U.S. Department of Labor

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

BRB Nos. 15-0239 BLA
and 15-0466 BLA

VIRGINIA M. COE (o/b/o and Widow of LAWRENCE H. COE) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/26/2016 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits in a Subsequent Claim, and the Decision and Order Awarding Survivor's Benefits, of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2011-BLA-05669) and the Decision and Order Awarding Survivor's Benefits (2012-BLA-06029) of Administrative Law Judge Lystra A. Harris, rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The Board has consolidated the appeals for purposes of decision only. This case involves a miner's subsequent claim,[1] filed on May 18, 2010, and a survivor's claim,[2] filed on March 29, 2012.

In a Decision and Order issued on March 25, 2015 in the miner's claim, the administrative law judge credited the miner with eighteen years of underground coal mine employment,[3] and found that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the presumption that the miner was totally disabled due to pneumoconiosis, set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[4] and established a change in an applicable condition of entitlement pursuant

[1] The miner's previous claim for benefits, filed on December 6, 2005, was denied by an administrative law judge on February 14, 2008, because the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Miner's Claim Director's Exhibit 1. On October 31, 2008, the district director denied the miner's request for modification. *Id.*

[2] Claimant is the widow of the miner, who died on February 24, 2012. Survivor's Claim Director's Exhibit 7.

[3] The miner's coal mine employment was in West Virginia and Virginia. Miner's Claim Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] If a miner has fifteen or more years of underground or substantially similar coal mine employment and has a totally disabling respiratory or pulmonary impairment, Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

to 20 C.F.R. §725.309. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

In a separate Decision and Order issued on May 11, 2015 in the survivor's claim, the administrative law judge found that claimant was automatically entitled to receive benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), under which the survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal in the miner's claim, employer argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. In the survivor's claim, employer argues that the administrative law judge erred in awarding benefits under Section 932(*l*) before the award of benefits in the miner's claim became final. Claimant has filed responses in both claims, urging the Board to affirm the awards. The Director, Office of Workers' Compensation Programs, has filed a response in the survivor's claim, urging the Board to affirm the award of benefits. Employer has filed a reply brief in the miner's claim, reiterating its arguments.[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. 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 Miner's Claim

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[6] or by

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings in the miner's claim that the miner invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[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

establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In addressing whether employer disproved the existence of legal pneumoconiosis,[7] the administrative law judge considered the opinions of Drs. Fino and Rosenberg.[8] Dr. Fino opined that the miner did not have legal pneumoconiosis, but suffered from emphysema due solely to smoking, and from idiopathic pulmonary fibrosis (IPF) unrelated to coal mine dust exposure. Employer's Exhibit 8 at 13-15; Employer's Exhibit 17 at 22-24. Dr. Rosenberg also opined that the miner had emphysema that was due solely to smoking, but concluded that the miner did not have IPF but, rather, had pleural scarring that was caused by pneumonia. Employer's Exhibit 12 at 8-10; Employer's Exhibit 18 at 18-19, 26.

The administrative law judge found that the opinions of Drs. Fino and Rosenberg were not well-reasoned or persuasive, for several reasons, including that neither physician adequately explained why he was of the opinion that the miner's years of coal mine dust exposure did not contribute to his emphysema. The administrative law judge therefore found that employer failed to establish that the miner did not have legal pneumoconiosis.

Employer argues that the administrative law judge applied an incorrect rebuttal standard, by requiring Drs. Fino and Rosenberg to "rule out" coal mine dust exposure as a cause of the miner's emphysema to disprove the existence of legal pneumoconiosis. Employer's Brief (Miner's Claim) at 9-12. Employer argues that the administrative law

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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).

[7] The administrative law judge found that employer established that the miner did not have clinical pneumoconiosis. Miner's Claim Decision and Order at 26-27.

[8] The administrative law judge also considered the opinion of Dr. Al-Khasawneh that the miner did not have legal pneumoconiosis. Director's Exhibit 11. The administrative law judge discredited Dr. Al-Khasawneh's opinion as "conclusory and undocumented," and found that it did not aid employer in rebutting the Section 411(c)(4) presumption. Miner's Claim Decision and Order at 30. Employer does not challenge that determination on appeal.

judge held it to a higher standard, instead of applying the definition of legal pneumoconiosis and considering whether employer established that the miner's impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure.[9] *Id*. at 11-12. This argument lacks merit.

Employer identifies the administrative law judge's use of the phrase "rule out" at a few points in her analysis of whether employer disproved legal pneumoconiosis.[10] Miner's Claim Decision and Order at 28, 30. The administrative law judge, however, did not require employer to "rule out" any connection between the miner's emphysema and his coal mine dust exposure. Instead, the administrative law judge evaluated the doctors' opinions, in which the doctors themselves excluded coal mine dust as a contributor to claimant's emphysema, and for several reasons found that they were not sufficiently credible to rebut the presumption that the miner had legal pneumoconiosis. Miner's Claim Decision and Order at 28-30. We therefore reject employer's allegation that the administrative law judge applied an improper standard in determining whether employer established that the miner did not have legal pneumoconiosis.

[9] A "rule out" standard applies only to the second method of rebutting the Section 411(c)(4) presumption, where employer must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. . . ." 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155-56 (2015) (Boggs, J., concurring and dissenting). The first method of rebuttal requires employer to establish that the miner does not have legal pneumoconiosis as defined in the regulations. 20 C.F.R. §718.305(d)(1)(i). The regulations, in turn, define legal pneumoconiosis as "any chronic lung disease or impairment and its sequelae" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). Thus, to disprove the existence of legal pneumoconiosis, employer need not "rule out" *any* link between the miner's lung disease or impairment and his coal mine dust exposure, but need only prove that his lung disease or impairment was not "significantly related to, or substantially aggravated by" dust exposure in coal mine employment.

[10] The administrative law judge may have added to the confusion by combining her analysis of whether employer could establish that the miner did not have legal pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), and whether it could establish that no part of the miner's total disability was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii), in one section of her decision. Miner's Claim Decision and Order at 27-30. The better approach would have been to analyze the two issues separately. *See Minich*, 25 BLR at 1-159.

Employer next argues that substantial evidence does not support the administrative law judge's finding that it failed to meet its burden to disprove legal pneumoconiosis. Specifically, employer argues that the opinions of Drs. Fino and Rosenberg are documented and reasoned, and establish that the miner's emphysema was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Employer's Brief at 14. Employer contends that in discounting the opinions of Drs. Fino and Rosenberg that the miner's emphysema was due solely to smoking, the administrative law judge substituted her own opinion for that of the medical experts, and mischaracterized Dr. Rosenberg's opinion. *Id.* We disagree.

The administrative law judge noted Dr. Fino's opinion that the miner's emphysema was due to smoking because, in Dr. Fino's view, the miner's pulmonary function impairment developed too quickly to be due to coal dust. Employer's Exhibit 17 at 23. The administrative law judge, however, also considered Dr. Fino's testimony that both coal mine dust exposure and smoking can contribute to emphysema at the same time. Employer's Exhibit 17 at 28. Given Dr. Fino's testimony, the administrative law judge acted within her discretion in discrediting Dr. Fino's opinion for not adequately explaining why the miner's "significant coal dust exposure did not contribute to his emphysema," along with his smoking. Miner's Claim Decision and Order at 30; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); 20 C.F.R. §718.201(b).

Similarly, the administrative law judge found that Dr. Rosenberg did not adequately address whether coal mine dust exposure contributed to, or aggravated, the miner's emphysema. The administrative law judge noted Dr. Rosenberg's statements that the miner was disabled by a "severe reduction of his diffusing capacity," and that such reductions are "characteristically" associated with emphysema caused by cigarette smoking. Employer's Exhibit 12 at 8-9. The administrative law judge permissibly found that Dr. Rosenberg's reasoning did not adequately explain why the miner's coal mine dust exposure did not also contribute to his emphysema. Miner's Claim Decision and Order at 29; *see Owens*, 724 F.3d at 558, 25 BLR at 2-353; *Barber*, 43 F.3d at 901, 19 BLR at 2-67; 20 C.F.R. §718.201(a)(2), (b).

Moreover, the administrative law judge considered Dr. Rosenberg's reasoning that, when emphysema is related to coal mine dust exposure, dust deposition "would be found in close proximity to [the] emphysema," whereas the miner lacked "interstitial scarring in the areas of emphysema . . . ."[11] Miner's Claim Decision and Order at 28;

[11] Dr. Rosenberg indicated that CT scans did not show that interstitial scarring was associated with the miner's emphysema. Employer's Exhibit 12 at 10.

Employer's Exhibit 12 at 9-10; Employer's Exhibit 18 at 20. The administrative law judge interpreted Dr. Rosenberg's opinion as essentially requiring positive x-ray evidence of pneumoconiosis in order to attribute the miner's emphysema to coal mine dust exposure, and she discounted this aspect of the doctor's opinion as contrary to the regulations. Miner's Claim Decision and Order at 29. Given Dr. Rosenberg's emphasis on the need to find coal dust deposits with "interstitial scarring" in order to conclude that the miner's emphysema was related to coal mine dust exposure, we reject employer's argument that the administrative law judge misinterpreted Dr. Rosenberg's opinion. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999). Further, the administrative law judge permissibly found that Dr. Rosenberg's "analysis [was] not persuasive," Miner's Claim Decision and Order at 29, given that the regulations permit a determination of the existence of pneumoconiosis, even without a positive x-ray. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); 20 C.F.R. §718.202(a)(4), (b).

It is for the administrative law judge to assess the credibility of the evidence and determine how much weight to assign it. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 144-45 (4th Cir. 2015). Because the administrative law judge permissibly discounted the opinions of Drs. Fino and Rosenberg, we affirm the administrative law judge's finding that employer failed to prove that the miner did not have legal pneumoconiosis, and therefore failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i).

Additionally, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Employer's argument that the administrative law judge failed to sufficiently discuss the issue of disability causation lacks merit. Employer's Brief (Miner's Claim) at 27-30. Employer cites one section of the administrative law judge's decision for support, Miner's Claim Decision and Order at 31, but overlooks the administrative law judge's earlier, more extensive discussion of the disability causation issue in the section of the decision in which she found that employer

[12] Because we affirm the administrative law judge's decision to discount the opinions of Drs. Fino and Rosenberg for the reasons stated above, we need not address employer's arguments that the administrative law judge erred in discounting their opinions because she also found their reasoning to be inconsistent with scientific principles set forth in the preamble to the 2001 regulatory revisions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief (Miner's Claim) at 14-23; Miner's Claim Decision and Order at 28-30.

did not rebut the existence of legal pneumoconiosis. Miner's Claim Decision and Order at 27-30.

Employer notes that Drs. Fino and Rosenberg cited the miner's emphysema as a cause or contributing factor in his impairment, but argues that both physicians opined that the miner did not have pneumoconiosis and that coal mine dust exposure did not cause or contribute to his emphysema. Employer's Brief (Miner's Claim) at 29. Because the administrative law judge permissibly discredited the opinions of Drs. Fino and Rosenberg that the miner's emphysema was not legal pneumoconiosis, she properly discredited their opinions that pneumoconiosis did not contribute to the miner's totally disabling impairment. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Miner's Claim Decision and Order at 29-30. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by proving that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(ii). Accordingly, we affirm the award of benefits in the miner's claim. 30 U.S.C. §921(c)(4).

The Survivor's Claim

The administrative law judge determined that claimant was automatically entitled to receive survivor's benefits under Section 932(*l*).[13] Employer contends that the administrative law judge's application of Section 932(*l*) was error because the miner's award was not yet final. Employer's Brief (Survivor's Claim) at 5-11. As employer recognizes, however, the Board has rejected that argument, and held that an award of benefits in a miner's claim need not be final for a claimant to receive benefits under Section 932(*l*). *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014). We decline employer's request to reconsider the Board's holding in *Rothwell*, and therefore affirm the award of benefits to claimant in the survivor's claim. 30 U.S.C. §932(*l*).

[13] The administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*l*): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner was found to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*). Survivor's Claim Decision and Order at 3-4.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim and Decision and Order Awarding Survivor's Benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge