

U.S. Department of Labor

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



BRB No. 15-0196 BLA

DONNA L. SHORT)	
(Widow of DAVID L. SHORT))	
)	
Claimant-Respondent)	
)	
v.)	
)	
KEYSTONE COAL MINING)	
CORPORATION)	DATE ISSUED: 02/24/2016
)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Lynda Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

Margaret M. Scully (Thompson, Calkins & Sutter LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2014-BLA-5320) of Administrative Law Judge Richard A. Morgan 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 a survivor's claim filed on October 12, 2012.

After crediting the miner with less than fifteen years of qualifying coal mine employment,¹ the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis.² However, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the evidence established the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Claimant³ responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled 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. Because the miner was credited with less than fifteen years of qualifying coal mine employment, claimant is not entitled to consideration under Section 411(c)(4). Therefore, the administrative law judge addressed whether claimant satisfied her burden to establish all the elements of entitlement under 20 C.F.R. Part 718.

³ Claimant is the surviving spouse of the miner, who died on August 10, 2012. Director's Exhibit 9.

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable, or the presumption set forth at 20 C.F.R. §718.305 is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4).

Legal Pneumoconiosis

Employer contends that the administrative law judge committed numerous errors in finding that the medical opinion evidence established the existence of legal pneumoconiosis⁴ pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Houser, Sood, Oesterling, Rosenberg, and Tomashefski. Drs. Houser and Sood diagnosed legal pneumoconiosis, opining that the miner suffered from chronic obstructive pulmonary disease (COPD)/emphysema due to both coal mine dust exposure and cigarette smoking. Claimant's Exhibits 1, 2. Although Drs. Oesterling, Rosenberg, and Tomashefski also diagnosed COPD/emphysema, they opined that it was due to cigarette smoking. Employer's Exhibits 1-3. Drs. Oesterling, Rosenberg, and Tomashefski opined that the miner's COPD/emphysema was not due to coal mine dust exposure. *Id.*

In evaluating the evidence, the administrative law judge found that the opinions of Drs. Houser and Sood were "well-documented and reasoned." Decision and Order at 17. The administrative law judge accorded less weight to the opinions of Drs. Oesterling, Tomashefski, and Rosenberg because he found that their opinions were inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. *Id.* at 16. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

We initially reject employer's contention that the administrative law judge erred in according less weight to Dr. Rosenberg's opinion. Employer's Brief at 17. The administrative law judge correctly noted that Dr. Rosenberg eliminated coal mine dust exposure as a source of the miner's COPD, in part, because he found a significant reduction in the miner's FEV1/FVC ratio which, in his opinion, was inconsistent with

⁴ "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).

obstruction due to coal mine dust exposure.⁵ Decision and Order at 16; Employer’s Exhibit 3 at 13. The administrative law judge discredited Dr. Rosenberg’s opinion on the basis that his reasoning for eliminating coal mine dust exposure as a source of the miner’s COPD is in conflict with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. Employer does not contest this specific finding.⁶ Consequently, we affirm the administrative law judge’s discrediting of Dr. Rosenberg’s opinion. Decision and Order at 16.

However, we agree with employer that the administrative law judge erred in discrediting the opinions of Drs. Oesterling and Tomashefski. The administrative law judge discredited the opinions of Drs. Oesterling and Tomashefski because he found that their opinions were inconsistent with the DOL’s recognition that the medical literature supports the theory that “dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms” Decision and Order at 16; *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). The administrative law judge, however, failed to cite any evidence in support of his finding that Drs. Oesterling and Tomashefski, in excluding coal dust exposure as a cause of the miner’s COPD/emphysema,⁷ actually based their

⁵ In attributing the miner’s chronic obstructive pulmonary disease (COPD) to cigarette smoking instead of coal mine dust exposure, Dr. Rosenberg specifically opined that “when coal mine dust exposure causes obstruction, the general pattern is that of a reduced FEV1, with a symmetrical reduction of the FVC, such that the FEV1/FVC ratio is preserved or only mildly reduced.” Employer’s Exhibit 3 at 13. Specific to the miner’s situation, Dr. Rosenberg noted there was an “extreme decline” in his FEV1/FVC ratio, indicating that his obstruction was entirely related to cigarette smoking. *Id.*

⁶ Rather, employer contends that the administrative law judge discredited employer’s physicians because they did not equate all COPD with pneumoconiosis. Employer Brief at 16. While we agree with employer that the regulations do not equate all COPD with pneumoconiosis, and that the administrative law judge must determine whether the miner’s pulmonary or respiratory impairment is significantly related to or substantially aggravated by dust exposure in coal mine employment, employer did not object to the specific finding of the administrative law judge or explain how the rationale cited by the administrative law judge for discrediting Dr. Rosenberg in this instance was erroneous.

⁷ In eliminating coal dust exposure as a cause of the miner’s COPD/emphysema, Dr. Oesterling relied upon the fact that there was “evidence of very minimal anthracotic pigmentation within [the miner’s] lung tissue,” Employer’s Exhibit 1 at 5, while Dr. Tomashefski emphasized that there was “no correlation of the lesions of centrilobular

opinions on the principle that dust-induced emphysema and smoke-induced emphysema occur through different mechanisms.⁸ Consequently, the administrative law judge's finding does not comport with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which requires that every adjudicatory decision 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with employer that the administrative law judge did not adequately address whether the opinions of Drs. Houser and Sood were sufficiently documented and reasoned. The administrative law judge erred in not addressing the bases for their respective opinions that the miner's COPD/emphysema was attributable in part to his coal dust exposure. *Wojtowicz*, 12 BLR at 1-165.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for further consideration. On remand, when reconsidering whether claimant has satisfied her burden of establishing the existence of legal pneumoconiosis, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). If the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis, he must address whether the existence of legal pneumoconiosis is established based on a

emphysema in [the miner's] lung tissue with coal macules or with significant coal dust deposition." Employer's Exhibit 2 at 7.

⁸ Further, employer properly observed that the Department of Labor found credible research which recognized a relationship between the amount of coal dust deposited in the lungs and the extent of emphysema. Employer Brief at 16-17, citing 65 Fed. Reg. 79,920, 79,942 (Dec. 20, 2000). Moreover, we recognize that "similar" is not the same as "identical."

review of all of the relevant evidence.⁹ *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997).

In light of our decision to vacate the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate his finding that the evidence established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), and instruct him to reconsider this issue, if necessary, on remand.

⁹ If, on remand, the administrative law judge finds that the evidence establishes the existence of legal pneumoconiosis, the finding that the pneumoconiosis arose out of coal mine employment would be subsumed in the administrative law judge's determination that the miner's chronic lung disease or impairment was significantly related to or substantially aggravated by dust exposure in coal mine employment, making it unnecessary for the administrative law judge to separately consider whether the legal pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *See* 20 C.F.R. §718.201(a)(2), (b); *Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge