U.S. Department of Labor

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

BRB No. 15-0533 BLA

ALBERT SIDNEY MURDOCK (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN LAUREL RESOURCES COMPANY	)	DATE ISSUED: 11/09/2016
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05721) of Administrative Law Judge Adele Higgins Odegard, rendered on a subsequent claim filed on May 2, 2011,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that claimant had at least fifteen years of coal mine employment in underground mines or work in conditions substantially similarly to those of an underground mine. The administrative law judge also determined that the evidence was sufficient to establish that claimant was totally disabled by a respiratory or pulmonary impairment prior to his death. Based on these determinations and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4).[2] The administrative law judge also found that a change in an applicable condition of entitlement was shown under 20 C.F.R. §725.309(c). Further, the administrative law judge determined that employer failed to rebut the Section 411(c)(4) presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that it did not establish rebuttal. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[3]

[1] Claimant filed a prior claim on October 6, 2004. Director's Exhibit 1. The district director denied benefits on May 17, 2005, finding that while claimant established the existence of pneumoconiosis, the evidence was insufficient to establish total disability. Director's Exhibit 1. Claimant filed a timely request for modification on December 27, 2005, which was denied by the district director on February 8, 2006. *Id.* Claimant took no further action with regard to that denial until he filed his subsequent claim on May 2, 2011. Director's Exhibit 3. Claimant died during the pendency of his claim and it is being pursued by his widow.

[2] Under Section 411(c)(4) of the Act, a miner is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. § 921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that: claimant had at least fifteen years of qualifying coal mine employment; suffered

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 of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal[5] nor clinical[6] pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v.*

---

from a totally disabling respiratory or pulmonary impairment; claimant was entitled to invocation of the Section 411(c)(4) presumption; and he established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Because claimant's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6.

[5] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition 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).

[6] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

Keystone Coal Mining Corp., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method.

I. The Presumed Fact of Clinical Pneumoconiosis

We initially affirm, as unchallenged by employer, the administrative law judge's determination that employer failed to disprove the existence of clinical pneumoconiosis, based on her review of the x-rays, CT scans, and treatment records.[7] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-13, 13-14, 14-17, 27-28. In evaluating the autopsy evidence, the administrative law judge considered that Dr. Dennis conducted the autopsy on June 4, 2012 and diagnosed: "1) anthracosilicosis with pigment deposition . . . black dust accumulation producing moderate to severe emphysema with macular development, one measuring greater than one centimeter with features suggestive of early progressive massive fibrosis; 2) severe emphysema; and 3) pulmonary congestion." Decision and Order at 18; Claimant's Exhibit 4. The administrative law judge determined that Dr. Dennis's opinion was "well-reasoned" and that he diagnosed clinical pneumoconiosis, based on the identification of "*anthracosilicosis* in the [c]laimant's lungs and the presence of black pigment throughout the lung sections."[8] Decision and Order at 21 (emphasis added); *see* Claimant's Exhibit 4.

[7] The administrative law judge found that three x-rays submitted in conjunction with the prior claim were positive for pneumoconiosis, while the record in the current subsequent claim had one negative x-ray and three x-rays that were equivocal regarding the existence of simple, clinical pneumoconiosis. Decision and Order at 13. She noted that while employer submitted two negative readings of CT scans dated November 12, 2003 and May 24, 2010, employer "has not proffered any evidence that CT scans are medically acceptable or relevant in diagnosing pneumoconiosis" as required by 20 C.F.R. §718.107(b). *Id*. at 14. The administrative law judge also noted that the treatment record contains references to "black lung disease" and x-rays showing "interstitial changes consistent with pneumoconiosis." *Id*. at 17.

[8] The administrative law judge determined that claimant could not establish complicated pneumoconiosis, based on Dr. Dennis's opinion, because Dr. Dennis did not state whether "the macular change observed on the autopsy slide is equivalent, on an X-ray, to at least one opacity one centimeter or greater in diameter." Decision and Order at 21, *citing Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999); 20 C.F.R. §718.304.

The administrative law judge next considered Dr. Oesterling's November 11, 2013 report, in which Dr. Oesterling reviewed the autopsy slides, Dr. Dennis's report, the death certificate, and medical records. Decision and Order at 19; Employer's Exhibit 6. Dr. Oesterling initially "reviewed slides A through J at a significant magnification" and indicated that there were "enlarged air spaces, but no black pigment." Employer's Exhibit 6.

As discussed, *infra*, Dr. Oesterling's findings with regard to Slide C are at issue in this appeal. Reviewing Slide C with increased magnification (Photos 9-11, 13-16), Dr. Oesterling stated:

> Photo 9 was obtained at 60x with millimeter [mm] markings to show a 2 mm area of pleura which was the only significant area of pigmentation. At 150x photo 10 shows very minimal anthracotic pigmentation in the subpleura surrounding the vessels and note the marked chronic inflammation present. Photo 11 at 600x shows minimal black pigment in the left aspect and chronic inflammatory cells throughout the right aspect surrounding dilated lymphatic channels. Again insufficient for a diagnosis of macular disease. . . .
>
> Photo 13 at 60x turns to the interstitium of this section and now shows minimal black pigment surrounding airways and their accompanying vessels. This measures less than 2 mm in greatest dimension. At 150x photo 14 shows this airway and the surrounding black pigment and note in this image throughout its left aspect the prominent cells seen in the air spaces. Photo 15 at 600x show the air space in the right aspect and the minimal black pigment surrounding it. Turning to the area with the marked cellularity in photo 16 at 600x we see cells with a finely stippled tan cytoplasm. Note the adjacent support tissues show chronic inflammation and early fibrosis.

Id. Dr. Oesterling concluded that claimant had "minimal anthracotic pigmentation of the pleura on several lung sections and mild anthracotic cuffing in the interstitium" but no evidence of "coal workers' pneumoconiosis." *Id*.

Considering the weight to accord the two conflicting autopsy reports, the administrative law judge stated:

> [C]linical pneumoconiosis is defined as "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. Dr. Oesterling described the presence of black pigment, which he acknowledged was coal mine dust, and *noted a fibrotic reaction to the coal mine dust*, writing that he saw evidence of early fibrosis. Dr. Oesterling's finding of early fibrosis fits within the definition of clinical pneumoconiosis. Thus, I find that Dr. Oesterling's opinion on clinical pneumoconiosis is inconsistent with his reported findings. . . .

Decision and Order at 21. The administrative law judge concluded that Dr. Oesterling's opinion is "not well-reasoned because he finds evidence of coal mine dust and fibrosis but fails to diagnosis clinical pneumoconiosis." *Id*. In contrast, the administrative law judge found that Dr. Dennis's diagnosis of clinical pneumoconiosis was reasoned and corroborated by the "overall weight of the x-ray evidence" and Dr. Fino's opinion that claimant had clinical pneumoconiosis.[9] *Id*. at 20-21. Thus, the administrative law judge found that employer did not disprove the existence of clinical pneumoconiosis and failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(B).

Employer notes that under 20 C.F.R. §718.202(a)(2) a finding of anthracotic pigmentation on autopsy does not establish the existence of pneumoconiosis. Employer contends that the administrative law judge misinterpreted Dr. Oesterling's report. Employer maintains that, contrary to the administrative law judge's finding, Dr. Oesterling "did not note a fibrotic reaction to the coal dust" and referenced fibrosis only in relation to "a finely stippled tan cytoplasm," which Dr. Oesterling attributed to smoking. Employer's Brief in Support of Petition for Review at 14. Employer contends that the case must be remanded for further consideration of whether employer disproved the existence of clinical pneumoconiosis. We disagree.

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984). The administrative law judge may also draw his or her own conclusions and inferences from the medical record. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Based on our review of Dr. Oesterling's autopsy report, we reject employer's suggestion that Dr. Oesterling's notations with regard to Slide C are subject to only one reasonable interpretation, and that the administrative law judge misinterpreted his findings. The administrative law judge permissibly concluded that Dr. Oesterling did not persuasively explain why the fibrosis on Slide C was not

[9] Dr. Fino diagnosed clinical pneumoconiosis, based on his review of four x-ray interpretations, three of which were positive. Decision and Order at 27; Employer's Exhibit 6.

related to the anthracotic pigmentation he observed on the same slide. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Thus, the administrative law judge acted within her discretion in finding that Dr. Oesterling did not persuasively explain why his autopsy findings did not satisfy the regulatory definition of clinical pneumoconiosis.[10] *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; Decision and Order at 21. We therefore affirm the administrative law judge's finding that Dr. Oesterling's opinion is not adequately reasoned to satisfy employer's burden of proof. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 21.

Because employer does not challenge the administrative law judge's crediting of Dr. Dennis's autopsy report, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c) presumption by affirmatively establishing that the miner did not have clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(B). *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 249 (4th Cir. 2016); *Bender*, 782 F.3d at 137; *Skrack*, 6 BLR at 1-711.

II. The Presumed Fact of Disability Caused by Clinical Pneumoconiosis

The administrative law judge gave "minimal weight" to Dr. Rasmussen's opinion on the issue of disability causation because Dr. Rasmussen did not diagnose clinical pneumoconiosis. Decision and Order at 28. The administrative law judge observed that employer's physician, Dr. Fino, diagnosed clinical pneumoconiosis "but failed to explain why [c]laimant's clinical pneumoconiosis did not contribute to [claimant's] respiratory impairment." *Id*. at 29. Because employer does not raise specific error with regard to the administrative law judge's determination that the evidence is insufficient to establish that no part of claimant's respiratory disability was caused by clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii), it is affirmed. *See Bender*, 782 F.3d at 137; *Skrack*, 6 BLR at 1-711; Decision and Order at 29. We therefore affirm the administrative law judge's

[10] The administrative law judge gave little weight to Dr. Rasmussen's opinion that claimant did not have clinical pneumoconiosis because Dr. Rasmussen did not have the opportunity to review Dr. Dennis's autopsy findings. Decision and Order at 27. Because we affirm the administrative law judge's crediting of Dr. Dennis's autopsy report, we reject employer's assertion that the administrative law judge erred in not crediting Dr. Rasmussen's opinion on the issue of clinical pneumoconiosis.

finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, and we affirm the award of benefits.[11]

[11] Because we affirm the administrative law judge's findings that employer failed to disprove clinical pneumoconiosis and respiratory disability due to clinical pneumoconiosis, it is not necessary to address employer's assertion that the administrative law judge erred in finding that it did not rebut the presumed fact of legal pneumoconiosis. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge