U.S. Department of Labor

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

BRB No. 16-0595 BLA

LILLIE M. GROVES (Widow of HUBERT R. GROVES) Claimant-Respondent v. SEXTET MINING CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/26/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05659) of Administrative Law Judge Timothy J. McGrath, rendered on a survivor's claim filed on May 11, 2012, 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 found that the miner had 15.56 years of surface coal mine employment, working in conditions that were substantially similar to those in underground mines, and a totally disabling respiratory or pulmonary impairment. Based on these findings, the administrative law judge determined that claimant[1] invoked the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4).[2] The administrative law judge further found that employer failed to rebut the presumption, and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in rendering evidentiary rulings in his Decision and Order, and 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 indicated that he will not file a substantive response unless specifically requested to do so by the Board. Employer also filed a reply brief, reiterating its arguments as to why the administrative law judge erred in weighing the rebuttal evidence.[3]

[1] Claimant is the surviving spouse of the miner, Hubert R. Groves, who died on November 6, 2011. Director's Exhibit 10. There is no indication in the record that the miner filed a claim for benefits during his lifetime. Therefore, Section 422(*l*) of the Act, which 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 survivor's benefits, is not applicable in this case. 30 U.S.C. §932(*l*) (2012).

[2] Under Section 411(c)(4) of the Act, a miner's death is presumed to be due to pneumoconiosis if the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in underground mines, 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: the miner had 15.56 years of surface coal mine employment in conditions substantially similar to those in underground mines; claimant established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2); and claimant invoked the

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).

I. Evidentiary Challenge - Exclusion of Dr. Crouch's report

Employer asserts that the administrative law judge erred in excluding Dr. Crouch's biopsy report from the record. The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Employer has not satisfied its burden in this case.

The regulations governing the development of evidence provide that each party may submit, in support of its affirmative case, "no more than one report of each biopsy." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). This numerical evidentiary limitation is mandatory and can only be exceeded if "the party submitting the evidence has established 'good cause' for the submission of the additional evidence." *Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-75 (2004); 20 C.F.R. §725.456(b)(1) (medical evidence exceeding the numerical limitations of 20 C.F.R. §725.414 "shall not be admitted into the hearing record in the absence of good cause"). An administrative law judge is not obligated *sua sponte* to conduct a good cause inquiry and may consider the issue waived where the party submitting excess evidence does not attempt to make such a showing. *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006).

During the evidentiary development phase of this case, employer obtained and submitted a biopsy report by Dr. Oesterling, dated May 3, 2013. Employer's Exhibit 10. Employer subsequently obtained and submitted a report of that same biopsy by Dr. Crouch, dated February 21, 2014. Employer's Exhibit 39. On its pre-hearing Evidence Summary Form, dated July 13, 2015, employer designated Dr. Oesterling's report as its one affirmative-case biopsy report, but did not include any reference to Dr. Crouch's report on the form. At the hearing on September 1, 2015, employer submitted the biopsy reports of Dr. Oesterling and Dr. Crouch, along with other medical evidence. Hearing Transcript at 14. After the hearing, employer submitted another Evidence Summary

---

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] As the miner's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 7.

Form, dated September 14, 2015, again designating Dr. Oesterling's report as its one affirmative-case biopsy report, while neglecting to mention Dr. Crouch's report.

Upon reviewing the record in preparation for his Decision and Order, the administrative law judge discovered that Dr. Crouch's report was not designated as admissible evidence and, in his Decision and Order, properly excluded that report because it exceeded the mandatory evidentiary limitations at 20 C.F.R. §725.414(a)(3).[5] Decision and Order at 17 n.15. Employer does not dispute that its two Evidence Summary Forms, submitted before and after the hearing, designate Dr. Oesterling's report as its one affirmative-case biopsy report and neglect to mention Dr. Crouch's report. Employer also does not dispute that, to the extent it designated Dr. Oesterling's report as its one affirmative-case biopsy report, Dr. Crouch's report exceeds the mandatory evidentiary limitations.[6] Finally, employer does not dispute that it failed to move for the re-designation of its evidence or argue that Dr. Crouch's report should be admitted for good cause pursuant to 20 C.F.R. §725.456(b)(1). Instead, employer argues only that the administrative law judge's issuance of his evidentiary ruling as part of the Decision and Order, rather than by interlocutory order, constitutes a "unilateral selection of evidence [that] deprived [employer] of its right to a fair hearing or the opportunity to resolve the issue." Employer's Brief at 12. This argument is without merit as the administrative law judge did not "unilaterally select" the evidence for employer. Employer selected its own evidence by specifically designating Dr. Oesterling's report, instead of Dr. Crouch's, as its one affirmative-case biopsy report. The administrative law judge properly relied on employer's designation of its own evidence. Thus, we affirm the administrative law judge's finding that Dr. Crouch's report was inadmissible because it exceeds the mandatory evidentiary limitations.[7]

[5] Specifically, the administrative law judge found that because employer "designated Dr. Oesterling's pathology report as its affirmative biopsy evidence" and the "regulations only allow a party to submit" one such report, Dr. Crouch's report should be excluded from the record. Decision and Order at 17 n.15.

[6] Employer also does not dispute that the administrative law judge correctly determined that Dr. Crouch's report was inadmissible as rebuttal evidence, because claimant did not submit an affirmative-case biopsy report that employer could rebut. *Id.*

[7] Because we are remanding this case, as discussed *infra*, employer will have the opportunity to make a good cause argument to the administrative law judge on remand for admission of Dr. Crouch's report, as a second biopsy report, in excess of the evidentiary limitations. *See* 20 C.F.R. §725.456(b)(1). However, because the administrative law judge properly relied on employer's designation of Dr. Oesterling's report in declining to consider Dr. Crouch's undesignated report, employer may not

II. Rebuttal of the Section 411(c)(4) Presumption

In order to rebut the presumption of death due to pneumoconiosis under Section 411(c)(4), employer must establish that the miner had neither legal nor clinical[8] pneumoconiosis, 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 found that employer failed to establish rebuttal by either method.

In considering whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge determined that Dr. Oesterling's biopsy report was not persuasive to establish the presence or absence of clinical pneumoconiosis. Relying on Dr. Dahhan's deposition testimony regarding the size of the biopsy sample, the administrative law judge concluded that Dr. Oesterling's report was insufficient to rebut the presumed fact of clinical pneumoconiosis because "the area of the lung sampled represented only a small portion of the miner's total lung tissue."[9] Decision and Order at

---

substitute Dr. Crouch's report for that of Dr. Oesterling, unless the administrative law judge determines that it is appropriate to reopen the record and allow employer to re-designate its evidence. 20 C.F.R. §§725.351(b); 725.455(c); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc) (administrative law judge has broad discretion in resolving procedural matters and determining the credibility of the evidence).

[8] 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*. The phrase "arising out of coal mine employment" denotes "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).

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).

[9] Employer asserts that the administrative law judge mischaracterized Dr. Dahhan's deposition testimony in finding that the biopsy sample was not representative of the miner's lungs as a whole. We disagree. Dr. Oesterling opined that the miner did

18. However, based on the administrative law judge's determination that the preponderance of the x-ray and CT scan evidence was negative for clinical pneumoconiosis, the administrative law judge found that employer disproved that the miner had clinical pneumoconiosis.

With regard to whether employer disproved the existence of legal pneumoconiosis, the administrative law judge rejected the opinions of employer's experts, Drs. Dahhan and Rosenberg, that the miner's respiratory disease was caused by smoking with no contribution from coal dust exposure. Employer asserts that the administrative law judge applied an improper rebuttal standard, requiring employer to prove the absence of "the possibility" of legal pneumoconiosis, not merely the absence of legal pneumoconiosis. Employer's Brief at 19. Employer's argument is without merit. The administrative law judge properly recognized that in order to disprove the existence of legal pneumoconiosis, employer had to establish by a preponderance of the evidence that the miner's lung disease or impairment was not "significantly related to, or substantially aggravated by" dust exposure in coal mine employment.[10] *See* 20 C.F.R. §§718.305(d)(2)(i)(A), 718.201(a)(2), (b); Decision and Order at 13, 19, 23, 28.

We also reject employer's assertion that the administrative law judge erred in giving less weight to Dr. Dahhan's opinion that the miner does not have legal

---

not have clinical pneumoconiosis based on his review of five biopsy slides relating to a bronchoscopy performed on the miner's upper left lobe. Employer's Exhibit 10. The slides were identified as "S10-02901" and lettered A1, A2, A3, B1 and B2. *Id*. Dr. Dahhan specifically testified that the biopsy sample was "too small to assess what's present in the lung" and indicated that the sample was obtained to determine the cause of a specific cavity in the miner's left upper lobe. Employer's Exhibit 45 at 23. The administrative law judge's reliance on Dr. Dahhan's deposition testimony to assign less weight to Dr. Oesterling's opinion on clinical pneumoconiosis was permissible. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); Decision and Order at 18.

[10] To the extent that employer suggests that the administrative law judge erred in discussing the preamble to the 2001 regulatory revisions in determining the credibility of the medical opinion evidence, that argument is rejected. As part of the deliberative process, an administrative law judge may evaluate expert opinions in conjunction with the Department of Labor's discussion of the prevailing medical science, set forth in the preamble. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-492, 25 BLR 2-633, 2-645 (6th Cir. 2014); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801 25 BLR 2-203, 2-210 (6th Cir. 2012).

pneumoconiosis. The administrative law judge correctly noted that Dr. Dahhan eliminated coal mine-dust exposure as a source of the miner's obstructive pulmonary disease, in part, by "using loss-of-FEV1 averages from medical studies to conclude that the miner's supposed loss of FEV1 from coal mine dust could not have rendered the miner totally disabled. . . ."[11] Decision and Order at 23. Based on the administrative law judge's determination that the record does not contain the results of any pulmonary function tests, we see no error in the administrative law judge's finding that Dr. Dahhan "is diagnosing the miner by statistics, using data he does not have." *Id.*; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Employer's Exhibit 1. Thus, we affirm the administrative law judge's finding that Dr. Dahhan's opinion is not persuasive and is insufficient to satisfy employer's burden to establish that the miner did not have legal pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer next asserts that the administrative law judge erred in finding "Dr. Rosenberg's opinion that emphysema associated with coal dust retention in the lungs is not persuasive." Employer's Brief in Support of Petition for Review at 23, *quoting* Decision and Order at 27, *citing Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012) and *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). Employer asserts that the administrative law judge's reliance on *Looney* and *Summers* to discredit Dr. Rosenberg's opinion on legal pneumoconiosis is misplaced, because Dr. Rosenberg "was unambiguous in his view that there can be legal pneumoconiosis in the absence of x-ray evidence" for clinical pneumoconiosis. Employer's Brief in Support of Petition for Review at 23, *citing* Employer's Exhibit 44 at 60-61. Employer's assertion of error has merit, in part.

[11] In his deposition, Dr. Dahhan noted that while the treatment records did not contain the results of any specific pulmonary function tests, "all the physicians who treated [the miner] indicated that he had severe [chronic obstructive pulmonary disease]," leading Dr. Dahhan to believe that the miner had a severe reduction in his FEV1. Employer's Exhibit 45 at 11. Dr. Dahhan stated that "the inhalation of coal dust . . . can cause an airway obstruction, but not to the degree that this [miner] demonstrate[d]." *Id.* Dr. Dahhan indicated that his conclusions were based on medical studies discussing the relative loss of FEV1 from smoking and coal dust exposure. *Id.* at 12.

We are unable to discern from the administrative law judge's summary statement the specific basis for discrediting Dr. Rosenberg's opinion under *Looney* and *Summers.*[12] As such, we conclude that the administrative law judge's finding with respect to Dr. Rosenberg's opinion does not satisfy the Administrative Procedure Act (APA).[13] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the administrative law judge's determination that employer did not disprove the existence of legal pneumoconiosis and that employer is unable to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(2)(i).

With regard to the issue of death causation, the administrative law judge found that the opinions of Drs. Dahhan and Rosenberg were not credible to establish that no part of the miner's death was due to legal pneumoconiosis, as neither physician diagnosed the disease. Because we have vacated the administrative law judge's determination that employer failed to disprove legal pneumoconiosis, we must also vacate the administrative law judge's determination that employer did not establish rebuttal pursuant to 20 C.F.R. §718.305(d)(2)(ii).

On remand, we instruct the administrative law judge to more fully explain, in accordance with the APA, the weight accorded Dr. Rosenberg's opinion relevant to rebuttal of the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(2)(i)(A), and to address, as necessary, whether the opinions of Drs. Dahhan and Rosenberg are

[12] Employer asserts that Dr. Rosenberg's opinion differs from the opinions in *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012), that were rejected based on an their views that coal dust exposure could not be implicated as an etiology for a miner's respiratory impairment when there was no x-ray evidence of clinical pneumoconiosis. Employer's Brief in Support of Petition for Review at 23. Employer also asserts that, unlike the medical opinions rejected in *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 22 BLR 2-279 (7th Cir. 2001), Dr. Rosenberg has not expressed any views in this case that are in conflict with the preamble to the 2001 regulatory revisions. Employer's Brief in Support of Petition for Review at 24.

[13] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

sufficient to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(2)(ii).[14] *See Wojtowicz*, 12 BLR at 1-165.

[14] Employer also argues that the administrative law judge did not properly address the miner's treatment records. Employer's Brief in Support of Petition for Review at 13. On remand, the administrative law judge may consider employer's argument that the treatment records, "none of which connected [the miner's] coal dust exposure to his obstructive lung disease in any way," corroborate Dr. Rosenberg's opinion that the miner did not have legal pneumoconiosis. *Id.*

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge