U.S. Department of Labor

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

BRB Nos. 16-0233 BLA
and 16-0234 BLA

CAROL BROWN (o/b/o and Widow of JAMES BROWN) Claimant-Respondent v. WELCREEK COAL COMPANY and BITUMINOUS CASUALTY CORPORATION c/o OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/11/2017 DECISION and ORDER

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Laura M. Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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 the Decision and Order (12-BLA-5589, 13-BLA-5655) of Administrative Law Judge John P. Sellers, III awarding benefits on claims 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 miner's subsequent claim filed on June 7, 2011,[1] and a survivor's claim filed on February 4, 2013.

The administrative law judge noted that employer stipulated that the miner worked for nineteen years in underground coal mine employment,[2] and suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[3] The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis.[4] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

[1] The miner's previous claims, filed on May 18, 1987 and December 7, 1989, were finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] The miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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).

[3] Because employer stipulated that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that the miner established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

[4] 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 underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

The administrative law judge noted that Section 422(*l*), 30 U.S.C. §932(*l*), provides that a 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 receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. The administrative law judge determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant[5] has not filed a response brief. The Director, Office of Workers' Compensation Programs responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions.[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).

The Miner's Claim

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[7] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as

[5] Claimant is the surviving spouse of the miner, who died on December 11, 2012. Director's Exhibit 7 (Survivor's Claim).

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

[7] "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).

defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

After finding that employer established that the miner did not have clinical pneumoconiosis, the administrative law judge addressed whether employer established that the miner did not have legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Rosenberg and Jarboe. Drs. Rosenberg opined that the miner suffered from chronic obstructive pulmonary disease (COPD) due to cigarette smoking and not coal mine-dust exposure. Employer's Exhibit 5. Dr. Jarboe opined that the miner suffered from emphysema due to cigarette smoking and post-radiation fibrosis. Employer's Exhibit 2. Dr. Jarboe opined that neither condition was due to coal mine-dust exposure. *Id.* The administrative law judge discredited both of these opinions because he found them inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 18-20. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Initially, we reject employer's contention that the administrative law judge erred in referring to the preamble to the 2001 regulatory revisions in determining the credibility of the medical opinion evidence. It was within the administrative law judge's discretion to rely on the preamble as a guide to assess the credibility of the medical evidence in this case. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011).

We further reject employer's contention that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Jarboe. The administrative law judge correctly noted that Drs. Rosenberg and Jarboe eliminated coal mine-dust exposure as a source of the miner's obstructive pulmonary disease, in part, because they found a significant reduction in the miner's FEV1/FVC ratio which, in their opinions, was inconsistent with obstruction due to coal mine-dust exposure.[8] Decision and Order at 18-

[8] In attributing the miner's obstructive pulmonary disease 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 5 at 5. Specific to the miner's situation, Dr. Rosenberg noted there was an extreme decline in the FEV1/FVC ratio, indicating that the miner's obstruction was entirely related to cigarette smoking. *Id.* Dr. Jarboe similarly opined that a "disproportionate reduction of FEV1 compared to the FVC is the hallmark of the functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation." Employer's Exhibit 2 at 6. Dr. Jarboe opined that "when the inhalation of

20; Employer's Exhibits 2, 5. The administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Jarboe because their reason for eliminating coal mine-dust exposure as a source of the miner's obstructive pulmonary disease 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.[9] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 18-20. Because the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Jarboe,[10] we affirm the administrative law judge's finding that employer failed to establish that the miner did not suffer from legal pneumoconiosis.[11] *See* 20 C.F.R. §718.305(d)(1)(i)(A).

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coal mine dust causes an impairment there tends to be a proportionate or parallel reduction of FVC and FEV1." *Id.* at 7. Specific to the miner's situation, Dr. Jarboe opined that the miner had a disproportionate reduction of the FEV1 compared to the FVC. *Id.* at 6. Dr. Jarboe therefore opined that the miner's pulmonary impairment was caused by smoking and not coal mine-dust exposure. *Id.* at 8-9.

[9] Employer notes that Dr. Rosenberg indicated that the statements in the preamble regarding the significance of the FEV/FVC ratio were being "misinterpreted." Employer's Brief at 17. Employer, however, does not challenge the Department of Labor's (DOL's) position as articulated in the regulation's preamble, that coal mine-dust exposure can also cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. In order to do so, employer would have to submit "the type and quality of medical evidence that would invalidate the DOL's position in that scientific dispute." *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014) (internal quotation marks omitted). Employer has presented no such evidence.

[10] Because the administrative law judge provided a valid basis for discrediting the opinions of Drs. Rosenberg and Jarboe, any error he may have made in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Rosenberg and Jarboe.

[11] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

The administrative law judge next addressed whether employer established rebuttal by proving that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted the opinions of Drs. Rosenberg and Jarboe that the miner's total disability was not due to pneumoconiosis because Drs. Rosenberg and Jarboe did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[12] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). We therefore affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits in the miner's claim is affirmed.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*l*): 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 had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order at 25. Because none of these findings is challenged on appeal, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932)(*l*); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[12] Drs. Rosenberg and Jarboe attributed the miner's death in part to chronic obstructive pulmonary disease (COPD). Employer's Exhibits 1 at 6, 3 at 19. The administrative law judge previously found that employer failed to establish that the miner's COPD did not constitute legal pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge