U.S. Department of Labor

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

BRB No. 17-0379 BLA

CONNIE DAMRON HATFIELD (Widow of BRYANT HATFIELD)	)	
Claimant-Petitioner	)	
v.	)	
LAUREL RUN MINING COMPANY	)	DATE ISSUED: 05/17/2018
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, 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:

Claimant appeals the Decision and Order on Remand Denying Benefits (2013-BLA-06010) of Administrative Law Judge Richard A. Morgan, rendered on a survivor's claim,

filed on July 9, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time. In its prior Decision and Order, the Board vacated the denial of benefits because the administrative law judge erred in finding that claimant did not establish total disability and, therefore, did not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012); *Hatfield v. Laurel Run Mining Co.*, BRB Nos. 15-0520 BLA and 15-0520 BLA-A, slip op. at 4-7 (Sept. 13, 2016) (unpub.). Pursuant to employer's cross-appeal, the Board rejected employer's assertion that the administrative law judge erred in determining that Dr. Crouch's opinion was not probative on the issue of legal pneumoconiosis. *Hatfield*, slip op. at 9 n.16.

On remand, the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, invoked the Section 411(c)(4) presumption. In consideration of rebuttal, he found that employer affirmatively established that the miner did not have legal pneumoconiosis, but did not disprove that the miner had clinical pneumoconiosis. He also found that employer established that no part of the miner's death was due to clinical pneumoconiosis and denied benefits accordingly.

On appeal, claimant argues that the administrative law judge erred in finding that employer rebutted the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[3]

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[1] Claimant is the surviving spouse of the miner, who died on October 26, 2010. Director's Exhibit 9. Because the miner was not awarded benefits during his lifetime, claimant is not derivatively entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. 932(*l*) (2012).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis where claimant establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2) and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

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,[5] or 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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

I. Existence of Legal Pneumoconiosis

To disprove legal pneumoconiosis,[6] employer must establish that the miner's chronic lung disease or impairment was not "significantly related to, or substantially

[4] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 5; Hearing Transcript at 15. 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).

[5] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment," and "includes but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis is defined as "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).

[6] Because the administrative law judge found that employer did not disprove clinical pneumoconiosis, which employer does not challenge on appeal, it is precluded from establishing rebuttal under 20 C.F.R. §718.305(d)(2)(i), which requires employer to establish that the miner had neither legal nor clinical pneumoconiosis. We address claimant's allegations of error regarding the administrative law judge's consideration of rebuttal of the existence of legal pneumoconiosis, however, as the findings on this issue are relevant to the second method of rebuttal at 20 C.F.R. §718.305(d)(2)(ii). *See Minich*

aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Minich*, 25 BLR at 154-56. The administrative law judge considered the medical opinions of Drs. Rasmussen, Abraham, Tomashefski, Castle, and Spagnolo. Dr. Rasmussen diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to both smoking and coal dust exposure. Claimant's Exhibits 1-3. Dr. Abraham diagnosed mild centrilobular emphysema and noted that both smoking and coal dust exposure can cause emphysema. Claimant's Exhibits 5, 6, 10. In his initial report, which consisted of a review of tissue slides from the miner's autopsy, Dr. Tomashefski diagnosed "very mild" simple coal workers' pneumoconiosis, interstitial fibrosis, and mild panlobular emphysema. Director's Exhibit 25. He stated:

> [N]either coal dust exposure nor mild simple coal workers' pneumoconiosis is a cause of [the miner's] interstitial fibrosis or mild panlobular emphysema. There is minimal pigment or crystal deposition in the areas of fibrosis within his lung to suggest that fibrosis is due to mineral dust deposition. . . . [T]here is little spatial relationship between mineral dust deposits and/or coal macules and diffuse emphysema in [the miner's] lung tissue. Both fibrosis and emphysema due to coal dust inhalation are typically associated with intense mineral dust deposits and prominent coal macules and nodules, in contrast to the minimal degree of dust deposition and very sparse minute coal macules seen in [the miner's] lung tissue.

Id. Dr. Tomashefski noted in his second report that panlobular emphysema "is less often associated with coal mine dust exposure" and "the mild degree of black pigment, the paucity of coal macules and the disparity between the distribution of black pigment and the lesions of emphysema are not consistent with significant emphysema due to coal dust exposure." Employer's Exhibit 8. Drs. Castle and Spagnolo reached similar conclusions in their reports based, in part, on a review of Dr. Tomashefski's analysis of the autopsy slides. Employer's Exhibits 3-7, 10.

The administrative law judge gave Dr. Rasmussen's opinion "somewhat less weight" because it was based on his views that smoking and coal dust exposure cause obstructive lung disease by identical means and that there is no way to differentiate the amount of damage attributable to each source. Decision and Order on Remand at 23. The administrative law judge accorded little weight to Dr. Abraham's opinion because he did not definitively identify coal dust exposure as a causal factor in the miner's emphysema. *Id*. at 20. The administrative law judge gave greatest weight to Dr. Tomashefski's opinion,

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v. *Keystone Coal Mining Co.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

as supported by the opinions of Drs. Castle and Spagnolo, finding that it was well reasoned and documented. *Id*. at 19-20, 24. The administrative law judge therefore concluded that employer rebutted the presumption that the miner had legal pneumoconiosis. *Id*. at 24.

Claimant contends that the administrative law judge erred in discrediting the opinion of Dr. Rasmussen and in crediting the opinions of Drs. Tomashefski, Castle, and Spagnolo. Claimant maintains that Dr. Tomashefski's opinion is not credible because it is based on his belief that "panlobular emphysema is less often associated with coal mine dust macules . . . contrary to the medical literature." Claimant's Brief at 16. Claimant also argues that Dr. Tomashefski's opinion is insufficient "to rule out the relationship between the miner's coal mine dust exposure and pulmonary impairment." *Id*. at 17. Claimant further argues that the opinions of Drs. Castle and Spagnolo excluded a diagnosis of legal pneumoconiosis based on the presence of only minimal clinical pneumoconiosis and are therefore contrary to the preamble to the 2001 regulations, which states that legal pneumoconiosis can exist in the absence of clinical pneumoconiosis. In addition, claimant asserts that the opinions of both physicians are insufficient to establish that "no part" of the miner's impairment was caused by coal dust exposure. We reject claimant's allegations of error.

Claimant's assertion that the opinions of employer's experts do not "rule out" coal dust exposure as a causal factor in the miner's impairment misstates the relevant standard. As the administrative law judge acknowledged, to rebut the existence of legal pneumoconiosis, employer must prove that the miner's impairment was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment.[7] 20 C.F.R. §718.201(a)(2), (b); *Minich*, 25 BLR at 1-154-56; Decision and Order on Remand at 18. The "rule out" or "no part" standard is relevant to the second method of rebuttal at 20 C.F.R. §718.305(d)(2)(ii).

Further, the administrative law judge rationally determined that Dr. Tomashefski's opinion is sufficient to rebut the presumed existence of legal pneumoconiosis. *See*

[7] The administrative law judge also accurately observed that the Department of Labor stated in the preamble to the 2001 regulations that medical and scientific evidence establishes that coal dust exposure can cause emphysema; smoking and coal dust cause emphysema through similar mechanisms; and emphysema can be legal pneumoconiosis if it arises from coal mine employment. Decision and Order on Remand at 18, *citing* 65 Fed. Reg. 79,920, 79,939, 79,943 (Dec. 20, 2000). In addition, he correctly noted that a medical opinion is inconsistent with the preamble if the physician fails to "offer a reason for opining that the miner's emphysema was not substantially aggravated by his coal mine dust exposure beyond [a] belief that coal mine dust exposure cannot cause that condition." Decision and Order on Remand at 18, *citing* 65 Fed. Reg. at 79,938.

Compton v. Island Creek Coal Co., 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order on Remand at 19-20, 23-24. Contrary to claimant's arguments, the administrative law judge permissibly found Dr. Tomashefski's opinion "to be consistent with the [p]reamble" because Dr. Tomashefski "recognizes that both fibrosis and emphysema can be due to coal dust inhalation but determines that in this case, they are not[.]" Decision and Order on Remand at 20; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012). The administrative law judge also permissibly determined that Dr. Tomashefski persuasively explained how his pathology findings of "minimal coal dust deposition," "very sparse, minute coal dust macules," and "little spatial relationship between mineral dust deposits and coal macule and diffuse emphysema," supported his conclusion that the miner's emphysema was unrelated to coal dust exposure.[8] Decision and Order on Remand at 23-24, *quoting* Director's Exhibit 25; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In light of his permissible finding that Dr. Tomashefski persuasively explained that the miner's emphysema is related to smoking but not coal dust exposure, the administrative law judge rationally declined to credit Dr. Rasmussen's opinion that the effects of coal dust exposure and smoking cannot be differentiated in this case. *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that Dr. Tomashefski's opinion is "the most well-reasoned and documented opinion regarding legal pneumoconiosis." Decision and Order on Remand at 23; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). We therefore affirm the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis under 20 C.F.R §718.305(d)(2)(i)(A).

II. Death Due to Pneumoconiosis

Because employer disproved that the miner had legal pneumoconiosis, its burden under 20 C.F.R. §718.305(d)(2)(ii) is to establish that "no part" of the miner's death was

[8] Dr. Tomashefski did not base his exclusion of legal pneumoconiosis on the absence of radiographically-apparent coal dust in the miner's lungs, which would conflict with the regulation recognizing that a physician can render a credible diagnosis of pneumoconiosis "notwithstanding a negative x-ray." 20 C.F.R. §718.202(a)(4); *see* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, 25 BLR 2-115, 2-125 (4th Cir. 2012).

caused by clinical pneumoconiosis.[9] 20 C.F.R. §718.305(d)(2)(ii); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015). Drs. Abraham and Rasmussen agreed that the miner's death was due to his cardiac condition, but opined that his pulmonary impairment affected his blood oxygenation levels and heart function. Claimant's Exhibits 3, 5. Drs. Castle, Spagnolo, Dennis, Crouch, and Tomashefski concluded that pneumoconiosis did not cause, contribute to, or hasten the miner's death. Employer's Exhibits 3, 6, 10. The administrative law judge discredited the opinions of Drs. Abraham and Rasmussen, and accorded greatest weight to the opinions of Drs. Castle and Spagnolo, as supported by Dr. Tomashefski's pathology findings. Decision and Order on Remand at 30. He therefore concluded that employer rebutted the presumption that pneumoconiosis played a role in the miner's death. *Id.*

Claimant argues that the administrative law judge erred in discrediting Dr. Rasmussen's opinion. Contrary to claimant's allegation, the administrative law judge permissibly determined that Dr. Rasmussen's opinion on death causation was poorly documented because he "presume[d] an impairment in blood oxygenation caused by pneumoconiosis," when there is no evidence of such an impairment.[10] Decision and Order on Remand at 28-30; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The administrative law judge also permissibly found that Dr. Rasmussen "did not specifically address" whether the miner's mild clinical pneumoconiosis alone would have contributed to his death, separate from his mistaken

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[9] Because we have affirmed the administrative law judge's finding that the miner's emphysema was not legal pneumoconiosis, we reject claimant's argument that the opinions of Drs. Tomashefski and Crouch are insufficient to rebut the presumption of death causation because they "ignore[] the question of whether the miner had legal pneumoconiosis which would have contributed to his death." Claimant's Brief at 23.

[10] The administrative law judge noted:

> The main process [Dr. Rasmussen] discussed regarding an impact on death is an impairment in oxygenation. However, he admitted as did the other pulmonologists that there is no objective evidence that the miner had an impairment in blood oxygenation since the resting blood gas tests were normal and no exercise blood gas testing was performed.

Decision and Order on Remand at 28-29.

belief that the miner also had legal pneumoconiosis that contributed to his death. Decision and Order on Remand at 29; *see Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32.

We also reject claimant's argument that the administrative law judge was required to discredit the opinions of Drs. Castle, Spagnolo, and Tomashefski as inadequately explained. The administrative law judge thoroughly reviewed each opinion and permissibly determined that the physicians' shared conclusion that the miner's clinical pneumoconiosis was too mild to have played a role in his death was well documented by Dr. Tomashefski's pathology findings and adequately explained.[11] *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order on Remand at 30. As it is supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that employer established that no part of the miner's death was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). We therefore affirm the

[11] Dr. Tomashefski reviewed tissue slides from the miner's autopsy and diagnosed "very mild" simple coal workers' pneumoconiosis, based on his observation of "a few coal macules." Director's Exhibit 25. He further stated:

> [The miner's] simple coalworkers' pneumoconiosis is of such a mild degree that it is my opinion that simple coalworkers' pneumoconiosis would not have caused [the miner] any significant respiratory symptoms or respiratory impairment. It is also my opinion, within a reasonable medical certainty, that [the miner's] mild simple coalworkers' pneumoconiosis is neither a cause of, nor a contributing factor in, his death.

Id. Dr. Spagnolo reviewed the miner's medical records and concluded that the miner did not have any impairment related to coal dust exposure. Employer's Exhibit 6. Citing the pathology reports of Drs. Tomashefski and Crouch, he also stated that the miner's simple coal workers' pneumoconiosis was too mild to have caused any clinically significant impairment and could not have caused or contributed to the miner's death from cardiovascular disease. *Id*. Dr. Castle also performed a record review, including the report of his examination of the miner on July 20, 2010, the pathology reports of Drs. Tomashefski and Crouch, and Dr. Rasmussen's report and deposition testimony. Employer's Exhibits 4, 5, 10. He disagreed with Dr. Rasmussen's view that clinical pneumoconiosis contributed to the miner's death by causing hypoxemia, noting that there is no evidence of baseline hypoxemia in the record. Employer's Exhibit 10. Citing Dr. Tomashefski's pathology findings in particular, Dr. Castle concluded "that [the miner's] death was not caused by, contributed to, or hastened in any way by the minimal, simple coal workers' pneumoconiosis that was present pathologically." *Id*.

administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Bender*, 782 F.3d at 137, 25 BLR at 2-699.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge