

U.S. Department of Labor

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



BRB No. 18-0587 BLA

DEBRA ANN TIDWELL)	
(Widow of J. L. TIDWELL))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CHEVRON MINING, INCORPORATED)	
)	DATE ISSUED: 09/16/2019
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 on Modification of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John R. Jacobs and Paisley Newsome (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

John W. Hargrove (Bradley Arant Boult Cummings LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Modification (2017-BLA-05849) of Administrative Law Judge Lee J. Romero, Jr., rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a request for modification of the denial of a survivor's claim filed on March 1, 2012.

Administrative Law Judge Adele Higgins Odegard issued a Decision and Order in the survivor's claim on May 27, 2016, finding claimant¹ invoked the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).² She further found, however, that employer rebutted the presumption by establishing pneumoconiosis played no role in the miner's death, and denied benefits.

Claimant requested modification on December 20, 2016, and submitted new medical evidence. Director's Exhibit 42. The case was assigned to Judge Romero (the administrative law judge), who found employer failed to rebut the Section 411(c)(4) presumption. Consequently, he found claimant established a mistake in a determination of fact at 20 C.F.R. §725.310. He further determined granting modification would render justice under the Act, and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply brief, reiterating its contentions on appeal.³

¹ Claimant is the widow of the miner, who died on October 11, 2011. Director's Exhibit 3. During his lifetime, the miner filed one claim on January 10, 2007, which was denied by the district director on April 6, 2007 by reason of abandonment. Director's Exhibit 1. Accordingly, claimant cannot establish automatic entitlement to benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), which requires a showing that the miner was determined to be eligible to receive benefits at the time of his death.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similarly to those in an underground mine, and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

³ Employer does not contest that the miner had more than fifteen years of qualifying coal mine employment, a totally disabling respiratory impairment at the time of his death, or claimant's entitlement to the presumption of death due to pneumoconiosis at Section

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The administrative law judge may correct "any mistake . . . including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither clinical nor legal pneumoconiosis,⁵ or "no part of his death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found employer did not rebut by either method.

411(c)(4) of the Act. 30 U.S.C. §921(c)(4). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 4.

⁵ Clinical pneumoconiosis is defined as "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. 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). "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).

We affirm the administrative law judge's finding employer failed to disprove the existence of legal pneumoconiosis as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). We therefore need not address employer's contentions regarding clinical pneumoconiosis.

Relevant to the second method of rebuttal, the administrative law judge considered the opinions of Drs. Bailey and Goldstein. Dr. Bailey opined coal workers' pneumoconiosis did not contribute to the miner's death.⁶ Employer's Exhibits 2 at 3; 14 at 23. Dr. Goldstein opined the miner died from cryptogenic organizing pneumonia unrelated to coal dust exposure. Director's Exhibit 44. The administrative law judge discredited their opinions as "poorly" reasoned, "unsupported," and "insufficient" to establish that neither legal nor clinical pneumoconiosis played any role in the miner's death. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 15-16.

Employer generally asserts the opinions of Drs. Bailey and Goldstein establish coal workers' pneumoconiosis did not contribute to the miner's death. Employer's Brief at 15; Reply Brief at 3 (unpaginated). Employer has not identified any specific error of law or fact, however, in the administrative law judge's finding the opinions of Drs. Bailey and Goldstein, the only opinions relevant to whether employer established rebuttal, are not credible.⁷ *See Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Rather, employer seeks a reweighing of the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign those opinions appropriate weight, and the Board may not reweigh the evidence or substitute its own inferences on

⁶ Dr. Bailey opined that the miner died from an interstitial lung disease called constructive bronchiolitis with multiple infections that developed into septic shock and low blood pressure. Director's Exhibit 45; Employer's Exhibits 1, 2, 14.

⁷ The administrative law judge also considered Dr. O'Reilly's opinion and the autopsy report prepared by Dr. Alexander. Decision and Order on Modification at 5-8. Dr. O'Reilly opined clinical pneumoconiosis, in the form of pulmonary fibrosis due to coal dust exposure, significantly contributed to the miner's death. Claimant's Exhibits 2, 5. Dr. Alexander diagnosed chronic interstitial fibrosis; focal bronchopneumonia; and pneumoconiosis, restricted anthrotic pigments, and silica particles in lymphatic system. He listed the cause of death as sepsis and lung disease, both of which contributed to the development of pneumonia and subsequent death. Director's Exhibit 7.

appeal. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Therefore, we affirm his finding employer failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(2)(i), (ii); Decision and Order on Modification at 10-16. We further affirm, as unchallenged, his findings that claimant established modification and granting modification renders justice under the Act. 20 C.F.R. §725.310; see *Mullins v. ANR Coal Co.*, 25 BLR 1-49, 1-52-53 (2012); *V.M. [Matney] v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008); *Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 4, 17.

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and employer did not rebut the presumption, we affirm the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge