U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0616 BLA

PAULINE BUTTRY (Widow of BOBBY J. BUTTRY)	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 09/19/2018
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 William T. Barto, Administrative Law Judge, United States Department of Labor.

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

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order[1] (2015-BLA-05740) of Administrative Law Judge William T. Barto 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 April 27, 2013.[2]

The administrative law judge found that the miner had at least fifteen years of underground coal mine employment[3] and a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2). Thus, he determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] He further found that employer did not rebut the presumption and awarded benefits accordingly.

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

---

[1] The administrative law judge issued a Decision and Order Granting Benefits on July 11, 2017, and a Decision and Order Granting Modification and Awarding Benefits on August 9, 2017, which was labeled "Corrected Copy." All references to "Decision and Order" herein refer to the administrative law judge's August 9, 2017, Decision and Order.

[2] Claimant is the widow of the miner, who died on September 13, 2012. Director's Exhibit 2.

[3] The miner's coal mine employment was in Virginia. Hearing Transcript at 18; Decision and Order at 2. 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] Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[6] or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

To prove that the miner did not have legal pneumoconiosis, employer must demonstrate that he did not have a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[7] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In determining that employer failed to establish that the miner did not have legal pneumoconiosis, the administrative law judge considered Dr. Caffrey's autopsy report and medical opinion.[8] Decision and Order at 19-20.

Dr. Caffrey reviewed the miner's autopsy slides, medical treatment records, Dr. Perper's report, and the report of the autopsy pathologist Dr. Bluemink. Employer's Exhibit 1. Dr. Caffrey agreed with Dr. Perper that the miner had centrilobular emphysema. *Id.* at 4. However, he disagreed with Dr. Perper's conclusion that the emphysema arose

---

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is 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).

[7] The administrative law judge found that employer established that the miner did not have clinical pneumoconiosis. Decision and Order at 12.

[8] The administrative law judge also considered the opinions of Drs. Al-Khasawneh and Perper diagnosing the miner with legal pneumoconiosis. Decision and Order at 13; Claimant's Exhibits 2, 3. The administrative law judge found that their opinions were not well-reasoned and were conclusory, and assigned their opinions diminished weight.

out of the miner's coal mine employment. *Id.* Dr. Caffrey opined that the miner's autopsy slides "show at most a mild degree of centrilobular emphysema, and the emphysema was not associated with coal dust." *Id.* at 4. He explained that emphysema "is not uncommon in someone [eighty-two] years of age (known as senile emphysema)." *Id.* He also explained that the miner had a sixty pack-year cigarette smoking history, and noted that cigarette smoking is the number one cause of emphysema. *Id.* Dr. Caffrey also noted that "some" of the miner's treating physicians diagnosed chronic obstructive pulmonary disease (COPD). Employer's Exhibit 1 at 4. He concluded, however, that the COPD was "not a significant medical problem," based on his review of the miner's treatment records. *Id.* Dr. Caffrey concluded that the miner's "significant problems were severe obstructive sleep apnea and significant aortic and mitral valvular disease, neither of which is associated" with coal mine dust exposure. *Id.* The administrative law judge found that Dr. Caffrey's opinion was unpersuasive and inconsistent with the regulations. Decision and Order at 12-14. Therefore, he accorded it "no weight." *Id.*

We reject employer's contention that the administrative law judge applied an improper rebuttal standard with respect to legal pneumoconiosis. Employer's Brief at 5-7. The administrative law judge correctly stated that in order to establish rebuttal via the first available method, employer must establish "that the miner had neither clinical nor legal pneumoconiosis." Decision and Order at 8. The administrative law judge also correctly noted that legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." *Id.*, *quoting* 20 C.F.R. §718.201(a)(2).

Moreover, the administrative law judge did not, as employer asserts, require Dr. Caffrey to "rule out" all contribution by coal mine dust exposure to the miner's COPD. Employer's Brief at 5-7. Rather, the administrative law judge permissibly found that Dr. Caffrey's exclusion of a diagnosis of legal pneumoconiosis was "not well-reasoned" because, although Dr. Caffrey believed that the miner's COPD was "not a significant problem," he failed to adequately explain "why the emphysema during his review of the autopsy slides is not associated with the coal dust also found on the same slides." Decision and Order at 14; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §718.201(b). The administrative law judge further permissibly found that despite Dr. Caffrey's identification of obstructive sleep apnea and aortic and mitral valvular disease as the more "significant" medical conditions, he failed "to explain how or why the presence of other significant diseases excludes the presence of legal pneumoconiosis." Decision and Order at 14; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Because the administrative law judge applied the correct rebuttal standard and permissibly found that Dr. Caffrey's opinion is not well-reasoned, we affirm his finding that Dr. Caffrey's opinion is insufficient to establish that the miner's COPD was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See Minich*, 25 BLR at 1-154-56.

Substantial evidence supports the administrative law judge's credibility determinations regarding Dr. Caffrey's opinion, and the Board is not empowered to reweigh the evidence.[9] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have legal pneumoconiosis.[10] 20 C.F.R. §718.305(d)(2)(i).

The administrative law judge next addressed whether employer could establish rebuttal by showing that no part of the miner's death was caused by pneumoconiosis and weighed Dr. Caffrey's opinion on this issue. 20 C.F.R. §718.305(d)(2)(ii). Dr. Caffrey opined that the miner "had a cardiac death" unrelated to his coal mine dust exposure. Employer's Exhibit 6 at 6. In support of his opinion, Dr. Caffrey noted that an EKG done two days before the miner's death revealed "probable inferior infarct [and] anterolateral infarct, recent." *Id*. Dr. Caffrey also noted that medical records from Holston Valley Medical Center on the day before the miner's death indicated that the miner was experiencing "progressively worsening bilateral lower extremity edema with congestive heart failure." *Id*. The diagnoses in these records included significant vascular coronary artery disease and valvular disease. *Id*. Dr. Caffrey opined that these conditions were unrelated to coal mine dust exposure. *Id*. The administrative law judge noted, however, that those same medical records included a "diagnosis of advanced [COPD]" and notations that the miner "experienced a near respiratory arrest hours before he entered into cardiac arrest." Decision and Order at 16; *see* Director's Exhibits 9, 10. Based on Dr. Caffrey's

---

[9] Because the administrative law judge provided valid reasons for discrediting Dr. Caffrey's autopsy report and medical opinion, we need not address employer's remaining challenges to the weight accorded this opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

[10] Employer argues that the administrative law judge erred in failing to weigh the report of Dr. Bluemink, the autopsy prosector, on the issue of legal pneumoconiosis. Employer's Brief at 9-12. We disagree. Dr. Bluemink diagnosed coal workers' pneumoconiosis, but opined that the "coal dust lung damage based on autopsy findings [is] mild" and "do[es] not fit the criteria of complicated pneumoconiosis based on the absence of significant fibrosis, scarring or well-developed nodules." Director's Exhibit 20. It is employer's burden to affirmatively establish that the miner did not have legal pneumoconiosis. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473 (6th Cir. 2011). Because Dr. Bluemink did not specifically address whether the miner had a chronic lung disease or impairment that was significantly related to, or substantially aggravated by, dust exposure in coal mine employment, his opinion could not assist employer in rebutting the presumed fact of legal pneumoconiosis. *Id.*; *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

"failure to acknowledge these circumstances," the administrative law judge permissibly found that Dr. Caffrey "fail[ed] to adequately explain why the [miner's] emphysema/COPD, which [e]mployer has failed to establish was not legal pneumoconiosis, did not hasten or play any part in the [m]iner's death." *Id.*; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Therefore, we affirm the administrative law judge's determination that employer failed to establish that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).[11]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[11] Employer again argues that the administrative law judge erred in failing to weigh Dr. Bluemink's autopsy findings when addressing whether it established that no part of the miner's death was caused by pneumoconiosis. Employer's Brief at 14-15. Contrary to employer's argument, because Dr. Bluemink did not affirmatively opine that no part of the miner's death was caused by pneumoconiosis, his opinion cannot assist employer in establishing rebuttal at 20 C.F.R. §718.305(d)(2)(ii). *Morrison*, 644 F.3d at 480; *see* Director's Exhibit 20.