U.S. Department of Labor

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

BRB Nos. 17-0280 BLA and
17-0350 BLA

LINDA KAY COLEMAN (Widow of and on behalf of JAMES EDWARD COLEMAN)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 04/25/2018
STUMP COAL COMPANY, INCORPORATED	)	
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 and Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05143) and the Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act (2016-BLA-05368) of Administrative Law Judge Alice M. Craft, rendered on a miner's subsequent claim and a survivor's claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] With regard to the miner's claim, the administrative law judge accepted the parties' stipulation that the miner worked at least fourteen years in coal mine employment.[2] The administrative law judge determined that the newly submitted evidence establishes that the miner had pneumoconiosis, and she therefore found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] The administrative law judge further found that claimant established that the miner was totally disabled due to pneumoconiosis. Accordingly, she awarded benefits, commencing April 2012, the month in which the miner filed his subsequent claim. She found claimant automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012), in the survivor's claim.[4]

[1] The miner filed an initial claim for benefits on January 22, 2010, which was denied by the district director on September 16, 2010, because the miner did not establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. The miner took no further action until filing the current claim on April 9, 2012. MC Director's Exhibit 3. The miner died on October 31, 2015, while his claim was pending. Survivor's Claim (SC) Director's Exhibit 5. Claimant, the widow of the miner, is pursuing his claim and also filed a claim for survivor's benefits on November 17, 2015. SC Director's Exhibit 5.

[2] Because the administrative law judge credited the miner with less than fifteen years of coal mine employment, the rebuttable presumption of total disability or death due to pneumoconiosis is not available in either the miner's claim or the survivor's claim. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that at least "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because the miner's prior claim was denied for failure to establish any element of entitlement, claimant had to prove one element in order to have the miner's claim reviewed on the merits.

[4] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits

On appeal, employer argues that the administrative law judge's reliance on the preamble to the 2001 regulations to determine the weight of the medical opinion evidence ensured an award of benefits in this case and prevented it from receiving a fair and impartial hearing. Employer therefore requests that the Board vacate the award of benefits and remand the case for consideration by a new administrative law judge. Alternatively, employer asserts that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis. Employer also argues that the administrative law judge erred in determining the date for commencement of benefits in the miner's claim. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

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without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-200 (2010).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of clinical pneumoconiosis, total respiratory or pulmonary disability, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 27-29.

[6] Because the record reflects that the miner's last coal mine employment was in Kentucky, we 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); MC Director's Exhibit 4.

I. The Preamble to the Regulations and Employer's Allegations of Bias

A substantial portion of employer's brief is devoted to its assertion that rather than deciding this case on the record evidence and imposing the burden of proof on claimant, the administrative law judge improperly substituted her reliance on the preamble to the 2001 revised regulations. Employer asserts that as a result, the administrative law judge deprived it of a fair and impartial hearing, in violation of the Administrative Procedure Act.[7] Employer maintains that the administrative law judge is not impartial to the extent her decisions "repeatedly and consistently reject any medical opinion that attributes a claimant's impairment to something other than coal dust exposure." Employer's Brief at 16. Thus, employer requests that the case be remanded for consideration by a new administrative law judge.

Employer's assertions of bias and error with respect to the administrative law judge's use of the preamble are rejected as without merit. The United States Court of Appeals for the Sixth Circuit, along with several other federal courts of appeals, has held that an administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact relevant to the elements of entitlement. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *see also Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). The Sixth Circuit held that the preamble does not constitute evidence outside the record requiring the administrative law judge to give the parties notice and an opportunity to respond. *Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12. The court concluded, therefore, that an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *Id*.

Further, the Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence, which is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). Employer has clearly not met that burden. In requesting a remand to a different administrative law judge, employer does not identify a single specific instance in this case or "scores of others" that would support its bald allegation that the administrative law judge's reliance on the preamble demonstrates bias. We therefore reject employer's assertions that the administrative law judge deprived it of a fair and impartial hearing, and

[7] The Administrative Procedure Act, 5 U.S.C. §556, as incorporated into the Act by 30 U.S.C. §932(a), mandates that the trier-of-fact be fair and impartial.

we deny its request to remand this case for consideration by a different administrative law judge. *Cochran*, 16 BLR at 1-107.

II. The Miner's Claim

To establish entitlement to benefits in the miner's claim, claimant was required to prove: the miner had pneumoconiosis; his pneumoconiosis arose out of coal mine employment; he had a totally disabling respiratory or pulmonary impairment; and his total disability was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

A. Legal Pneumoconiosis

To establish the existence of legal pneumoconiosis, claimant must demonstrate that the miner suffered from a "chronic lung disease or impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge credited the opinions of Drs. Forehand, Vernon, and Perper that coal dust significantly contributed to the miner's totally disabling chronic obstructive pulmonary disease (COPD), over the contrary opinions of Drs. Caffrey, Jarboe, and Rosenberg.[8] MC Decision and Order at 23-27. Noting that the physicians "all possess excellent credentials," she found that Drs. Forehand, Vernon, and Perper "better explained" how the evidence they developed or reviewed "supported their conclusions" and that they "expressed views consistent with the premises underlying the regulations." *Id*. at 27.

Employer challenges the administrative law judge's reliance on Dr. Forehand's opinion, arguing that the physician merely identified "risk factors" for claimant's respiratory condition and did offer a definitive opinion as to whether it was caused by coal dust exposure. Employer's Brief at 21. Employer's argument is without merit. Dr. Forehand specifically opined that the miner suffered from a disabling obstructive respiratory impairment caused by the "combined effects of cigarette smoking and coal mine dust exposure." MC Director's Exhibit 15. He explained that "the effect of cigarette and coal mine dust is additive" and that coal dust exposure substantially contributed to the miner's respiratory disease, based on the miner's exposure to dust at the face of the mine

[8] The administrative law judge noted that Dr. Kulbacki, who conducted the miner's autopsy, did not offer an opinion on whether the miner had legal pneumoconiosis. MC Employer's Exhibit 4.

for a lengthy period of time. MC Employer's Exhibit 4 at 16-17. Based on the explanation provided by Dr. Forehand, we see no error in the administrative law judge's determination that his opinion is reasoned and supports a finding that the miner had legal pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

We also reject employer's allegation that the opinions of Drs. Vernon and Perper do not satisfy claimant's burden to establish legal pneumoconiosis because neither physician identified the degree to which coal dust exposure contributed to the miner's respiratory condition. Contrary to employer's assertion, a physician need not apportion a specific percentage of a miner's lung disease to cigarette smoke versus coal dust exposure to establish the existence of legal pneumoconiosis, provided that the physician has credibly diagnosed a chronic respiratory and pulmonary impairment that is "significantly related to, or substantially aggravated by dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000) (because coal dust need not be the sole cause of the miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them). The Sixth Circuit has held that a claimant can satisfy this burden by showing that coal dust exposure contributed "at least in part" to the miner's respiratory or pulmonary impairment. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 25 BLR 2-615, 2-618 (6th Cir. 2014), *citing Southard v. v. Director, OWCP*, 732 F.2d 66, 72, 6 BLR 2-26, 2-35 (6th Cir. 1984). Accordingly, the administrative law judge permissibly credited the opinions of Drs. Vernon and Perper as reasoned because they persuasively explained that both coal dust exposure and smoking caused the miner's condition.[9] *See*

[9] Dr. Vernon, the miner's treating physician, diagnosed severe chronic obstructive pulmonary disease (COPD) due to both smoking and coal dust exposure. He noted that that "[t]obacco dependency and coal mine dust are both known causative agents for the development of [COPD]" and that it was difficult to determine the degree to which each "causative agent" caused the miner's condition. MC Employer's Exhibit 2. Dr. Vernon explained that coal dust contributed to the miner's COPD based on the fact that the miner worked at the face of the mine. Employer's Exhibit 5 at 23. He further testified that he was unable say what percentage of claimant's pulmonary disability was caused by cigarette smoking versus coal dust exposure because there is not "any good data that can distinguish between people's disability, based upon coal dust exposure or cigarette and tobacco[.]" *Id.* at 17.

Based on his review of medical records and an examination of the miner's autopsy slides, Dr. Perper diagnosed the miner with COPD in the form of centrilobular emphysema due to both smoking and coal dust exposure. MC Claimant's Exhibit 1. Dr. Perper explained that the miner's "susceptibility to toxicity of coal dust was aggravated by him

Cornett, 227 F.3d at 576-77, 22 BLR at 2-121-122; MC Decision and Order at 23-24. The administrative law judge also rationally concluded that their opinions are consistent with the position of the DOL that the effects of smoking and coal dust exposure are additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133.

The administrative law judge gave less weight to the opinions of Drs. Jarboe and Rosenberg[10] because she found that they are contrary to the DOL's position, set forth in the preamble, that the effects of cigarette smoking and coal dust are additive, and the regulation at 20 C.F.R. §718.201(c), which states that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[11] MC Decision and Order at 25-26. Employer argues that in contrast to the administrative law judge's analysis, the Secretary of the DOL "specifically denied that section 718.201(c) permits a presumption of progressivity or latency, let alone an irrebuttable one." Employer's Brief at 20, *citing Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp. 2d 47 (D.D.C. 2001). Employer's argument is without merit.

The administrative law judge did not apply 20 C.F.R. §718.201(c) as an irrebuttable presumption of progressivity and latency. Rather, she evaluated the opinions of Drs. Jarboe and Rosenberg in light of the plain language of the regulation. 20 C.F.R. §718.201(c). Dr. Jarboe stated, *inter alia*, that the miner's "cough and mucus production would have cleared after [twenty-two] years away from the inhalation of coal dust." MC Employer's Exhibit 3. In a supplemental opinion, Dr. Jarboe reiterated that the miner's respiratory impairment was due solely to cigarette smoke based on the harmful effects of cigarettes and the amount of time between when he left the coal mine industry and when he developed symptoms. MC Employer's Exhibit 12. Similarly, Dr. Rosenberg indicated that "it is unlikely that a

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starting to work at an earlier age and his work as a coal rock bolter, associated with increased exposure to airborne coal dust." *Id*. at 25.

[10] Dr. Jarboe diagnosed the miner with "chronic bronchitis manifested by chronic cough and heavy mucus production[,]" which he attributed to the miner's cigarette smoking history. MC Employer's Exhibit 3. Dr. Rosenberg stated that the miner's obstructive lung disease was due solely to smoking. MC Employer's Exhibit 12.

[11] The administrative law judge found that Dr. Caffrey's opinion was not reasoned on the issue of legal pneumoconiosis. MC Decision and Order at 26; MC Employer's Exhibit 10. We affirm the administrative law judge's finding as it is not challenged by employer. *See Skrack*, 6 BLR at 1-711.

miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the last exposure. As such[,] workers would not be expected in a latent and progressive fashion to experience falls in their FEV1 values in relationship to legal [coal workers' pneumoconiosis] years after having left their coal mine employment." MC Employer's Exhibit 11.

Given the doctors' blanket statements that legal pneumoconiosis would not have develop based solely on the amount of time since the miner's last exposure to coal dust, the administrative law judge rationally found their opinions to be contrary to the regulation that recognizes pneumoconiosis as a latent and progressive disease which may first become detectable only after the miner's coal dust exposure ceases. 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Because the administrative law judge provided valid rationales for crediting the opinions of Drs. Forehand, Vernon, and Perper and rejecting those of Drs. Jarboe and Rosenberg, we affirm her finding that claimant established the existence of legal pneumoconiosis. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

B. Total Disability Causation

The administrative law judge found that claimant established that the miner's respiratory disability was due to legal pneumoconiosis at 20 C.F.R. §718.204(c), based on the opinions of Drs. Forehand, Vernon, and Perper. Employer asserts that the administrative law judge simply found disability causation established based on the finding of legal pneumoconiosis and did not require claimant to satisfy her burden of proof. We disagree.

The administrative law judge explicitly stated that claimant has the burden of establishing that the miner's respiratory disability was due to pneumoconiosis. Decision and Order at 29. She then rationally found that Dr. Forehand's opinion that the miner's legal pneumoconiosis "substantially contributed" to the miner's disabling respiratory or pulmonary impairment was sufficient to satisfy claimant's burden of proof. MC Decision and Order at 20, *quoting* MC Director's Exhibit 15 at 23; *see Groves*, 761 F.3d at 600-01, 25 BLR at 2-626-27, *citing Island Creek Coal Co. v. Calloway*, 460 Fed. App'x. 504, 512-13 (6th Cir. 2012). Furthermore, contrary to employer's contention, the administrative law judge permissibly discredited the opinions of Drs. Caffrey, Jarboe, and Rosenberg that pneumoconiosis played no role in the miner's total respiratory or pulmonary disability because they relied on "their disagreement" with her "finding that the [m]iner had legal pneumoconiosis." MC Decision and Order at 30; *see Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013) (it is permissible for an

administrative law judge to give less weight to a medical opinion on disability causation if the physician erroneously fails to diagnose the disease). We therefore affirm the administrative law judge's finding that claimant established that the miner was totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Thus, we affirm the award of benefits in the miner's claim.

C. Commencement Date for Benefits

Once entitlement is demonstrated, the date for the commencement of benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603, 12 BLR 2-178, 2-184 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable, benefits will commence with the month during which the claim was filed, unless credible evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In a subsequent claim, no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The administrative law judge observed that by the time Dr. Forehand prepared his August 23, 2012 report that she relied on to find total disability due to pneumoconiosis established, the miner "was already totally disabled." MC Decision and Order at 30. She further stated that she could not determine when the miner "first became totally disabled" and therefore concluded that the miner was entitled to benefits commencing in April 2012, the month in which he filed his subsequent claim. *Id*. at 31.

Employer alleges that the administrative law judge's finding is in error, maintaining that the record is "uncontradicted that prior to December 2013, [the miner] was not disabled at all, let alone due to pneumoconiosis." Employer's Brief at 23. Employer bases its argument on the fact that the first qualifying pulmonary function study is dated December 5, 2013. Employer also contends that the administrative law judge erred in relying on Dr. Forehand's opinion to find total disability causation established because the physician was unaware of the exertional requirements of the miner's usual coal mine job and did not explicitly find that the miner was totally disabled due to pneumoconiosis.

Contrary to employer's allegations, Dr. Forehand noted that the miner's work as a pinner required "[h]eavy lifting of roof bolts, header, [and] moving belts," and he specifically opined that the miner was totally disabled due to legal pneumoconiosis. MC

Director's Exhibit 15 at 20, 23; MC Employer's Exhibit 4 at 14, 21. In addition, the fact that the miner had non-qualifying pulmonary function studies before December 5, 2013, does not, in and of itself, establish that he was not totally disabled at that time. *See* 20 C.F.R. §718.204(b)(2)(iv) ("total disability may nevertheless be found if a physician exercising reasoned medical judgement . . . concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [coal mine] employment"). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant is entitled to benefits in the miner's claim commencing April 2012. 20 C.F.R. §§725.309(c)(6), 725.503(b); *see Lykins*, 12 BLR at 1-182.

III. The Survivor's Claim

Relying on the award of benefits in the miner's claim, the administrative law judge issued a separate order correctly finding that claimant satisfied the prerequisites for automatic entitlement under Section 422(*l*) of the Act.[12] 30 U.S.C. §932(*l*); Decision and Order Awarding Continuing Benefits Under the Automatic Entitlement Provisions of the Black Lung Benefits Act at 4. Employer does not challenge claimant's entitlement to survivor's benefits, other than to argue that the miner was not entitled to benefits on his claim. In light of our affirmance of the award of benefits in the miner's claim, we also 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*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[12] To establish automatic entitlement to survivor's benefits under Section 422(*l*), claimant must prove that: 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*).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, and Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge