U.S. Department of Labor

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

BRB No. 16-0103 BLA

DOROTHY BLANCH BENFIELD (o/b/o GEORGE W. BENFIELD)	)	
Claimant-Respondent	)	
v.	)	
DELYN LIMITED	)	DATE ISSUED: 11/18/2016
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND C/O WEST VIRGINIA INSURANCE COMMISSION	)	
Employer/Carrier-Petitioners	)	
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 of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05294) of Administrative Law Judge Adele Higgins Odegard, rendered on a subsequent claim filed on February 7, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that the miner established at least 39.52 years of underground coal mine employment, established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i), (iv) and, consequently, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Therefore, the administrative law judge determined that the miner invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.[2] The administrative law judge also found that employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge applied the incorrect burden of proof in evaluating whether it rebutted the presumed existence of legal pneumoconiosis. In addition, employer asserts that the administrative law judge erred in finding that the medical opinion evidence and treatment records were insufficient to rebut the presumed existence of pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, have not filed substantive response briefs in this appeal.[3]

[1] Claimant, the miner, filed an initial claim for benefits on August 29, 1994, which was administratively closed on April 13, 1995, because claimant did not appeal the district director's determination that he failed to establish that he had a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Claimant did not take any further action before filing the current claim. Director's Exhibit 3. Claimant died on October 12, 2012, while his claim was pending, and his widow is pursuing this claim on his behalf. Director's Exhibit 24.

[2] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he or she had at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner: had at least 39.52 years of underground coal mine employment; suffered from a totally disabling respiratory impairment; invoked the rebuttable presumption at

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.[4] 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).

I. Rebuttal of the Presumption

Because the miner 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,[5] or by 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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-46 (2015) (Boggs, J., concurring and dissenting).

A. The Presumed Existence of Pneumoconiosis

With respect to rebuttal of the presumed existence of clinical pneumoconiosis, the administrative law judge rationally found that employer could not satisfy its burden in

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Section 411(c)(4); and established 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).

[4] The record reflects that the miner's last coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, the Board will apply the law 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).

[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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

light of its stipulation that the miner had "at least a minor form of the disease."[6] Hearing Transcript at 15; Decision and Order at 22.

Regarding the presumed existence of legal pneumoconiosis, the administrative law judge considered the autopsy reports of Drs. Oesterling and Swedarsky, the miner's treatment records, and the medical opinions of Drs. Zaldivar and Spagnolo.[7] The administrative law judge discredited the autopsy reports of Drs. Oesterling and Swedarsky because they did not adequately explain their conclusions that the miner did not have a lung disease or impairment related to coal dust exposure. Decision and Order at 26. Weighing the treatment records, the administrative law judge determined that the statements contained within them are equivocal on the presence of legal pneumoconiosis. Decision and Order at 31; Employer's Exhibits 2, 5-11, 14.

In evaluating the medical opinion evidence, the administrative law judge stated that she gave "equal probative weight" to the physicians on the basis of their comparable credentials.[8] Decision and Order at 32. The administrative law judge discredited Dr. Zaldivar's opinion that the miner's respiratory impairment is unrelated to coal dust

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[6] At the hearing, employer's counsel stated:

> I can concede the existence of clinical simple pneumoconiosis based on the pathology evidence that has been submitted in this case. While I don't believe the x-ray evidence shows any evidence of simple pneumoconiosis, I believe it's established by pathology that he has at least a minor form of that disease. . . . I still would like to preserve the issue of causal relationship.

Hearing Transcript at 15. The administrative law judge determined that employer's stipulation was supported by the record. Decision and Order at 22.

[7] In addition, the administrative law judge considered the autopsy report of Dr. Zhang, the prosector, and gave it little weight because he did not indicate whether the miner had legal pneumoconiosis. Decision and Order at 26; Claimant's Exhibit 1; Employer's Exhibit 16. The administrative law judge also considered Dr. Shamma-Othman's medical opinion but gave it no weight because she found that the physician did not specify whether coal dust exposure was a cause of the severe obstructive and restrictive lung disease she diagnosed. Decision and Order at 32; Director's Exhibit 11.

[8] Dr. Zaldivar is Board-certified in internal medicine, pulmonary medicine, and sleep disorders and is a B reader. Director's Exhibit 21. Dr. Spagnolo is Board-certified in internal medicine and pulmonary medicine. Employer's Exhibit 19.

exposure because he did not sufficiently explain why coal dust could not have been a cause of the impairment along with the miner's heart failure. Decision and Order at 32-33; Director's Exhibit 21; Employer's Exhibits 17, 21. The administrative law judge discredited Dr. Spagnolo's similar opinion because he did not directly state whether the miner had a respiratory impairment, and did not adequately explain why coal dust could not have been a causal factor. Decision and Order at 33-34; Employer's Exhibits 19, 22. Based upon these findings, the administrative law judge concluded that employer did not rebut the presumed existence of legal pneumoconiosis. Decision and Order at 34.

Employer initially argues that, contrary to the administrative law judge's findings, Drs. Oesterling and Swedarsky adequately explained why they did not diagnose legal pneumoconiosis in their autopsy reports. We reject employer's contention, as substantial evidence supports the administrative law judge's decision to discredit these opinions.

The administrative law judge found that Dr. Oesterling noted that the miner's mild centrilobular pulmonary emphysema "is in many instances seen unaccompanied by coal dust[,]" but did not indicate how much of the miner's emphysema was unaccompanied by coal dust or state whether coal dust could have also contributed to the emphysema.[9] Employer's Exhibit 3. Therefore, the administrative law judge acted within her discretion in giving less weight to Dr. Oesterling's autopsy report. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); Decision and Order at 26; Employer's Exhibit 3. The administrative law judge also permissibly gave less weight to Dr. Swedarsky's opinion because, as the administrative law judge determined, he described coal macules and black pigment surrounding the focal emphysema he observed, but did not indicate whether he believed coal dust exposure contributed to the development of the emphysema. *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; 65 Fed. Reg. 79,941 (Dec. 20, 2000); Decision and Order at 26; Employer's Exhibit 18. Therefore, we affirm the administrative law judge's finding that the autopsy evidence was insufficient to rebut the presumed existence of legal pneumoconiosis.

Employer also contends that the administrative law judge applied an incorrect standard when finding that the medical opinion evidence did not establish the absence of legal pneumoconiosis. In support, employer cites the administrative law judge's statement that "Dr. Zaldivar's and Dr. Spagnolo's opinions do not rebut the presumption

[9] Employer acknowledges in its brief, "Dr. Oesterling did not specifically state that the absence of coal mine dust from the areas of emphysema indicated an absence of the process identified as legal pneumoconiosis . . . ." Employer's Brief in Support of Petition for Review at 23.

at §718.305 because they cannot establish that 'no part' of the [c]laimant's pulmonary impairment was caused by pneumoconiosis as defined in §718.201." Decision and Order at 34, *citing* 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013). Employer further maintains that, contrary to the administrative law judge's finding, Drs. Zaldivar and Spagnolo specifically explained why the miner's chronic obstructive pulmonary disease (COPD) was caused solely by his congestive heart failure.[10] Employer contends that Dr. Spagnolo's testimony contradicts the administrative law judge's finding that the medical records contain a history of COPD and shortness of breath prior to the miner's hospitalizations. In addition, employer alleges that the opinions of Drs. Zaldivar and Spagnolo establish that all of the miner's respiratory problems developed after his heart attack, due to cardiac-related fluid retention.[11] Employer's contentions are without merit.

Although employer is correct in asserting that the "no part" standard does not apply in the context of rebuttal of the presumed existence of legal pneumoconiosis, remand is not required on this basis.[12] The administrative law judge permissibly determined that Dr. Zaldivar's opinion is entitled to little weight because he did not adequately explain why coal dust exposure was not a contributing factor in the miner's respiratory impairment. *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133. Dr. Zaldivar acknowledged that the miner had COPD and indicated that it "is most reasonably attributable to smoking" but did not explain how he excluded a contribution from the miner's forty years of coal mine employment. Employer's Exhibit 17.

[10] Employer also argues that the administrative law judge neglected to weigh Dr. Porterfield's treatment record report, which employer describes as corroborating Dr. Zaldivar's opinion. Contrary to employer's contention, the administrative law judge considered Dr. Porterfield's report when summarizing the medical evidence, and noted that Dr. Zaldivar referenced Dr. Porterfield's statement that the miner's "main problem is his heart with [congestive heart failure] more so than his lungs." Decision and Order at 14, 30-31; Employer's Exhibit 11.

[11] Employer raises this issue in the context of the administrative law judge's finding that the opinions of Drs. Zaldivar and Spagnolo were insufficient to rebut the presumed fact of total disability causation at 20 C.F.R. §718.305(d)(1)(ii). Because the physicians' discussion of whether coal dust exposure was a causal factor in the miner's totally disabling respiratory impairment is also relevant to rebuttal of the presumed existence of legal pneumoconiosis, we address employer's challenge under 20 C.F.R. §718.305(d)(1)(A).

[12] In initially describing rebuttal at 20 C.F.R. §718.305, the administrative law judge correctly stated the burdens of proof applicable to pneumoconiosis and total disability causation. Decision and Order at 21, 32.

We also affirm the administrative law judge's discrediting of Dr. Spagnolo's opinion. Dr. Spagnolo indicated in his written report that "[t]wo spirometry studies were . . . obtained in 2012 that show the presence of an obstructive pulmonary defect that, if true, likely resulted [from] 18 years of additional cigarette smoking and the presence of severe left heart failure at the time of testing." Employer's Exhibit 19. He confirmed at his deposition that he could not exclude a contribution from smoking towards the abnormal results on the March 2012 pulmonary function and blood gas studies. Employer's Exhibit 22 at 29. However, as the administrative law judge found, Dr. Spagnolo did not explain why coal dust exposure could not have also contributed to these abnormalities. Decision and Order at 34.

Finally, the administrative law judge permissibly discredited Dr. Zaldivar's and Dr. Spagnolo's conclusion that, because the miner's respiratory impairment did not appear until after his heart attack, coal dust exposure was not a causal factor in the impairment. *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 35-36. The administrative law judge correctly found that in light of the physicians' acknowledgment that there were no objective studies predating the miner's cardiac event, their belief that the miner did not previously have a respiratory or pulmonary impairment was unsupported.[13] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-235 (4th Cir. 1998); Decision and Order at 35-36; Employer's Exhibits 17, 22 at 29.

Because the administrative law judge rationally found that the opinions of Drs. Zaldivar and Spagnolo are not adequately reasoned on the source of the miner's totally disabling COPD/emphysema, these opinions could not be credited for the purposes of rebuttal at 20 C.F.R. §718.305(d)(1)(i)(A), regardless of the standard applied.[14] *See*

[13] Dr. Zaldivar stated "[p]rior to the heart attack, clinically, there was no evidence that [the miner] suffered from any shortness of breath that would prevent him from performing any and all activities of a man his age" but acknowledged that *"*[*t*]*he only breathing test in these records was obtained after the heart attack* and after the left ventricular systolic dysfunction was diagnosed." Employer's Exhibit 17 (emphasis added). Dr. Spagnolo testified concerning the abnormal objective studies in 2012 that the miner did not have "*any other tests between '94 and '12* . . . ." Employer's Exhibit 22 at 29 (emphasis added).

[14] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Spagnolo, we need not address employer's additional arguments concerning the administrative law judge's weighing of these opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

Mingo Logan Coal Co. v. Owens, 724 F.3d 550, 558, 25 BLR 2-339, 2-245 (4th Cir. 2013). We affirm, therefore, the administrative law judge's determination that employer did not rebut the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

B. Rebuttal of the Presumed Casual Relationship

Relying on his findings at 20 C.F.R. §718.305(d)(1)(i)(A), the administrative law judge concluded that employer did not rebut the presumed fact that the miner's total respiratory or pulmonary disability is due to pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 35-36. Employer argues that the administrative law judge erred in substituting her own conclusions for that of the medical experts.

We reject employer's allegation of error. The administrative law judge rationally determined that the reasons she provided for discrediting the opinions of Drs. Zaldivar and Spagnolo on the issue of legal pneumoconiosis also undercut their opinions that no part of the miner's disabling respiratory or pulmonary impairment was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453 (6th Cir. 2013); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 35-36. Consequently, we affirm her conclusion that employer failed to rebut the presumed fact of disability causation under 20 C.F.R. §718.305(d)(1)(ii). We further affirm, therefore, the administrative law judge's finding that employer was unable to rebut the Section 411(c)(4) presumption by either of the methods set forth in 20 C.F.R. §718.305(d)(1). *Bender*, 782 F.3d at 137.

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