U.S. Department of Labor

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

BRB Nos. 14-0433 BLA and
14-0434 BLA

MARGARET S. MAGGARD (Widow of and o/b/o PALMER MAGGARD) Claimant-Respondent v. WESTMORELAND COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/30/2015 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Living Miner's Claim and Survivor's Claim of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

Jonathan P. Rolfe (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 GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5199, 2012-BLA-5583) of Administrative Law Judge Linda S. Chapman, rendered on a

subsequent miner's claim[1] and a survivor's claim[2] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the Act). In the miner's claim, the administrative law judge credited the miner with 20.75 years of underground coal mine employment and found that he suffered from a totally disabling respiratory impairment under 20 C.F.R. §718.204(b)(2). The administrative law judge concluded, therefore, that the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), was invoked.[3] The administrative law judge also determined that employer did not rebut the presumption. Consequently, the administrative law judge determined that a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309, and awarded benefits accordingly.

In the survivor's claim, the administrative law judge adopted the findings she made in the miner's claim and concluded that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at amended Section

[1] The miner filed an initial claim for benefits on October 27, 1997, which was ultimately denied by the district director on June 16, 1998, because the evidence did not establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. The miner filed requests for modification on May 5, 1999, June 5, 2000, and June 14, 2001. *Id*. These requests were denied on June 21, 1999, June 20, 2000, and July 25, 2001, respectively. *Id*. The miner did not take any further action until he filed a subsequent claim on July 31, 2008, which was denied by the district director on September 8, 2008. MC Director's Exhibits 3, 30. The miner requested reconsideration on September 29, 2008. MC Director's Exhibit 33. The miner died on May 18, 2009, while his request was pending. Survivor's Claim (SC) Director's Exhibit 2.

[2] Claimant, the widow of the miner, filed her claim for survivor's benefits on July 25, 2011, and is continuing to pursue the miner's claim on her husband's behalf. MC Director's Exhibit 47; SC Director's Exhibit 2. The district director issued a proposed Decision and Order awarding benefits in the survivor's claim on January 31, 2012, and employer requested a hearing. SC Director's Exhibits 19, 23. The miner's subsequent claim and the survivor's claim were consolidated and forwarded to the Office of Administrative Law Judges on March 15, 2012. MC Director's Exhibit 48; SC Director's Exhibit 23.

[3] Under amended Section 411(c)(4) of the Act, a miner's total disability or death 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), as implemented by 20 C.F.R. §718.305(b).

411(c)(4). The administrative law judge further determined that employer did not rebut the presumption. Accordingly, the administrative law judge also awarded benefits in the survivor's claim.

On appeal, employer contends that the administrative law judge erroneously applied the "rule out" standard on rebuttal of the amended Section 411(c)(4) presumption in the miner's claim and improperly limited employer's methods of rebuttal to those contained in 30 U.S.C. §921(c)(4). Employer also argues that the administrative law judge did not properly weigh the medical opinions relevant to rebuttal in the miner's claim. Employer has not raised any separate allegations of error regarding the survivor's claim. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, asserting that the administrative law judge applied the proper rebuttal standard and urging the Board to reject employer's arguments concerning the alleged limitations on the rebuttal methods available to employer.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.[5] 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).

The Miner's Claim

Once an administrative law judge determines that the presumption that the miner was totally disabled due to pneumoconiosis at amended Section 411(c)(4) has been invoked, the burden shifts to the party opposing entitlement to affirmatively prove that the miner did not have legal and clinical pneumoconiosis, or that no part of the miner's disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1); *see W. Va. CWP Fund v.*

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had 20.75 years of underground coal mine employment, that total disability was established at 20 C.F.R. §718.204(b)(2), that the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4), was invoked, and that a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 17.

[5] The record indicates that claimant's last coal mine employment was in 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).

Bender, 782 F.3d 129, 134-35, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). In this case, the administrative law judge stated that in order to rebut the amended Section 411(c)(4) presumption under 20 C.F.R. §718.305, employer must establish that the miner "did not suffer from clinical pneumoconiosis, or that his totally disabling respiratory or pulmonary impairment did not arise out of his coal mine employment." Decision and Order at 17. The administrative law judge found that the x-ray evidence and the CT scan evidence establish "the absence of clinical pneumoconiosis." *Id*. at 17, 18. The administrative law judge further stated that, on the issue of legal pneumoconiosis, employer is required to prove that the miner's "disabling respiratory impairment was not due, at least in part, to exposure to coal dust." *Id*. at 18. She indicated that "to meet this burden, [e]mployer must affirmatively *rule out* a causal relationship between [the miner's] disabling respiratory impairment and his coal mine employment." *Id*. The administrative law judge concluded, after a review of the medical opinion evidence, that: "Employer has not met its burden to rule out [the miner's] extensive history of underground coal mine dust exposure as a factor in his disabling respiratory impairment. Thus, [claimant] has established that [the miner] was totally disabled due to pneumoconiosis." *Id*. at 20. The administrative law judge then proceeded to consider the survivor's claim. *Id*.

Employer argues that the administrative law judge "misapplied the law regarding legal pneumoconiosis, by improperly mixing her analysis of disability, legal pneumoconiosis and causation." Employer's Brief at 12. Employer further contends that the administrative law judge erred in limiting it to the statutory methods of rebuttal afforded the Secretary of Labor. Employer also alleges that the administrative law judge did not provide valid rationales for discrediting the opinions of Drs. Rosenberg and Hippensteel, that the miner's totally disabling respiratory impairment was unrelated to coal dust exposure.[6]

[6] In a footnote, employer also asserts, without explanation, that the administrative law judge did not consider all of the evidence in determining whether clinical pneumoconiosis existed. Employer's Brief at 14 n.3. In light of the administrative law judge's determination that the x-ray and CT scan evidence established the absence of clinical pneumoconiosis, we decline to address employer's allegation. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); Decision and Order at 18. Similarly, employer contends that the administrative law judge did not review the evidence relevant to the miner's smoking history. Although the administrative law judge did not render a specific finding on this issue, remand is not required, as she gave permissible reasons for discrediting the opinions of Drs. Rosenberg and Hippensteel that are unrelated to their understanding of the miner's smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 18-20.

As an initial matter, we note that employer is correct in stating that the administrative law judge's rebuttal analysis was based on a blending of the standards applicable to legal pneumoconiosis and total disability causation. *See* Decision and Order at 17-18. This does not constitute error requiring remand, however. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Pursuant to 20 C.F.R. §718.201(a)(2), "legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). A disease or impairment "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). As previously noted, pursuant to 20 C.F.R. §718.305(d)(1)(ii), an employer can rebut the presumed fact of disability causation by proving that "no part of the miner's total respiratory or pulmonary disability was caused by pneumoconiosis *as defined in* [*20 C.F.R.*] *§718.201*." 20 C.F.R. §718.305(d)(1)(ii) (emphasis added). When legal pneumoconiosis, i.e., pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2) is involved, 20 C.F.R. §718.305(d)(1)(ii) indicates that rebuttal is established by proof that no part of the miner's total respiratory disability was caused by a chronic lung disease or impairment arising out of coal mine employment. 20 C.F.R. §§718.201(a)(2), 718.305(d)(1)(ii). Thus, the central inquiry in this case, under both 20 C.F.R. §718.305(d)(1)(i)(A) and (ii), is whether employer can affirmatively establish that dust exposure in coal mine employment did not play a causal role in the miner's totally disabling respiratory impairment. In this case, if the administrative law judge permissibly determined that the opinions of employer's experts are not adequately reasoned on this issue, employer is precluded from rebutting the amended Section 411(c)(4) presumption at both 20 C.F.R. §718.305(d)(1)(i)(A) and (ii). *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013).

Contrary to employer's contentions, the administrative law judge acted within her discretion in finding that the opinions of Drs. Rosenberg and Hippensteel were insufficient to establish rebuttal under 20 C.F.R. §718.305(d)(1)(i)(A) and (ii). Dr. Rosenberg reviewed medical records and opined that the miner had a totally disabling obstructive impairment that was due solely to cigarette smoking. Miner's Claim (MC) Employer's Exhibit 5 at 7. The administrative law judge noted Dr. Rosenberg's statement that he excluded coal dust exposure as a cause of the miner's obstructive lung disease and impairment, because the miner exhibited a significant reduction in his FEV1/FVC ratio, which Dr. Rosenberg identified as characteristic of obstruction due solely to smoking. Decision and Order at 18; Survivor's Claim (SC) Director's Exhibit 44; SC Claimant's Exhibit 5; SC Employer's Exhibit 6 at 18-19. The administrative law judge permissibly found that Dr. Rosenberg's rationale is inconsistent with the medical science accepted by the Department of Labor (DOL) in the preamble to the 2001 revised

regulations, as DOL explicitly recognized the prevailing scientific view that coal mine dust can cause clinically significant obstructive disease, as demonstrated by reductions in the FEV1/FVC ratio.[7] 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); Decision and Order at 18-19.

We also hold that the administrative law judge did not err in citing previous Board decisions affirming the discrediting of Dr. Rosenberg's opinion because he relied on a miner's preserved FEV1/FVC ratio to exclude a contribution from coal dust. The administrative law judge did not use these decisions as a substitute for performing her duty as fact-finder. Rather, she cited them for the proposition that it is permissible to give less weight to a physician's opinion that conflicts with the preamble to the 2001 regulations. *See Looney*, 678 F.3d at 314-17, 25 BLR at 2-130, 2-133. We affirm, therefore, the administrative law judge's findings discrediting the opinion of Dr. Rosenberg. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

The administrative law judge also acted within her discretion in giving less weight to Dr. Hippensteel's opinion. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133. As employer argues, Dr. Hippensteel recognized that pneumoconiosis can be latent and progressive. SC Employer's Exhibit 7 at 18. However, Dr. Hippensteel also stated that the miner "does not have evidence of industrial bronchitis from his coal mine dust exposure since it should subside within a period of several months after leaving coal mine dust exposure." SC Director's Exhibit 14. Dr. Hippensteel further testified that "the latency . . . begins at the time of first exposure, not at the time of the end of exposure in regards to coalworkers' pneumoconiosis." SC Employer's Exhibit 7 at 18-19. Therefore, although Dr. Hippensteel acknowledged that pneumoconiosis can be latent and progressive, the administrative law judge rationally determined that his opinion conflicts

[7] Employer's contention that Dr. Rosenberg's opinion is corroborated by recent medical studies is rejected. Contrary to employer's suggestion, Dr. Rosenberg's deposition testimony indicates that the studies that support the proposition that coal mine dust exposure causes a "symmetric reduction of FVC generally such that the ratio of the FEV1/FVC ratio [sic] is preserved," are not "recent," but rather were cited by the Department of Labor (DOL) in the preamble to the 2001 revised regulations. Employer's Exhibit 6 at 18-19. In addition, the DOL quoted with approval in the preamble the conclusion of the National Institute for Occupational Safety and Health that coal dust-induced respiratory or pulmonary impairments can be diagnosed based on decrements in the FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

with the regulations, which recognize that pneumoconiosis is "a latent and progressive disease which may first become detectable only *after the cessation of coal mine dust exposure*." 20 C.F.R. §718.201(c) (emphasis added); *see* 65 Fed. Reg. 79,971-972 (Dec. 20, 2000); Decision and Order at 20. We affirm, therefore, the administrative law judge's determination that Dr. Hippensteel did not provide an adequately reasoned opinion as to whether the miner's totally disabling impairment was related, in any way, to dust exposure in coal mine employment.[8] *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76.

We also reject employer's contention that the administrative law judge erred in requiring it to establish that no part of the miner's disabling respiratory impairment was due to his coal dust exposure. As to the administrative law judge's use of the "no part" standard, we agree with the Director that, in light of the administrative law judge's findings that the opinions of Drs. Rosenberg and Hippensteel are not adequately reasoned, these opinions could not be credited for purposes of rebuttal at 20 C.F.R. §718.305(d)(1)(i)(A) and (ii), regardless of the standard applied. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-447 (6th Cir. 2013); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-245 (4th Cir. 2013); Director's Letter Brief at 3.

Finally, we hold that there is no merit to employer's contention that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor under 30 U.S.C. §921(c)(4). In support of its

[8] Because the administrative law judge provided valid rationales for discrediting the opinions of Drs. Rosenberg and Hippensteel, we need not address the additional allegations of error raised by employer regarding her weighing of these opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). Similarly, we are not required to address employer's contentions regarding the administrative law judge's weighing of the medical evidence that supports claimant's entitlement to benefits. Because it is employer's burden to establish rebuttal, and the administrative law judge did not resolve the conflict in the evidence by according greater weight to the opinions of claimant's experts, the probative value of these opinions is not relevant. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35, BLR (4th Cir. 2015). Further, although employer contends that the administrative law judge erred in failing to address the x-rays, CT scans, and pulmonary function studies on rebuttal, employer does not explain how this evidence cures the defects that the administrative law judge found in the opinions of Drs. Rosenberg and Hippensteel. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference.").

argument, employer relies upon the statutory language of 30 U.S.C. §921(c)(4), and the United States Supreme Court's holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976), that the rebuttal limitations are inapplicable to coal mine operators. Employer's argument is substantially similar to the one that the Board rejected in *Owens*, 25 BLR at 1-4, and we reject it here for the reasons set forth in that decision. *See also Bender*, 782 F.3d at 137-40 (recognizing that the rebuttal provisions apply to coal mine operators as well as the Secretary).

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Hippensteel, the only opinions supportive of a finding that the miner did not suffer from legal pneumoconiosis and was not totally disabled due to pneumoconiosis, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption in the miner's claim. We further affirm, therefore, the award of benefits in the miner's claim. *See Bender*, 782 F.3d at 137-40.

The Survivor's Claim

Pursuant to 30 U.S.C. §932(*l*) of the Act,[9] claimant is automatically entitled to survivor's benefits if she establishes that: she filed her claim after January 1, 2005; her claim was pending on or after March 23, 2010; she is an eligible survivor of the miner; and the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*). The record in the survivor's claim establishes that the first and second criteria are met. SC Director's Exhibit 2. Claimant's status as an eligible survivor was not a contested issue, thereby establishing the third criterion. Based on our affirmance of the award in the miner's claim, the fourth criterion is also met. Therefore, claimant has demonstrated her automatic entitlement to benefits under Section 932(*l*).[10] 30 U.S.C. §932(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[9] With respect to survivors' claims, the amendments revived the "derivative entitlement" provision of Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 932(*l*), a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish, by any means, that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010).

[10] The administrative law judge awarded benefits in the survivor's claim based on her findings that claimant invoked the presumption of death due to pneumoconiosis set forth in amended Section 411(c)(4), and employer failed to rebut it. Decision and Order at 20-21. In light of the applicability of Section 932(*l*), consideration under amended Section 411(c)(4) was unnecessary. *See Mathews*, 24 BLR at 1-200.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Living Miner's Claim and Survivor's Claim is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge