U.S. Department of Labor

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

BRB Nos. 18-0027 BLA
and 18-0028 BLA

ELLEN YATES (o/b/o and Widow of JERRY YATES)	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 11/09/2018
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Lifetime Benefits and the Decision and Order Awarding Survivor Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Lifetime Benefits (2015-BLA-5944) and the Decision and Order Awarding Survivor Benefits (2015-BLA-5943) of Administrative Law Judge Thomas M. Burke, rendered on consolidated claims 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 miner's subsequent claim filed on December 16, 2011, and a survivor's claim filed on July 6, 2015.[1]

In the miner's claim, the administrative law judge accepted the parties' stipulation that the miner had 20.95 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2012), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly. In the survivor's claim, the administrative law judge found that claimant was entitled to derivative benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[3]

On appeal, employer contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a substantive response to employer's appeals.

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,

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[1] The miner filed two prior claims, each of which was denied for failure to establish any element of entitlement. Miner's Claim (MC) Director's Exhibits 1, 2. The miner died on June 6, 2015, while his current subsequent claim was pending before the Office of Administrative Law Judges. MC Director's Exhibit 46. Claimant, the miner's widow, is pursuing the miner's claim on his behalf, and her survivor's claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the claimant establishes 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 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).

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).

The Miner's Claim

Because claimant invoked the Section 411(c)(4) presumption,[5] the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[6] or 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Clinical Pneumoconiosis

In considering whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge considered nine readings of four x-rays.[7]

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 1.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Legal pneumoconiosis is defined as "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 restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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).

[7] Drs. Alexander and DePonte read the January 24, 2012 x-ray as positive, while Dr. Wolfe read it as negative. MC Director's Exhibits 13, 19, 20. Dr. Miller read the April 3, 2012 x-ray as positive, while Dr. Wolfe read it as negative. MC Director's Exhibits 18, 20. Dr. Ahmed read the June 14, 2012 x-ray as positive, while Dr. Wolfe read it as negative. MC Director's Exhibit 21; MC Claimant's Exhibit 11. Dr. DePonte read the

Decision and Order Awarding Lifetime Benefits at 19. He found that all of the readings were by physicians who were dually qualified as Board-certified radiologists and B readers. *Id*. The administrative law judge further found that "each of the three most recent x-rays [dated April 3, 2012, June 14, 2012, and March 19, 2013] was read once as positive and once as negative" for pneumoconiosis, while the January 24, 2012 x-ray had two positive readings and one negative reading for pneumoconiosis. *Id*. Additionally, the administrative law judge observed that "four different Board[-]certified radiologists and B readers" interpreted the miner's x-rays as positive for pneumoconiosis in comparison to two dually-qualified radiologists who read the films as negative. *Id.* Finding that "a preponderance of the total readings by the highly qualified radiologists" is positive, the administrative law judge concluded that employer failed to establish that the miner did not have clinical pneumoconiosis, based on the x-ray evidence. *Id.*

Employer generally asserts that the administrative law judge erred in "counting heads" and that he did not rationally explain his finding that a preponderance of the x-ray evidence is positive. Employer's Brief at 6, *citing Sea "B" Mining Co. v. Addison*, 831 F.3d 244 (4th Cir. 2016). Employer contends that the x-ray evidence fails to support a finding of pneumoconiosis because it is "at best in equipoise." Employer's Brief at 7. Employer also contends that the administrative law judge failed to consider that the 1/0 readings by Drs. DePonte, Miller, and Ahmed indicate that while they read the films as positive, they "seriously considered" giving those x-rays a negative reading. *Id.*, *quoting Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconiosis*, 4 (Rev. Ed. 2011). Employer's allegations of error are without merit.

Employer's assertion that the x-ray evidence is in equipoise does not establish error by the administrative law judge, as an x-ray that is found to be neither positive nor negative for clinical pneumoconiosis does not satisfy employer's burden to disprove the existence of the disease. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). Furthermore, employer's suggestion that Drs. DePonte, Miller, or Ahmed "seriously considered" the films they reviewed to be negative is irrelevant because each physician gave a positive reading, 1/0, for pneumoconiosis under the ILO classification system. Employer's Brief at 7; *see* 20 C.F.R. §718.202(a)(1). Because the administrative law judge did not simply count the number of x-ray readings, but properly conducted both a qualitative and quantitative review of the conflicting readings in conjunction with the radiological credentials of the physicians, we affirm his finding that a preponderance of the x-ray evidence is positive. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992).

March 19, 2013 x-ray as positive, while Dr. Seaman read it as negative. MC Director's Exhibit 39; MC Claimant's Exhibit 12.

Thus, we affirm the administrative law judge's determination that the x-ray evidence does not support employer's burden to establish that the miner did not have clinical pneumoconiosis. *See Addison*, 831 F.3d at 256.

We also reject employer's assertion that the administrative law judge did not give proper weight to the negative CT scan evidence. The administrative law judge noted that Dr. Fino read three CT scans, dated January 30, 2009, August 19, 2009, and April 27, 2010, as negative for pneumoconiosis. Decision and Order Awarding Lifetime Benefits at 20; Miner's Claim (MC) Employer's Exhibit 9. The administrative law judge permissibly credited the positive x-ray evidence over the negative CT scan evidence, however, taking into consideration the radiological qualifications of the interpreting physicians and the fact that the x-ray evidence is more recent than the negative CT scan evidence.[8] *See Adkins*, 958 F.2d at 52. Thus, we affirm the administrative law judge's findings that employer did not disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B),[9] and failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[10]

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[8] We see no error in the administrative law judge's finding that Dr. Fino's negative CT scan evidence is less persuasive than the positive x-ray evidence because Dr. Fino is not a radiologist, while the physicians who read the x-rays are dually qualified as Board-certified radiologists and B readers. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (en banc); Decision and Order Awarding Lifetime Benefits at 20.

[9] The administrative law judge found that the other CT scans contained in the miner's treatment records do not aid employer in disproving clinical pneumoconiosis because they do not specifically address the presence or absence of the disease. Decision and Order Awarding Lifetime Benefits at 19. Additionally, in considering the medical opinion evidence, the administrative law judge assigned controlling weight to Dr. Habre's diagnosis of clinical pneumoconiosis over the contrary opinions of Drs. Fino and Castle. *Id*. at 22. We affirm the administrative law judge's credibility findings with respect to the treatment records and medical opinion evidence, as those finding are not challenged by employer. *See Skrack*, 6 BLR at 1-711.

[10] Because we affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, which finding precludes rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i), we need not address employer's arguments regarding legal pneumoconiosis.

Disability Causation

The administrative law judge also considered whether employer rebutted the Section 411(c)(4) 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). He discredited the opinions of Drs. Fino and Castle on the cause of the miner's totally disabling respiratory or pulmonary impairment because neither physician diagnosed clinical pneumoconiosis. Decision and Order Awarding Lifetime Benefits at 25; MC Employer's Exhibits 9, 10. Employer's argument that the administrative law judge's rationale is improper where clinical pneumoconiosis is only presumed and not "a found fact" lacks merit. Employer's Brief at 18.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in cases involving rebuttal of the Section 411(c)(4) presumption "an administrative law judge 'may not credit' a physician's opinion on causation absent [a] 'specific and persuasive showing' that it is not linked to an erroneous failure to diagnose pneumoconiosis." *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, (4th Cir. 1995); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). Because the administrative law judge permissibly discredited the opinions of Drs. Fino and Castle, we affirm his determination that employer failed to establish that no part of the miner's total respiratory disability was due to clinical pneumoconiosis, and thus failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge's award of benefits in the miner's claim is therefore affirmed.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order Awarding Survivor's Benefits at 2. Because we have affirmed the award of benefits in the miner's claim, and employer raises no separate error with regard to the administrative law judge's findings in the survivor's claim, *see* 20 C.F.R. §802.211(b), we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the administrative law judge's Decision and Order Awarding Lifetime Benefits and Decision and Order Awarding Survivor Benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge