U.S. Department of Labor

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

BRB Nos. 16-0095 BLA
and 16-0095 BLA-A

NATALIE PHILLIPS (Widow of ROBERT LEE PHILLIPS) Claimant-Respondent Cross-Petitioner v. PERRY & HYLTON INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND C/O WELLS FARGO DISABILITY MANAGEMENT Employer/Carrier- Petitioners Cross-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/30/2016 DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C. for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals, and claimant[1] cross-appeals, the Decision and Order (2013-BLA-05221) of Administrative Law Judge Adele Higgins Odegard awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of the denial of a survivor's claim filed on April 16, 2008.

In the initial decision, Administrative Law Judge Richard A. Morgan found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, Judge Morgan found that claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Applying Section 411(c)(4),[2] the administrative law judge found that claimant established that the miner had twenty-four years of surface coal mine employment.[3] However, Judge Morgan found that claimant failed to establish that any of

[1] Claimant is the widow of the miner, who died on February 5, 2008. Director's Exhibit 10.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305. To invoke the Section 411(c)(4) presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4).

[3] The record reflects that the miner's last coal mine employment was in West Virginia. Director's Exhibits 3, 5. Accordingly, the Board will apply the law of the

the miner's coal mine employment took place in conditions substantially similar to those in an underground mine. Judge Morgan, therefore, found that claimant did not establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Judge Morgan also considered whether claimant could establish entitlement to survivor's benefits, without the assistance of the Section 411(c)(4) presumption. Judge Morgan found that the evidence established the existence of both clinical pneumoconiosis[4] and legal pneumoconiosis.[5] 20 C.F.R. §718.202(a). He further found that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, Judge Morgan found that the evidence did not establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205. Accordingly, Judge Morgan denied benefits.

Claimant appealed, but while her appeal was pending before the Board, she filed a motion to remand to the district director, informing the Board that she was pursuing a request for modification. *See* 20 C.F.R. §725.310. In response, the Board dismissed claimant's appeal and remanded the case for modification proceedings.

In a Decision and Order dated October 13, 2015, Administrative Law Judge Adele Higgins Odegard (the administrative law judge) found that the evidence did not establish the existence of complicated pneumoconiosis. The administrative law judge, therefore, found that claimant could not invoke the Section 411(c)(3) presumption. However, the administrative law judge determined that Judge Morgan made a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, when he found that the miner's twenty-four years of surface coal mine employment did not constitute qualifying coal mine employment for the purpose of establishing invocation of the Section 411(c)(4)

United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[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).

presumption. The administrative law judge further found that the record established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established that the miner had the fifteen years of qualifying coal mine necessary for invocation of the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in support of the administrative law judge's finding that claimant established that the miner's twenty-four years of surface coal mine employment took place in conditions substantially similar to those in an underground mine. In her cross-appeal, claimant asserts that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis and, therefore, erred in finding that she did not invoke the Section 411(c)(3) presumption. Neither employer nor the Director has filed a response to claimant's cross-appeal.[6]

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. 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).

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

Employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically challenges the administrative law judge's finding that claimant established that the miner had twenty-four years of qualifying coal mine employment. Section 411(c)(4) requires at least fifteen years of employment either in "underground coal mines," or in "a coal mine other than an underground mine" in "substantially similar" conditions. 30 U.S.C. §921(c)(4).

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner suffered from a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Section 411(c)(4) does not define the term "substantially similar." Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Although the record does not contain any testimony from the miner in connection with his 1987 claim, the administrative law judge noted that work history documents submitted in connection with that claim indicate that all of the miner's coal mine employment took place at "strip" mines. Decision and Order at 14; Claimant's Exhibit 3. The administrative law judge further noted that the miner represented that all of his coal mine work exposed him to "dust, gases, or fumes." *Id.*

The administrative law judge also considered new testimony from Gary Harvey, a former co-worker of the miner, from Donna Jones, the miner's daughter, and from claimant herself. Mr. Harvey testified that he worked with the miner at Perry & Hylton from 1976 to 1986, where he saw the miner "on a regular daily basis." Hearing Transcript at 43, 45. Mr. Harvey testified that the miner worked on a crusher and then later as a utility man. *Id.* at 45. Mr. Harvey testified that the miner's work as a utility man required him to go into the pit to "grease the loaders," and that the pit "was a bad place to be as far as the dust." *Id.* Mr. Harvey characterized the strip mine as a dusty place, "more in the winter than in the summer." *Id.* at 44.

Ms. Jones testified that when her father came home from his work at the mines, he would wash up in the kitchen sink with a special "sandpaper soap," leaving a "layer of dust on the towels." Hearing Transcript at 26. Ms. Jones testified that, even after scrubbing, the miner would still have dust in the lines of his hands and around his fingernails. *Id.* Ms. Jones further testified that when she or one of her siblings would pick up the miner's clothes to be washed, they "would carry them way out in front of us, because we knew if they touched us, then we got coal dust on us." *Id.* at 26-27. Ms. Jones also testified that before the family could use the car that the miner drove to work, someone had to "take a wet washcloth and go out and clean off the steering wheel, because if you didn't, your hands would turn black." *Id.* at 30. Ms. Jones testified that "if you didn't put something on the seat, your clothes and your legs would just turn . . . terribly black." *Id.* Claimant agreed with her daughter's testimony that the miner was "pretty dirty" when he came home from the mines, and that "a lot of cleaning" took place after the miner came home from work. *Id.*

Based on the "credible and uncontradicted testimonial evidence," the administrative law judge found the miner was "regularly exposed to coal mine dust." Decision and Order at 15. The administrative law judge, therefore, found that claimant

established that the miner's twenty-four years of surface coal mine employment was "qualifying," i.e. took place in conditions substantially similar to those in an underground mine. *Id.*

Employer contends that claimant's evidence is insufficient to establish that the miner was regularly exposed to coal-mine dust while working at his surface coal mine employment. We disagree. The administrative law judge credited the uncontradicted testimonial evidence regarding the miner's coal mine dust exposure, and found it sufficient to establish that the miner was regularly exposed to coal-mine dust during his twenty-four years of surface coal mine employment.[7] It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Because the administrative law judge's credibility determination is based on substantial evidence, we affirm the administrative law judge's finding that claimant established that the miner was regularly exposed to coal-mine dust during his surface coal mine employment. Consequently, we affirm the administrative law judge's finding that claimant established that the miner had twenty-four years of qualifying coal mine employment.[8] *Id.*

In light of our affirmance of the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment, and his unchallenged finding that the miner suffered from a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption

[7] The administrative law judge found that the miner's daughter's testimony regarding the miner's post-work cleaning ritual "indicates that the [m]iner was exposed to [such] a significant amount of coal mine dust that he needed to wash it off as soon as possible, before carrying out his post-work activities . . . ." Decision and Order at 15. The administrative law judge also found that her testimony regarding the condition of the miner's car indicates that the miner's coal mine dust was "both regular and significant," reasoning that if the miner's coal mine dust exposure had been sporadic, "it would not have been necessary for . . . family members to regularly take measures to protect themselves and their clothing from residue in the car." *Id.*

[8] In light of this affirmance, we also affirm the administrative law judge's finding that Administrative Law Judge Richard A. Morgan made a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, when he found that the miner's twenty-four years of surface coal mine employment did not take place in conditions substantially similar to those in an underground mine.

that the miner's death was due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

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

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to rebut the presumption by establishing both that the miner did not have legal and clinical pneumoconiosis,[9] 20 C.F.R. §718.305(d)(2)(i), 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)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). The administrative law judge found that employer failed to establish rebuttal by either method.

After noting that the employer conceded that the miner suffered from clinical pneumoconiosis, the administrative law judge found that employer failed to establish that the miner did not suffer from legal pneumoconiosis.[10] Decision and Order at 25. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law judge's finding that employer failed to establish that the miner did not suffer from pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

In addressing whether employer could establish that "no part" of the miner's death was caused by pneumoconiosis, the administrative law judge considered the opinions of Drs. Tomashefski and Oesterling.[11] Director's Exhibit 48; Employer's Exhibit 1. The

[9] "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).

[10] The administrative law judge found that employer failed to establish that the miner's chronic obstructive pulmonary disease did not arise out of his coal mine employment. Decision and Order at 24.

[11] We affirm the administrative law judge's unchallenged determination that Dr. Famularcano's death certificate was entitled to "no weight" on the issue of the cause of the miner's death. *See Skrack*, 6 BLR at 1-711; Decision and Order at 26.

administrative law judge found that Dr. Tomashefski, by stating that the miner's coal mine dust exposure and pneumoconiosis were not significant causes or contributory factors to his death, "did not rule out the [m]iner's clinical pneumoconiosis as a factor." Decision and Order at 28-29; Employer's Exhibit 1. The administrative law judge, therefore, found that Dr. Tomashefski did not opine that "no part" of the miner's death was due to pneumoconiosis. *Id.* at 29. The administrative law judge also found Dr. Oesterling's opinion insufficient to support employer's burden of establishing rebuttal, stating:

> [T]he parties have stipulated that the [m]iner had clinical pneumoconiosis. There was no stipulation on the extent of the [m]iner's clinical pneumoconiosis. . . . Because the extent of the [m]iner's clinical pneumoconiosis is relevant to whether Dr. Oesterling's opinion should be credited, I find it is necessary to address this issue.
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> . . . . Dr. Oesterling characterized the [m]iner's clinical pneumoconiosis as "mild micronodular with minimal macular interstitial" and Dr. Tomashefski characterized it as "mild to moderate." I find that Dr. Tomashefski's description of the pneumoconiotic pigment in the [m]iner's lung tissue, based on the autopsy slides, is more complete than Dr. Oesterling's. And I note, in particular, that Dr. Tomashefski indicated the part of the lung that corresponded to each autopsy slide. I find that his description of "mild to moderate" clinical pneumoconiosis is supported by his descriptions of the tissues observed at autopsy, and therefore I give his opinion as to the extent of the [m]iner's pneumoconiosis significant weight. In contrast, I find that it is more difficult to assess whether Dr. Oesterling's conclusion is supported by the evidence, because Dr. Oesterling sometimes did not indicate what portion of the lung his observations related to. Because Dr. Oesterling did not provide sufficient information for me to assess whether his characterization of the extent of the [m]iner's clinical pneumoconiosis was accurate, I give his opinion less weight. And, because I gave more weight to Dr. Tomashefski's opinion, which indicated that the [m]iner's clinical and legal pneumoconiosis may have played roles (albeit minor ones) in the development of his pneumonia and in his death, I find that Dr. Oesterling's opinion does not rebut the presumption at [Section] 718.305, because it does not establish that "no part" of the [m]iner's death was due to pneumoconiosis.

Decision and Order at 29. The administrative law judge, therefore, found that employer failed to establish that "no part" of the miner's death was due to pneumoconiosis. *Id.* at 29-20.

Employer contends that claimant failed to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death. Employer's Brief at 20. Employer's argument misplaces the burden of proof and misstates the standard for rebuttal of the Section 411(c)(4) presumption. Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, she was not required to submit evidence establishing that the miner's death was due to pneumoconiosis. Moreover, because employer failed to establish that the miner did not have pneumoconiosis, the administrative law judge correctly stated that employer could rebut the Section 411(c)(4) presumption only 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)(ii); Decision and Order at 26.

Employer's additional statements regarding the administrative law judge's consideration of the opinions of Drs. Tomashefski and Oesterling amount to a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the administrative law judge's finding that employer failed to establish that "no part of the miner's death was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(2)(ii).

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, the administrative law judge's award of benefits is affirmed.[12]

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

[12] In view of our affirmance of the administrative law judge's award of benefits, we need not address the arguments raised in claimant's cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).