U.S. Department of Labor

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

BRB Nos. 16-0340 BLA
and 16-0340 BLA-A

MAURICE ACREE (Widow of THOMAS R. ACREE) Claimant-Respondent Cross-Petitioner v. FREEMAN UNITED COAL MINING COMPANY Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/25/2017 DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits in a Modification of a Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Julie A. Webb (Craig & Craig, LLC), Mount Vernon, Illinois, for employer.

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

PER CURIAM:

Employer appeals, and claimant[1] cross-appeals, the Decision and Order Awarding Benefits in a Modification of a Survivor's Claim[2] (2013-BLA-06006) of Administrative Law Judge Larry S. Merck, rendered 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 accepted the parties' stipulation that the miner had twenty years of underground coal mine employment and determined that the miner suffered from a totally disabling respiratory or pulmonary impairment. Based on these determinations, the administrative law judge found that claimant was entitled to invoke the rebuttable presumption that the miner's death was due pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that Dr. Rosenberg's opinion was not sufficiently reasoned to satisfy employer's burden to rebut the Section 411(c)(4) presumption. Claimant has filed a brief, urging affirmance of the award of benefits, but has also filed a cross-appeal alleging, in the alternative, that the administrative law judge erred in allowing employer to submit Dr. Rosenberg's opinion into the record. Employer responds to claimant's cross-appeal, urging the Board to reject

[1] Claimant is the widow of the miner, who died on October 31, 2009. Director's Exhibit 11.

[2] Claimant filed her survivor's claim on September 27, 2011. Director's Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on December 12, 2012. Director's Exhibit 19. Claimant filed a request for modification on February 1, 2013, which was denied by the district director on May 29, 2013. Director's Exhibit 20, 23. Thereafter, claimant requested a hearing and the case was assigned to the administrative law judge.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis when it is established that the miner had fifteen or more 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), as implemented by 20 C.F.R. §718.305(b).

claimant's arguments. The Director, Office of Workers' Compensation Programs, has not filed a response brief with regard to either appeal.[4]

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.[5] 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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[6] or by establishing 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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge observed that employer relied on the opinions of Drs. Selby and Rosenberg to establish rebuttal of the Section 411(c)(4) presumption. Decision and Order at 32. In addressing whether employer was able to disprove the existence of legal pneumoconiosis, the administrative law judge found that Dr. Selby's opinion attributing the miner's respiratory symptoms to conditions other than coal dust

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that: the miner had twenty years of underground coal mine employment; the miner suffered from a totally disabling respiratory or pulmonary impairment; and claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 27.

[5] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit as the miner's last coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Director's Exhibits 1, 4.

[6] 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). 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).

exposure was not well-reasoned.[7] *Id.*; Claimant's Exhibit 1. We affirm the administrative law judge's decision to assign little weight to Dr. Selby's opinion as it is not challenged by employer. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 27.

With regard to Dr. Rosenberg's opinion, the administrative law judge stated:

> Dr. Rosenberg, in the discussion portion of his report, first noted that [the] Miner did not have chronic obstructive pulmonary disease; he stated that [the] values on [the] Miner's [pulmonary function tests] were consistent with mild restriction and not obstruction. Dr. Rosenberg stated that such restriction was not unexpected in the presence of morbid obesity, for which [the] Miner met the criteria based on his weight in 1995. He related [the] Miner's need for chronic oxygen and a combination of sleep-disordered breathing resulting from obesity along with chronic congestive heart failure developing in relationship to coronary artery disease. Dr. Rosenberg went on to discuss the x-ray evidence and then stated: "Clearly, [Miner] did not have clinical [coal workers' pneumoconiosis]. Also, as noted above, he did not have airflow obstruction to be considered as having legal [coal workers' pneumoconiosis]."

Decision and Order at 32, *quoting* Claimant's Exhibit 1.

Contrary to employer's contention, we see no error in the administrative law judge's finding that Dr. Rosenberg's opinion is not well-reasoned on the issue of legal pneumoconiosis. Decision and Order at 32. As correctly noted by the administrative law judge, "Dr. Rosenberg's suggest[ion] that the [m]iner did not have legal pneumoconiosis because he did not have airflow obstruction . . . is contrary to the regulatory definition of legal pneumoconiosis which includes[,] but is not limited to[,] any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.*; *see* 20 C.F.R. §718.201(a)(2); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Furthermore, the administrative law judge permissibly found that while Dr. Rosenberg opined that the miner's restrictive respiratory impairment was consistent with obesity he "does not adequately explain why [the] [m]iner's restrictive disease could not have been significantly related to, or substantially aggravated by his

[7] The administrative law judge observed that Dr. Selby "did not specifically address the issue of legal pneumoconiosis." Decision and Order at 32.

dust exposure in coal mine employment. Decision and Order at 32; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103.

It is the function of the administrative law judge, as the trier-of-fact, to weigh the evidence, draw appropriate inferences, and determine credibility. *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893, 13 BLR 2-348, 2-355 (7th Cir. 1990). As substantial evidence supports the administrative law judge's determination that employer did not disprove the existence of legal pneumoconiosis, we affirm his finding that employer failed to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(2)(i).[8] *Id.*; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Additionally, we reject employer's contention that the administrative law judge erred in finding that employer failed to disprove the presumed fact of death causation. Contrary to employer's contention, the administrative law judge permissibly found that as neither Dr. Selby nor Dr. Rosenberg offered a reasoned opinion regarding the existence of legal pneumoconiosis, their opinions were not credible to establish that that no part of the miner's death was caused by legal pneumoconiosis. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013); *see Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1346 n.20, 25 BLR 2-549, 2-579 n.20 (10th Cir. 2014); Decision and Order at 33. Thus, we 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), and we further affirm the award of benefits.[9] *See Minich*, 25 BLR at 1-54-56.

[8] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i). We therefore need not address employer's contentions of error regarding the administrative law judge's finding that employer did not rebut the presumed fact of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] Because we affirm the award of benefits, it is not necessary that we address claimant's arguments on cross-appeal. *See Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Modification of a Survivor's Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge