U.S. Department of Labor

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

BRB No. 18-0077 BLA

BETTYE J. JOHNSON (Widow of FRANKLIN JOHNSON) Claimant-Respondent v. JIM WALTER RESOURCES, INCORPORATED and WALTER ENERGY, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/13/2019 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Cecelia B. Freeman and John R. Jacobs (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05438) of Administrative Law Judge Theresa C. Timlin 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 April 28, 2014.[1]

The administrative law judge credited the miner with twenty-seven years of underground coal mine employment, pursuant to the parties' stipulation, and found the evidence established the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge determined employer did not rebut the presumption. The administrative law judge also found the evidence established the miner's adult son is disabled pursuant to 20 C.F.R. §§725.209, 725.221, and eligible for benefits as a dependent. Accordingly, the administrative law judge awarded benefits, augmented for support of the miner's disabled adult son.

On appeal, employer contends the administrative law judge erred in finding claimant established disability pursuant to 20 C.F.R. §718.204(b)(2) and invocation of the

[1] Claimant is the surviving spouse of the miner, who died on May 1, 2013. Director's Exhibit 12. The miner filed six applications for benefits. The district director withdrew the most recent, filed on April 9, 2012, pursuant to the miner's request. The district director denied the second most recent, filed on January 25, 2010, on November 1, 2010, based on the miner's failure to establish total respiratory disability. Director's Exhibit 1. Because the miner was not awarded benefits in any of his claims, claimant cannot benefit from Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his 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*) (2012).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner 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); *see* 20 C.F.R. §718.305.

Section 411(c)(4) presumption. Employer further argues the administrative law judge erred in finding it did not rebut the presumption. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply brief, reiterating its arguments.[3]

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.[4] 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).

Invocation of the Section 411(c)(4) Presumption

Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish the miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that the miner had twenty-seven years of underground coal mine employment and that the miner's adult disabled son qualifies as a dependent of claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 7-8, 11.

[4] The record indicates that the miner's coal mine employment was in Alabama. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

After finding total disability not established pursuant to 20 C.F.R. §718.202(b)(2)(i)-(iii), the administrative law judge considered the medical opinions of Drs. Barney, Ozgun, and Zaldivar pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5]

Dr. Barney performed the Department of Labor-sponsored pulmonary evaluation of the miner on June 12, 2012. Claimant's Exhibit 5. Based on a pulmonary function study showing a "severely reduced [forced vital capacity (FVC)]," he concluded the miner was "severely short of breath with minimal exertion and cannot perform any work." *Id*.

Dr. Ozgun, a pulmonologist, treated the miner from May 2002 until November 2012. Claimant's Exhibit 8; Hearing Transcript at 27, 29. He testified the miner's pulmonary function studies showed a totally disabling impairment comprised of restrictive and obstructive elements, adding the miner "was a bit of an outlier in terms of exercise tolerance than what we found on his pulmonary function studies." Hearing Transcript at 34. Dr. Ozgun explained the miner's "pulmonary function studies always looked better than he did, breathing-wise." *Id*. at 34. He also testified he does not do "disability exams" but his observations of the miner in August and November 2012 supported a conclusion he was unable to perform strenuous manual labor from a pulmonary standpoint. *Id*. at 35.

At employer's request, Dr. Zaldivar reviewed the miner's death certificate, terminal hospitalization records, autopsy report, and two pulmonary function studies. Employer's Exhibit 1. In a report dated February 29, 2016, he diagnosed "a restriction of FVC" and concluded: "There was no evidence of any pulmonary impairment at all, except for the one brought about by obesity. There is no evidence that there is any intrinsic pulmonary disease." *Id*. In a June 22, 2016 supplemental report,[6] Dr. Zaldivar reviewed additional records consisting of ten pulmonary function studies, x-rays, office notes from Dr. Ozgun's treatment of the miner, a CT scan report, the death certificate, and the transcript of Dr. Ozgun's hearing testimony. *Id*. He determined the miner had a "restriction of FVC" due to obesity:

> According to these records, strictly from the pulmonary standpoint, there is no pulmonary impairment whatsoever. The lungs were compressed and unable to expand fully, but only during the FVC maneuver. The total lung

[5] The administrative law judge observed that Drs. Ozgun and Zaldivar are Board-certified pulmonologists. Decision and Order at 16, 17; Claimant's Exhibit 5; Employer's Exhibit 1; Hearing Transcript at 27. Dr. Barney's qualifications are not of record.

[6] At the close of the hearing held on March 24, 2016, the administrative law judge allowed employer time to obtain a supplemental report from Dr. Zaldivar, based on his review of Dr. Ozgun's treatment records and hearing testimony. Hearing Transcript at 57.

> capacity was normal. The reason they could not expand fully during the FVC maneuver is that obesity created too much resistance for [the miner] to be able to forcefully inhale and exhale on command. Had he not been obese, his lung capacity would have been entirely normal. . . . There is no intrinsic lung dysfunction.

Id.

The administrative law judge found Dr. Barney's opinion well documented and reasoned. Decision and Order at 17. Applying the treating physician standards in 20 C.F.R. §718.104(d) to Dr. Ozgun's opinion, she stated:

> This longstanding treating physician relationship enabled Dr. Ozgun to consider more than just the FEV1 values on two pulmonary function tests in determining that [the] Miner was impaired from a pulmonary standpoint. He also looked at mid-flows and total lung capacity, which were always below normal. He had both restrictive and obstructive impairment on pulmonary function tests. [The] Miner also had wheezing on physical exams. Dr. Ozgun's opinion, therefore, is reasoned, documented, and entitled to significant probative weight.

Id. at 19. She then found Dr. Zaldivar's initial report neither reasoned nor documented because he focused on the cause of death, reviewed only two pulmonary function studies, and did not indicate whether the moderate restrictive impairment he diagnosed was totally disabling. *Id*. She concluded that the opinions of Drs. Barney and Ozgun outweighed Dr. Zaldivar's and that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Employer contends the administrative law judge overlooked Dr. Zaldivar's June 22, 2016 supplemental report and therefore erred in discrediting his February 29, 2016 narrative report because he reviewed only two pulmonary function studies. Claimant responds the administrative law judge's error is harmless, as she provided a rationale for discrediting Dr. Zaldivar's opinion that remains valid even in light of her omission of his supplemental report from consideration. Employer also alleges the administrative law judge erred in giving great weight to Dr. Ozgun's opinion, ignoring the fact Dr. Ozgun initially testified the results of the miner's pulmonary function studies reflected a totally disabling respiratory impairment, but subsequently explained "the pulmonary function studies failed to show true impairment" and "did not reflect a total disability." Employer's Brief at 4. Employer's contentions have merit.

With respect to Dr. Zaldivar's opinion, we agree with employer that the administrative law judge omitted Dr. Zaldivar's subsequent report dated June 22, 2016, from consideration. Decision and Order at 7, 16, 19, 26-27, 39, 40; Employer's Exhibit 1. The administrative law judge's observation that Dr. Zaldivar's disability opinion was based solely on his review of two pulmonary function studies is, therefore, erroneous. With respect to Dr. Ozgun's opinion, the administrative law judge merely indicated that he diagnosed a totally disabling impairment and that his opinion was "well reasoned and based on objective testing," adding that his status as a treating physician entitled his opinion to "significant probative weight." Decision and Order at 17, 19. However, in crediting Dr. Ozgun's diagnosis of total disability, the administrative law judge did not address his conflicting testimony regarding whether the miner's pulmonary function study results reflected disability, and whether the miner's exercise tolerance correlated with these results. Hearing Transcript at 34-35. In addition, she did not explain how she found the pulmonary function study evidence insufficient to establish total disability because the qualifying study Dr. Ozgun performed was non-conforming, but then concluded that the non-conforming study supported his total disability diagnosis. Decision and Order at 13-14, 19.

The Act and the Administrative Procedure Act (APA), require the administrative law judge to consider "all relevant evidence" when adjudicating a claim and to issue a Decision and Order that includes 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." 30 U.S.C. §923(b); 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Because the administrative law judge did not consider relevant evidence in the form of Dr. Zaldivar's supplemental report; did not resolve conflicts in the evidence; and did not adequately explain her credibility determinations regarding Dr. Ozgun's opinion, her Decision and Order does not comply with the Act or the APA.[7] 30 U.S.C. §923(b); 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Contrary to claimant's assertion, the proper course is to remand the case, as the Board lacks the authority to render factual findings or provide rationales that do not appear in the administrative law judge's Decision and Order. 20 C.F.R. §802.301(a); *see Director, OWCP, v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *McCune v. Central*

[7] Employer's brief on appeal is lacking in terms of identifying these errors in the administrative law judge's weighing of the medical opinion evidence. Nevertheless, this does not permit the Board to exceed its authority and render determinations that are committed to the administrative law judge in her role as fact-finder. 20 C.F.R. §802.301(a); *see Director, OWCP, v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Appalachian Coal Co., 6 BLR 1-996, 1-998 (1984). Absent actual consideration of Dr. Zaldivar's supplemental report, one cannot assume that the administrative law judge's review of the report would not affect her weighing of Dr. Zaldivar's opinion. *See McCune*, 6 BLR at 1-998. In addition, the failure to resolve conflicts in Dr. Ozgun's opinion and to provide a detailed rationale make it impossible to discern how the administrative law judge determined that the opinion was well reasoned and documented. *See Wojtowicz*, 12 BLR at 1-165. Rather than filling in the gaps, we vacate the administrative law judge's findings with respect to the medical opinions of Drs. Zaldivar and Ozgun and remand the case for reconsideration of whether the medical opinion evidence is sufficient to establish total disability. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

On remand, the administrative law judge must consider the opinions of Drs. Ozgun and Barney, in conjunction with the contrary opinion expressed in Dr. Zaldivar's initial and supplemental reports, and determine whether claimant has established the miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); *see Lollar v. Ala. By-Products Corp.*, 893 F.2d 1258, 1266, 13 BLR 2-277, 2-284 (11th Cir. 1990). When weighing the medical opinion evidence, the administrative law judge must resolve material conflicts and consider the physicians' respective qualifications, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024-25, 24 BLR 2-297, 2-315 (10th Cir. 2010); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge is also required to set forth her findings on remand in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Rebuttal of the Section 411(c)(4) Presumption

Upon invocation of the Section 411(c)(4) presumption, the burden shifts to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[8] or that

[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). "Arising out of coal mine employment" means that the chronic pulmonary disease or respiratory or pulmonary impairment is "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).

"no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 20-41.

Disproving the Existence of Pneumoconiosis

Legal Pneumoconiosis

Employer first challenges the administrative law judge's weighing of the medical opinion evidence relevant to legal pneumoconiosis, and contends that her finding that employer did not rebut the existence of the disease is based on her failure to address Dr. Zaldivar's supplemental report. We agree. As was the case when the administrative law judge considered total disability, she erred in omitting Dr. Zaldivar's supplemental report when she addressed rebuttal of the presumed existence of legal pneumoconiosis. *See McCune*, 6 BLR at 1-998; Decision and Order at 26. Accordingly, her determination that Dr. Zaldivar "did not have the advantage, as Dr. Ozgun did, of reviewing [the] Miner's . . . pulmonary function tests over the course of time," was incorrect. Decision and Order at 26. We therefore vacate her finding that Dr. Zaldivar's opinion was entitled to less weight than Dr. Ozgun's opinion. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). We further vacate her determination that Dr. Zaldivar did not explain why the miner's "extensive coal mine dust exposure history" did not contribute to his pulmonary impairments. Decision and Order at 26. Employer is correct in asserting that due to her omission of Dr. Zaldivar's supplemental report, the administrative law judge was unaware he disputed Dr. Ozgun's diagnoses of obstructive and restrictive impairments related to coal dust exposure.[9] Employer's Exhibit 1. Thus, we also vacate the administrative law

[9] Dr. Zaldivar indicated in his supplemental report dated June 22, 2016, that Dr. Ozgun's diagnosis of an obstructive impairment and chronic obstructive pulmonary disease is inconsistent with the definition of obstruction which requires a reduction in the ratio of FEV1 to FVC. Employer's Exhibit 1. He also stated Dr. Ozgun "made incorrect assumptions about the expiratory flow in the mid-portion at the curve which is also called 'MEF 25-75%,'" and did not have access to the most recent pulmonary function study, performed on December 12, 2011, which showed a residual volume "incompatible with airway obstruction." *Id*. Dr. Ozgun did not comment on this study at the hearing, testifying he "did not have [a 2011 study] documented" in his evidence chart. Hearing Transcript at 37. The administrative law judge attributed this study to both Dr. Ozgun and Dr. Postma. Decision and Order at 7, 13, 30. Dr. Zaldivar explained in both of his reports obesity alone prevented full expansion of the miner's lungs, causing the miner's restrictive impairment. Employer's Exhibit 1.

judge's finding that employer failed to rebut the presumed existence of legal pneumoconiosis.

On remand, the administrative law judge must review Dr. Zaldivar's opinion, as expressed in his initial and supplemental reports, in conjunction with the contrary opinions of Drs. Ozgun and Barney, and determine whether employer has established the miner did not have legal pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(ii)(A). As instructed *supra*, she must consider the physicians' qualifications, the extent to which their conclusions are documented and explained, and the sophistication of, and bases for, their diagnoses. *See Gunderson*, 601 F.3d at 1024-25, 24 BLR at 2-315; *Clark*, 12 BLR at 1-155. She must also comply with the APA and render her findings on remand in detail, including the underlying rationales. *See Wojtowicz*, 12 BLR at 1-165.

Clinical Pneumoconiosis

Employer also alleges the administrative law judge applied an incorrect interpretation of 20 C.F.R. §718.106(c) to discount the autopsy evidence, which did not include a diagnosis of clinical pneumoconiosis, and did not properly weigh other evidence establishing its absence. These contentions have merit.

The administrative law judge reviewed the autopsy report dated May 1, 2013, and indicated that 20 C.F.R. §718.106(c) "states that a negative biopsy or *negative autopsy* is not conclusive evidence of the absence of pneumoconiosis, but that where positive findings are obtained on biopsy or *autopsy*, the results will constitute evidence of the presence of pneumoconiosis." Decision and Order at 23 (emphasis added); Director's Exhibit 13; Claimant's Exhibit 7. The administrative law judge then summarized the findings of Dr. O'Sheal, the autopsy prosector, and concluded:

> There is nothing in the autopsy to suggest that [the] Miner had either clinical or legal pneumoconiosis. The pathologist did look at [the] Miner's lungs, both macroscopically and microscopically but did not record any changes consistent with pneumoconiosis. However, as discussed above, while an autopsy can provide conclusive evidence of the existence of clinical

[10] To establish that the miner did not suffer from legal pneumoconiosis, employer must demonstrate that it is more likely than not the miner did not have a chronic dust disease or impairment that is "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)(ii)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting).

> pneumoconiosis, a negative autopsy is not conclusive evidence of the absence of pneumoconiosis.

Decision and Order at 24-25.

Employer correctly maintains the administrative law judge predicated her determination on an erroneous interpretation of 20 C.F.R. §718.106(c), as the regulation does not reference autopsy evidence.[11] In light of the administrative law judge's mistaken view that 20 C.F.R. §718.106(c) precluded her from treating the negative autopsy report as probative of the absence of clinical pneumoconiosis, we must vacate her finding. We further vacate her determination that employer failed to rebut the presumed existence of clinical pneumoconiosis. On remand, she must reconsider the autopsy report and make a determination as to whether the autopsy report is probative of the absence of clinical pneumoconiosis. *See*, *e.g.*, *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (determining the significance of an x-ray reading silent on the existence of pneumoconiosis is for the administrative law judge).

The administrative law judge also did not render definitive findings as to the evidentiary value of the readings of the December 30, 2002 CT scan and the treatment record x-rays, none of which diagnose clinical pneumoconiosis. *See Marra*, 7 BLR at 1-218-19; Claimant's Exhibits 7, 8. The administrative law judge determined the December 30, 2002 CT scan and treatment record x-rays were "persuasive evidence" of the absence of pneumoconiosis, but also indicated that evidence silent as to the presence of pneumoconiosis is not "probative" on the issue and, without explanation, gave greater weight to the x-rays designated by the parties than to the treatment record x-rays. Decision and Order at 28, 39. We therefore vacate the administrative law judge's findings that the CT scan and x-ray evidence were entitled to little weight on the issue of the existence of clinical pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-165.

On remand, the administrative law judge must reconsider the CT scans and x-rays and make explicit findings as to the probative value of the readings silent as to the existence of clinical pneumoconiosis. She must also reconsider her weighing of the medical opinion evidence on the existence of clinical pneumoconiosis to the extent her findings on remand

[11] The regulation provides: "A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis. However, where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis." 20 C.F.R. §718.106(c).

are relevant.[12] Based on her reconsideration of the CT scan and x-ray evidence, the autopsy report and, if necessary, the medical opinion evidence, the administrative law judge must determine whether employer has rebutted the presumed existence of clinical pneumoconiosis by the preponderance of the evidence.

Disproving Death Causation

Because the administrative law judge relied on vacated findings under 20 C.F.R. §718.305(d)(2)(i), we further vacate the finding employer failed to establish pneumoconiosis caused "no part" of the miner's death under 20 C.F.R. §718.305(d)(2)(ii). Decision and Order at 40-41. If the administrative law judge determines employer has not rebutted the presumed existence of either legal or clinical pneumoconiosis, she must reassess whether employer has rebutted the presumption of death causation.

Finally, in reconsidering this survivor's claim on remand, the administrative law judge is required to set forth her all of her findings in detail, including the underlying rationales, in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[12] The administrative law judge discredited Dr. Zaldivar's contrary opinion, in part, because the designated x-ray evidence "weigh[ed] in favor of a showing that the Miner had clinical pneumoconiosis." Decision and Order at 23.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge