

U.S. Department of Labor

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



BRB No. 19-0532 BLA

REGINA K. BUCKLEY)
(Widow of FRED A. BUCKLEY))
))
Claimant-Petitioner)
))
v.)
))
SHREWSBURY COAL COMPANY)
))
and)
))
VALLEY CAMP COAL COMPANY)
))
Employer/Carrier-)
Respondents)
))
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
))
Party-in-Interest)

DATE ISSUED: 09/28/2020

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Third Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Robert M. Williams (Maroney, Williams, Weaver & Pancake, PLLC), Charlestown, West Virginia, for Claimant.

Andrea L. Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Third Remand (2011-BLA-05809) of Administrative Law Judge Drew A. Swank rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (Act). This case involves a survivor's claim filed on August 9, 2010,¹ and is before the Benefits Review Board for a fourth time.²

The Board previously affirmed Administrative Law Judge Thomas M. Burke's determination that Claimant invoked the rebuttable presumption that the Miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).³ *Buckley v. Shrewsbury Coal Co.*, BRB No. 15-0184 BLA, slip op. at 3 n.4 (Feb. 29, 2016) (unpub.). However, the Board vacated his determination that Employer did not rebut the presumption by disproving the Miner had legal pneumoconiosis. *Buckley v. Shrewsbury Coal Co.*, BRB No. 17-0132 BLA (Apr. 30, 2018) (unpub.) (Hall, J., dissenting). The Board also vacated his determination that Employer failed to establish that no part of the Miner's death was caused by legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). In the interest of justice and judicial economy, and because the case

¹ Claimant is the widow of the Miner, who died on July 28, 2008. Director's Exhibit 9. The Miner filed a claim on August 30, 2005, which was denied on October 1, 2008, in a Decision and Order issued by Administrative Law Judge Thomas M. Burke. No further action was taken on the Miner's claim. Because the Miner was not awarded benefits during his lifetime, Claimant is not eligible for derivative benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012) (providing a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis).

² We incorporate the procedural history of this case and the prior holdings by the Board, as set forth in *Buckley v. Shrewsbury Coal Co.*, BRB No. 17-0132 BLA (Apr. 30, 2018) (unpub.) (Hall, J., dissenting); *Buckley v. Shrewsbury Coal Co.*, BRB No. 15-0184 BLA (Feb. 29, 2016) (unpub.), and *Buckley v. Shrewsbury Coal Co.*, BRB No. 13-0193 BLA (Jan. 31, 2014) (unpub.).

³ Section 411(c)(4) provides a rebuttable presumption that the Miner's death was due to pneumoconiosis if Claimant establishes the Miner worked fifteen or more years in underground or substantially similar surface coal mine employment, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4); see 20 C.F.R. §718.305.

was being remanded for a third time, the Board further ordered the case to be reassigned on remand to a different administrative law judge. *Id.* at 8. *Id.*

On remand, this case was assigned to Administrative Law Judge Drew A. Swank (administrative law judge), who found Employer rebutted the presumption by disproving the Miner had legal pneumoconiosis and established no part of the Miner's death was caused by legal pneumoconiosis. Accordingly, he denied benefits.

On appeal, Claimant argues that the administrative law judge erred in finding Employer rebutted legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because Claimant invoked the Section 411(c)(4) presumption that the Miner's death was 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 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 Employer established rebuttal by both methods.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the Miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

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 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). 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).

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge determined that the opinions of Employer’s experts outweighed the opinions of Claimant’s experts and established the Miner did not suffer from legal pneumoconiosis. Decision and Order at 13-17.

Claimant argues the administrative law judge’s finding must be vacated, as her medical experts possess superior clinical expertise and training in comparison with Employer’s experts. Claimant’s Petition for Review at 3. Claimant further asserts Employer’s experts did not address the Miner’s “extensive exposure to coal and silica in reaching their opinions.” *Id.* at 4. In addition, Claimant relies on Dr. Gaziano’s notation that there was “very little tissue” obtained from the Miner’s lung surgery to contend the administrative law judge erred in relying on the opinions of Employer’s pathologists. *Id.* at 5.

The administrative law judge considered the opinions of Board-certified pathologists Drs. Oesterling and Bush,⁶ and the medical opinions of Drs. Cohen, Rasmussen, Basheda, and Rosenberg to determine whether coal dust exposure was significantly related to or a substantial aggravating factor of the Miner’s interstitial pulmonary fibrosis. Decision and Order on Third Remand at 13-17; Director’s Exhibits 12, 13; Claimant’s Exhibit 1, 5, 10; Employer’s Exhibits 1, 2, 8-11. The administrative law judge permissibly determined the opinions of Drs. Oesterling and Bush that the Miner’s interstitial fibrosis was unrelated to coal dust exposure were well-documented and well-reasoned as they “provided comprehensive reviews of the Miner’s surgical biopsy slides,” and specifically excluded coal dust as a cause of the fibrosis based on the minimal amount of anthracotic pigment seen on the biopsy slides. Decision and Order on Remand

⁶ The administrative law judge also considered the opinions of Drs. Tomchin and Marks, who reviewed the Miner’s July 7, 2008 lung biopsy slides. Decision and Order on Third Remand at 14. Dr. Tomchin diagnosed interstitial fibrosis and stated that the biopsy materials are “suggestive but not diagnostic of end-stage usual interstitial pneumonitis.” Director’s Exhibit 11. Dr. Mark also reviewed the slides, stating usual interstitial pneumonitis (UIP) “is the diagnosis I prefer,” but could not make the diagnosis with certainty because the disease was too far advanced and there was too much chronic organizing pneumonia present. *Id.* The administrative law judge found Dr. Tomchin’s mention of chronic obstructive lung disease unsupported by the record, and Dr. Marks did not diagnose legal pneumoconiosis. Decision and Order on Third Remand at 14.

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). Employer's Exhibits 1, 2. Next, he reasonably concluded the medical opinions of Drs. Basheda and Rosenberg,⁷ as supported by the pathology findings of Drs. Oesterling and Bush, were entitled to greater weight than the contrary opinions of Drs. Cohen and Rasmussen because their conclusions that the Miner's interstitial fibrosis was not related to coal dust exposure were based on "thorough reviews" of the objective medical evidence, pathological reports, and relevant medical literature. Decision and Order on Third Remand at 15, 17; see *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Employer's Exhibits 8-11.

In contrast, the administrative law judge acted within his discretion in according less weight to the opinions of Drs. Cohen and Rasmussen that the Miner's fibrosis was coal dust-related as they did not have the benefit of reviewing the pathological evidence, which Dr. Cohen acknowledged is a valuable tool in rendering a definitive diagnosis of the Miner's condition.⁸ See *Akers*, 131 F.3d at 441; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-

⁷ Dr. Basheda reviewed the Miner's medical records and noted he had approximately twenty-two years of coal dust exposure, which put him "at risk for coal dust-induced pulmonary disease." Employer's Exhibit 8. Dr. Basheda further excluded coal dust as a causative factor of the Miner's UIP as he observed evidence of linear scarring, with an absence of nodules or rounded opacities in the upper lung zones on the CT scans and x-rays, coupled with restriction and impaired diffusion demonstrated on the pulmonary function studies. *Id.* He also noted that coal dust does not cause UIP and stated that the "pathology findings of coal dust ... would not translate into linear opacities in the lower lung fields that you see in [UIP.]" Employer's Exhibit 11 at 13. Dr. Rosenberg reviewed the Miner's medical records, observing the Miner's reported coal mine employment histories exceeding twenty years. Employer's Exhibit 9. He explained the pathology findings showed basilar-predominant fibrosis with honeycombing in the middle and lower lung zones, which is consistent with UIP, the cause of which is unknown. *Id.*

⁸ In his June 28, 2006 report, Dr. Cohen noted the Miner was diagnosed with idiopathic pulmonary fibrosis (IPF), but stated "this diagnosis was made without the benefit of pathology specimens." Claimant's Exhibit 1. He explained, "[w]here there is no surgical lung biopsy, the diagnosis remains uncertain." *Id.* In his December 17, 2007 report, Dr. Cohen noted "[a] definite diagnosis of IPF in the presence of a surgical biopsy showing UIP patterns of fibrosis requires exclusion of other known causes of interstitial lung disease such as drug toxicities, *environmental exposures* and connective tissue diseases." Claimant's Exhibit 5 (emphasis in original). Dr. Rasmussen stated that the Miner died of respiratory failure that resulted from an acute lung injury superimposed on severe interstitial lung disease, which is characteristic of interstitial fibrosis. Claimant's Exhibit 10. Citing medical studies, he further indicated the Miner's fibrosis could not be

1291, 1-1294 (1984); Decision and Order on Third Remand at 16; Claimant's Exhibits 1, 5. He also permissibly found Dr. Rasmussen's opinion less probative because it was unclear whether he diagnosed legal or clinical pneumoconiosis and whether he based his conclusions on the Miner's specific condition or generalities cited in the medical literature. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order on Third Remand at 17; Claimant's Exhibits 5, 10. Because the administrative law judge provided valid reasons for finding the opinions of Employer's experts better documented and reasoned than the opinions of Drs. Cohen and Rasmussen, we reject Claimant's allegation that the opinions of Drs. Cohen and Rasmussen were entitled to greater weight based on their superior clinical expertise and training. *See Akers*, 131 F.3d at 441 (in addition to their qualifications, an administrative law judge should consider the physicians' "explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.").

Regarding Dr. Gaziano's comment that the samples from the Miner's surgical biopsy provided "very little tissue to examine", Judge Burke excluded Dr. Gaziano's January 25, 2011 report from the record at the January 26, 2012 formal hearing, as this submission exceeded the evidentiary limitations for Claimant's affirmative medical reports. Hearing Transcript at 34; *see* Claimant's Petition for Review at 5. Because Dr. Gaziano's report was not admitted, the administrative law judge could not rely on it when determining the probative value of the pathologists' reports. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). Moreover, a review of the reports of Drs. Oesterling and Bush belies Claimant's assertion that Dr. Gaziano's opinion established the inadequacy of the tissue samples. In his July 15, 2011 report, Dr. Bush stated, "[t]wo wedge biopsies from the left upper lobe of the lung provided a significant amount of lung tissue to prepare the fourteen histologic slides for microscopic examination." Employer's Exhibit 2 (emphasis added). Dr. Oesterling similarly noted in his June 14, 2011 report that the fourteen stained sections prepared at the Charleston Area Medical Center Pathology Department "were of good technical quality" and he was able to provide his medical opinion "based on these slides." Employer's Exhibit 1.

labeled idiopathic without excluding coal dust exposure and smoking as causal factors, and the incidence of interstitial fibrosis is higher among coal miners. *Id.* Dr. Rasmussen also noted the Miner's clinical records do not support a diagnosis of restrictive lung disease, which usually accompanies interstitial fibrosis, but do show an impairment in oxygen transfer after exercise, which can be caused by coal workers' pneumoconiosis. *Id.*

Claimant has not otherwise challenged the administrative law judge's according greater weight to the opinions of Drs. Basheda and Rosenberg, as supported by the pathology findings of Drs. Oesterling and Bush, that the Miner's interstitial fibrosis was unrelated to coal dust exposure. Accordingly, we affirm his determination that these opinions disproved the existence of legal pneumoconiosis. Because Employer disproved both legal and clinical pneumoconiosis,⁹ Employer established the Miner did not have pneumoconiosis and, therefore, we affirm the administrative law judge's finding that Employer established rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

Because Employer disproved the existence of pneumoconiosis, Employer need not establish that no part of the Miner's death was caused by legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-22 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We therefore need not address the administrative law judge's rebuttal finding pursuant to §718.305(d)(2)(ii).¹⁰

Because Claimant invoked the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis but Employer rebutted the presumption, we affirm the administrative law judge's determination that Claimant is not entitled to benefits.

⁹ Judge Burke found Employer rebutted the presumed existence of clinical pneumoconiosis. 2012 Decision and Order at 19. The Board has not disturbed this finding in its prior decisions. *Buckley*, BRB No. 17-0132 BLA; *Buckley*, BRB No. 15-0184 BLA; *Buckley*, BRB No. 13-0193 BLA.

¹⁰ Claimant summarily asserts "all of the experts concluded that the Miner's death was contributed to [by] his occupational disease." Claimant's Petition for Review at 5. Contrary to Claimant's assertion, however, Drs. Basheda, Rosenberg, Oesterling, and Bush all opined that coal dust exposure did not cause, contribute, or play any role in hastening the Miner's death, while only Dr. Rasmussen opined that the Miner's coal dust exposure contributed to his death. Claimant's Exhibit 10; Employer's Exhibits 1, 2, 8, 9; Decision and Order on Third Remand at 18-19.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Third Remand is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge