no part" of the miner's coal mine dust exposure caused his pulmonary disease. Employer's Brief at 9-10. The administrative law judge did not find the opinions of Drs. Bellotte and Ghio insufficient to disprove the existence of legal pneumoconiosis because they failed to "rule out" or establish that "no part" of the miner's disease or impairment was caused by

[7] Dr. Bellotte's written report identifies obesity, asthma, allergies, hypertension, gastroesophageal reflux disease, "probable" heart disease, and an "undiagnosed condition in the right thoracic cavity" which is the "major contributor to his pulmonary impairment." MC Director's Exhibit 18.

[8] Dr. Veraldi's opinion consists of her medical treatment records from five visits with the miner between February 14, 2013 and August 28, 2014.

coal mine dust exposure. MC Decision and Order at 20-24. Rather, he found their opinions outweighed by Dr. Veraldi's contrary opinion based on her superior qualifications and status as a treating physician. *Id*. at 24. The administrative law judge therefore determined that employer failed to disprove legal pneumoconiosis by establishing that the miner's "pulmonary condition was not significantly related to, or substantially aggravated by, dust exposure." *Id*.; *see Minich*, 25 BLR at 1-155 n.8. Thus, employer's assertion that the administrative law judge applied an incorrect rebuttal standard pursuant to 20 C.F.R. §718.305(d)(1)(i)(A) is without merit.

We find merit, however, to employer's argument that the administrative law judge did not adequately explain why Dr. Veraldi's opinion warranted more weight than those of Drs. Bellotte and Ghio. Employer's Brief at 11-29, 33, 34. The administrative law judge acknowledged that the physicians disagree as to whether the miner's interstitial fibrosis was significantly related to or substantially aggravated by his coal mine dust exposure. His resolution of this dispute, however, is based solely on unexplained determinations that Dr. Veraldi "has superior qualifications to offer an opinion on the cause of interstitial fibrosis" and her "qualifications to treat interstitial lung disease plus the testing at the Simmons Center for Interstitial Lung Disease give her opinion controlling weight." Decision and Order at 24.

The administrative law judge accurately recognized Dr. Veraldi as an Attending Physician at the University of Pittsburgh Medical Center in the Simmons Center for Interstitial Lung Disease, a Professor of Medicine at the University of Pittsburgh School of Medicine, Division of Pulmonary, Allergy, and Critical Care Medicine, and author of "at least one [article that] addresses interstitial lung disease." MC Decision and Order at 23. He did not, however, compare her qualifications with those of Drs. Bellotte and Ghio or offer any explanation as to why her credentials are superior to the otherwise "excellent qualifications" of Drs. Bellotte and Ghio.[9] *Id*. at 24. Because the administrative law judge

[9] The administrative law judge acknowledged Drs. Bellotte and Ghio are Board-certified in internal medicine and pulmonary medicine, and Dr. Ghio has academic qualifications as an assistant and associate professor of medicine. MC Decision and Order at 24. He did not consider that Dr. Ghio has authored numerous articles, including four articles which employer contends pertain "to pulmonary fibrosis and its causes," and contributed to seven book chapters which employer contends "discuss pneumoconiosis, environmental lung disease and/or interstitial lung disease." Employer's Brief at 15, *citing* Employer's Exhibit 7 at 9-22 (items 28, 30, 162, 197) and 22-24 (items 5, 8, 11, 13, 19, 20, 22). Whether these publications in any way enhance Dr. Ghio's credentials is a matter for the administrative law judge to consider. *See W.Va. CWP Fund v. Bender*, 782 F.3d

did not adequately explain why Dr. Veraldi has "superior qualifications to offer an opinion on the cause of interstitial fibrosis," his finding does not comport with the Administrative Procedure Act (APA) and cannot be affirmed.[10] *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) (providing that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record"); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with employer that the administrative law judge did not adequately explain his determination that Dr. Veraldi merited controlling weight based on her status as the miner's "treating physician" and her "qualifications to treat interstitial lung disease plus the testing at the Simmons Center for Interstitial Lung Disease." MC Decision and Order at 23-424; Employer's Brief at 15-27. The regulation at 20 C.F.R. §718.104(d) permits an administrative law judge to give controlling weight to a medical expert based on her status as a treating physician. The administrative law judge, however, did not fully address the factors that must be considered before doing so: nature of the relationship, duration of the relationship, frequency of treatment, and extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Additionally, the regulation provides that a decision to give controlling weight to a treating physician is permissible, "provided that the weight given . . . shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) (administrative law judge must consider the quality of a physician's reasoning);

129, 144 (4th Cir. 2015) (internal quotations omitted); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951 (4th Cir. 1997).

[10] We reject employer's assertion that Dr. Veraldi's opinion is entitled to less weight on the basis that her Board-certification in internal medicine lapsed in 2014 and that she does not list certification as a B-reader. Employer's Brief at 13. Dr. Veraldi was Board-certified in internal medicine from August 24, 2004 to December 31, 2014. MC Claimant's Exhibit 9. As claimant's office visits were between February 14, 2013 and August 28, 2014, employer does not point to any error by the administrative law judge in relying on Dr. Veraldi's Board-certification in internal medicine. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). Moreover, employer has not shown how Dr. Veraldi's lack of radiological qualifications as a B reader for diagnosing clinical pneumoconiosis on x-ray would have made any difference in the administrative law judge's weighing of her qualifications with regard to the medical opinion evidence on the issue of legal pneumoconiosis. *Id.*

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 636 (6th Cir. 2009) (weight accorded to treating physicians under 20 C.F.R. §718.104(d) is based on their power to persuade). The only factor the administrative law judge identified as support for Dr. Veraldi's opinion was the testing conducted at the Simmons Center, but he did not describe the tests on which he was relying or explain how they rendered Dr. Veraldi's diagnoses more credible than the other physicians.[11] Because the administrative law judge did not adequately explain his decision to give Dr. Veraldi's opinion controlling weight, we must vacate that finding. 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165.

Although we hold that the administrative law judge did not adequately explain his credibility determinations, we reject employer's argument that Dr. Veraldi "cannot be afforded determinative weight . . . because she misrepresents and misapplies" a medical article by Dr. Cohen[12] (the Cohen article) "upon which her entire argument rests." Employer's Brief at 23. It is the administrative law judge's function to weigh the medical opinions, including the underlying rationale of the physicians and the evidence and documentation on which they rely. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946 (4th Cir. 1997); *Hicks*, 138 F.3d at 533. The administrative law judge acknowledged that both Dr. Veraldi and Dr. Ghio cited the Cohen article as support for their diagnoses, but he did not render a finding as to whether either opinion was made more or less credible by the

[11] We reject employer's argument that Dr. Veraldi's opinion is undermined because she "immediately jumped to the conclusion that the controlling differential diagnosis was lung disease of an occupational nature," prior to reviewing any of the tests she ordered. Employer's Brief at 17. Although Dr. Veraldi's initial "Impression" of "interstitial lung disease" due to "occupational" factors was formulated during her first examination of the miner on February 14, 2013, her diagnosis of coal dust-related lung disease remained consistent throughout her subsequent treatment, including after the additional testing was completed. MC Claimant's Exhibit 7. For example, her treatment notes from May 9, 2013, include the results of several studies, including a March 19, 2013 sniff test, a February 14, 2013 x-ray, a March 19, 2013 computed tomography (CT) scan, and a lung biopsy. *Id.* She concluded, "Based upon careful review of all available data . . . Mr. Johnson has diffuse interstitial fibrosis related to his history of work in the coal mines." *Id.* She reached similar conclusions in reports dated November 14, 2013 and August 28, 2014. *Id.*

[12] *See* Robert A.C. Cohen, M.D., Aiyub Patel, M.D. and Francis H.Y. Green, M.D., Lung Disease Caused by Exposure to Coal Mine and Silica Dust, Seminars in Respiratory and Critical Care Medicine, Vol. 29, No. 6 (2008).

physicians' reliance on that article. Decision and Order at 21-23. We decline to render such a finding in the first instance.[13]

Furthermore, the burden to rebut the presumption that the miner had legal pneumoconiosis rests with employer. 20 C.F.R. §718.305(d)(1)(i)(A). Thus, regardless of the weight accorded to Dr. Veraldi's opinion, the administrative law judge must be persuaded that the evidence put forward by employer is sufficient to establish by a preponderance of the evidence that the miner did not have a lung disease or impairment that is significantly related to or substantially aggravated by coal mine dust exposure given claimant's thirty years of exposure as an underground miner. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) ("Once the presumption is invoked, there is no need for the claimant to prove the existence of pneumoconiosis[.]"); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554 (4th Cir. 2013) ("In the absence of credible rebuttal evidence, the miner would then be entitled to benefits.").

In view of the foregoing, we must vacate the administrative law judge's finding that employer failed to disprove that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A) and remand the case for further consideration of the medical opinion evidence. In rendering his decision on remand, the administrative law judge must consider

[13] Employer asserts that the Cohen article "make[s] clear" that fibrosis related to coal mine dust always "has *both* pigmented *and* unpigmented areas," whereas Dr. Veraldi cited the Cohen article for the proposition that coal mine dust exposure "may result in a pattern that mimics idiopathic pulmonary fibrosis and the histopathology does not always demonstrate coal dust pigmentation." Employer's Brief at 25-26 (emphasis added); MC Claimant's Exhibit at 7. As employer notes, one passage of the Cohen article states that the "less common" form of interstitial fibrosis, "[h]istologically . . . has both pigmented and unpigmented areas." Robert A.C. Cohen, M.D., Aiyub Patel, M.D. and Francis H.Y. Green, M.D., Lung Disease Caused by Exposure to Coal Mine and Silica Dust, Seminars in Respiratory and Critical Care Medicine, Vol. 29, No. 6, p.655 (2008). Another passage of the article, however, discusses a study of severe interstitial fibrosis in Welsh miners which found "interstitial fibrosis *with and without* coal dust pigmentation [to be] the most common pathological finding," and further found "no significant difference in survival for [miners] *with or without* pigmentation of the fibrosis." *Id.* at 656. The determination of whether the physicians' opinions are supported by their underlying documentation is for the administrative law judge, as fact-finder. *W.Va. CWP Fund v. Bender*, 782 F.3d at 144. He is not bound to accept the opinion or theory of any medical expert but must draw his own conclusions. *Id.*

all relevant evidence[14] and explain the bases for his credibility determinations in accordance with the APA. *See Wojtowicz,* 12 BLR at 1-165. Specifically, he must evaluate the credibility of the medical opinions in light of the physicians' qualifications, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Because we vacate the administrative law judge's finding that employer failed to rebut the presumed existence of legal pneumoconiosis, we must also vacate his finding that employer failed to rebut the presumed fact of disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 25. Thus, we vacate the administrative law judge's award of benefits in the miner's claim.

On remand, the administrative law judge is instructed to reconsider whether employer rebutted the Section 411(c)(4) presumption. He must begin his rebuttal analysis by considering whether employer disproved that the miner had legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b); 718.305(d)(1)(i)(A). Specifically, the administrative law judge must determine whether employer established that the miner did not have a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b); *see* 20 C.F.R. §718.305(d)(1)(i)(A); *Smith*, 880 F.3d at 699; *Minich*, 25 BLR at 1-155 n.8. Given that the administrative law judge determined that employer disproved the existence of clinical pneumoconiosis, if he finds that employer has disproved the existence of legal pneumoconiosis, employer will have rebutted the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i) and the administrative law judge need not reach the issue of disability causation. If employer fails to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i), however, the administrative law judge must determine whether employer has rebutted the presumption by establishing 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)(ii); *see Minich*, 25 BLR at 1-159.

[14] In weighing the medical opinions on legal pneumoconiosis, the administrative law judge did not indicate the weight, if any, he was giving to Dr. Allen's opinion. Although Dr. Allen stated that she needed more information to diagnose interstitial fibrosis, she definitively diagnosed legal pneumoconiosis in the form of a moderate restrictive defect related to coal mine dust exposure. MC Director's Exhibit 16.

II. Survivor's Claim

Because we have vacated the award of benefits in the miner's claim, we must also vacate Judge Morgan's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*).

On remand, should the administrative law judge again award benefits in the miner's claim, claimant is automatically entitled to benefits in the survivor's claim. *See* 30 U.S.C. §932(*l*). If the administrative law judge denies benefits in the miner's claim, however, Judge Morgan must consider whether claimant can establish entitlement to survivor's benefits by establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b) or by operation of the Section 411(c)(4) presumption. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in the miner's claim is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion. Additionally, Judge Morgan's Decision and Order Awarding Benefits in the survivor's claim is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge