U.S. Department of Labor

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

BRB No. 17-0060 BLA

IRONA J. AMOS (Widow of GARY J. AMOS) Claimant-Respondent v. McELROY COAL COMPANY and CONSOL ENERGY, INCORPORATED Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/19/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Jessica Spencer Benedict and Christopher Prezioso (Dinsmore & Shohl, LLP), Wheeling, 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 (2014-BLA-05727) of Administrative Law Judge Natalie A. Appetta, rendered on a survivor's claim filed on May 9, 2013, pursuant to 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 the miner had twenty-four years of underground coal mine employment and determined that he suffered from a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant[1] invoked the rebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] She further found that employer did not rebut the presumption and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer did not 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 response brief.[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

[1] Claimant is the surviving spouse of the deceased miner, Gary J. Amos, who died on April 23, 2013. Director's Exhibit 9. Because there is no indication in the record that the miner was eligible to receive benefits at the time of his death, claimant is not eligible for automatic survivor's benefits pursuant to 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 in cases where the 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); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that: the miner had twenty-four years of underground coal mine employment; the miner had a totally disabling respiratory or pulmonary impairment; and claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The administrative law judge applied the law of the United States Court of Appeals for the Fourth Circuit and, as no party challenges the administrative law judge's

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 that the miner's death was due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither clinical nor legal 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)(i), (ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge determined that employer failed to rebut the presumption by either method.

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge rejected the opinions of Drs. Fino and Zaldivar, regarding the etiology of the miner's respiratory disease.[6] Employer challenges the administrative

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determination that the miner last worked in West Virginia, we will also apply the law of that jurisdiction. *Skrack*, 6 BLR at 1-711; Decision and Order at 3 n.2.

[5] 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). This definition encompasses any chronic 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). 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 coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[6] Dr. Fino opined that the miner suffered from severe idiopathic fibrosis and smoking-related bullous emphysema/chronic obstructive pulmonary disease (COPD). Employer's Exhibits 3-5, 7. The administrative law judge found, *inter alia*, that Dr. Fino's view that miner's emphysema/COPD was unrelated to coal dust exposure, based on the significant reduction in the FEV1/FVC ratio, was inconsistent with the preamble. Decision and Order at 34, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). She also found that Dr. Fino failed to adequately address why the miner's "significant coal[-]mine dust exposure was not a contributing or aggravating factor in the miner's COPD or emphysema[,]" even if it was not the direct cause of the respiratory disease. Decision and Order at 35. The administrative law judge rejected Dr. Zaldivar's opinion that the miner's COPD/emphysema was due entirely to smoking on the ground that it was not adequately explained, given Dr. Zaldivar's acknowledgement that "[t]he intensity or

law judge's finding that the evidence failed to disprove that the miner had legal pneumoconiosis. However, other than asserting that the miner had a significant smoking history and summarizing the opinions of Drs. Fino and Zaldivar, employer fails to identify any specific error committed by the administrative law judge in rendering her credibility determinations. The Board must limit its review to contentions of error specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). As employer's brief raises no specific allegations of error with regard to the reasons given by the administrative law judge for discrediting the opinions of Drs. Fino and Zaldivar, we affirm the administrative law judge's finding that employer failed to disprove that the miner had legal pneumoconiosis. We therefore affirm the administrative law judge's finding that employer is unable to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i).[7] *See Sarf*, 10 BLR at 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii). Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Fino and Zaldivar, that the miner's death was unrelated to legal pneumoconiosis, because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease.[8] *See Hobet Mining, LLC v.*

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extent of the [miner's] smoking history is not clear from these records." Decision and Order at 33, *quoting* Employer's Exhibit 6 at 6.

[7] It is not necessary that we address employer's arguments regarding clinical pneumoconiosis, as employer's failure to disprove the existence of legal pneumoconiosis precludes rebuttal under 20 C.F.R. §718.305(d)(2)(ii). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] In asserting that it is entitled to rebuttal of the presumption under 20 C.F.R. §718.305(d)(2)(ii), employer notes that Dr. Fino's statement: "Even if I were to assume that the [the miner] had coal workers' pneumoconiosis, it did not contribute to his disability." Brief in Support of Petition for Review at 14, *citing* Employer's Exhibit 5. The administrative law judge, however, permissibly determined that Dr. Fino's statement was not sufficiently explained, as "Dr. Fino provided no rationale for this conclusion in the body of his report." Decision and Order at 35; *see Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Moreover, the relevant inquiry at 20 C.F.R.

Epling, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order at 43. We therefore affirm the administrative law judge's determination that employer failed to establish rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(ii). *Copley*, 25 BLR at 1-89.

Accordingly, the administrative law judge's 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

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§718.305(d)(2)(ii) is whether employer has established that no part of the miner's death was caused by pneumoconiosis. *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).