

U.S. Department of Labor

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



BRB No. 16-0068 BLA

NANCY L. DESKINS)	
(Widow of DARRELL L. DESKINS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	DATE ISSUED: 11/29/2016
)	
Employer-Petitioner)	
)	
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 Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, 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 (2012-BLA-05878) of Administrative Law Judge Christine L. Kirby, rendered on a survivor's claim filed on

September 1, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹ The administrative law judge credited the miner with thirty-one years of underground coal mine employment, and found that he suffered from a totally disabling respiratory or pulmonary impairment. Based on these determinations and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. The administrative law judge further determined that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer asserts that the administrative law judge erred in finding that employer's evidence was insufficient to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this 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.³ 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).

¹ Claimant is the widow of the miner, who died on April 29, 2010. Decision and Order at 2; Director's Exhibit 15. The miner filed two prior claims for benefits, both of which were denied. Director's Exhibits 1, 2. The miner's last claim, filed on April 30, 2004, was denied by Administrative Law Judge Stephen L. Purcell in a Decision and Order issued on January 31, 2007. Director's Exhibit 2. There is no indication in the record that the miner took any action with regard to that denial.

² Under Section 411(c)(4), the miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and that he suffered from 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 The record indicates that the miner's last coal mine employment was in Virginia. Director's Exhibits 6, 8; Hearing Transcript at 15. Accordingly, 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).

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis,⁴ the burden shifted to employer to rebut the presumption by affirmatively establishing that the miner had neither legal⁵ nor clinical⁶ pneumoconiosis, or that "no part of the miner's death was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

Under the first rebuttal method, the administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(B), based on her consideration of the x-ray and medical opinion evidence. Decision and Order at 17-18. In considering whether employer disproved the

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had thirty-one years of underground coal mine employment, that the miner suffered from a totally disabling respiratory or pulmonary impairment, and that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14-15.

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). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added).

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).

existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(A), the administrative law judge determined that the opinions of Drs. Castle and Basheda did not satisfy employer's burden of proof. *Id.* at 18-19.

Employer argues on appeal that the administrative law judge did not properly analyze the rationales given by Drs. Castle and Basheda for why the miner did not have legal pneumoconiosis, and that she erred in rendering her credibility determinations. We disagree.

The administrative law judge thoroughly summarized the findings of both Dr. Castle and Dr. Basheda. Decision and Order at 9-12. She noted that Dr. Castle diagnosed "mild obstructive airway disease associated with hyperinflation, gas trapping, and reduction in diffusion capacity," which Dr. Castle characterized as being "entirely typical and indicative" of emphysema caused by smoking. Decision and Order at 9; *see* Employer's Exhibit 4. She also observed that Dr. Basheda diagnosed "tobacco-induced chronic obstructive pulmonary disease [(COPD)]/asthma," which he attributed to smoking but not coal dust exposure. Decision and Order at 11; *see* Employer's Exhibit 6. The administrative law judge further noted that Dr. Basheda described the miner as suffering from respiratory symptoms, including chronic cough with phlegm production, dyspnea on exertion, and intermittent wheezing, which Dr. Basheda described as being "present in asthma/tobacco-induced COPD," and "not present in coal dust-induced obstructive lung disease." Decision and Order at 11, *quoting* Employer's Exhibit 6 at 18. In addition, the administrative law judge pointed out that Dr. Basheda described the miner as having been treated with medications that are "effective for disorders associated with tobacco-induced COPD/asthma" but "which are not effective for *coal dust-induced* obstructive lung disease." Decision and Order at 11 (emphasis added); *see* Employer's Exhibit 6.

Contrary to employer's argument, based on our review of the opinions of Drs. Castle and Basheda, we see no error in the administrative law judge's conclusion that neither Dr. Castle, nor Dr. Basheda, "offer any basis for finding that the miner's asthma and emphysema were not *substantially aggravated* by his coal mine dust exposure, *beyond their belief that those conditions are consistent with cigarette smoking and not [consistent] with coal mine dust exposure.*"⁷ Decision and Order at 18 (emphasis added).

⁷ Dr. Basheda pointed to the miner's CT scans showing centrilobular emphysema as support for his opinion that the miner's obstructive respiratory disease was due entirely to smoking. Decision and Order at 11; Employer's Exhibit 6. The administrative law judge properly noted, however, that a physician's view that "smoking causes centrilobular emphysema, but coal dust does not, is also inconsistent with the premises

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-23, 25 BLR 2-255, 2-263 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge permissibly determined that employer's experts did not adequately explain their rationales for why the miner's asthma or emphysema did not constitute legal pneumoconiosis, we affirm her conclusion that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i).⁸ *See Bender*, 782 F.3d at 137; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

In considering whether employer established the second method of rebuttal, the administrative law judge found that the evidence was insufficient to establish that no part of the miner's death was due to pneumoconiosis and explained:

In this case, both Drs. Castle and Basheda reported that the exact events during the miner's final months were not included in the record and, therefore, they could not opine specifically on the causes of the miner's death. These physicians did note the presence of stage IV, poorly

underlying the 2001 regulations.” Decision and Order at 18; *see* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000).

⁸ We agree with employer that, in discrediting Dr. Basheda's opinion because “his findings regarding the miner's pulmonary or respiratory disability are outweighed by the other evidence of record,” the administrative law judge appears to have conflated the issue of total disability with the issue of the existence of pneumoconiosis. Employer's Brief at 7, *citing* Decision and Order at 18. As employer asserts, whether the miner suffered from a respiratory or pulmonary impairment that was totally disabling, and the etiology of that impairment, are two distinct issues. 20 C.F.R. §§718.202(a)(4); 718.204(b)(2). However, we consider any error in the administrative law judge's finding to be harmless, as we affirm her alternate determination that Dr. Basheda's opinion on the issue of legal pneumoconiosis was not reasoned. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

differentiated lung adenocarcinoma with metastases to the miner's adrenal glands and brain. Dr. Castle speculated upon what might have happened between the last medical report in January, 2010 and the miner's death in April, 2010 and discussed what events may have occurred with this serious and extensive cancer present. I find, however, that such hypotheticals are not sufficient to establish that no part of the miner's death was caused by legal pneumoconiosis. With no records to review *that demonstrate whether or not the miner's emphysema and asthma played any part in the miner's eventual death*, I find the record in this case is insufficient to rebut the presumption that the miner's death was due to pneumoconiosis.

Decision and Order at 19; (emphasis added).

Employer contends that the administrative law judge erred in determining that the opinions of Drs. Castle and Basheda were speculative and failed to considered relevant evidence.⁹ We disagree. Dr. Castle opined that the miner "most likely succumbed to his widespread metastatic poorly differentiated adenocarcinoma of the lung and complications thereof," but he acknowledged that "[f]rom the information we have it's not possible for me to say exactly what happened at the time of [the miner's] death. I can tell you that a couple of different scenarios were extraordinar[ily] likely." Employer's Exhibit 8 at 27 (emphasis added). Similarly, Dr. Basheda noted that "there is no information available surrounding the details of [the miner's] death," and opined that the miner's "[d]eath [was] most likely related to metastatic adenocarcinoma of the lung" and not related to pneumoconiosis. Employer's Exhibit 6 at 20-21 (emphasis added). Because the administrative law judge's finding that Drs. Castle and Basheda "could not opine specifically on the cause of the miner's death" is supported by substantial evidence, we see no error in the administrative law judge's finding that their opinions were speculative and insufficient to satisfy employer's burden of proof. *See Hicks*, 138 F.3d at

⁹ We reject employer's argument that the administrative law judge "erred by failing to consider the hospitalization and treatment records from January 2010 to April 2010, and discrediting Drs. Castle and Basheda by finding that no such evidence existed in the record." Petition for Review and Brief on Behalf of Employer at 20. Contrary to employer's characterization, the administrative law judge specifically summarized the evidence considered by Drs. Castle and Basheda, including the hospitalization and treatment records from January 2010 to April 2010. Decision and Order at 9-12. We see no error in her conclusion that neither Dr. Castle nor Dr. Basheda persuasively explained, based on the evidence they reviewed, why the miner's emphysema and asthma (legal pneumoconiosis) did not contribute in any way to his death from lung cancer. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 19.

533, 21 BLR at 2-335; *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); Decision and Order at 19.

Thus, we affirm the administrative law judge's finding that the opinions of Drs. Castle and Basheda failed to affirmatively establish that no part of the miner's death was due to pneumoconiosis under 20 C.F.R. §718.305(d)(2)(ii). See *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Clark*, 12 BLR at 1-55. We therefore affirm the administrative law judge's determination that employer

failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Bender*, 782 F.3d at 137.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge