U.S. Department of Labor

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

BRB Nos. 17-0241 BLA
and 17-0242 BLA

GRETCHEN GREEN (o/b/o and Widow of ROBERT PAUL GREEN)	)	
Claimant-Respondent	)	
v.	)	
DEL RIO, INCORPORATED	)	
and	)	DATE ISSUED: 12/05/2017
UNDERWRITERS SAFETY & CLAIMS	)	
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 in Miner's Claim and Awarding Benefits in Claimant's Claim of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in Miner's Claim and Awarding Benefits in Claimant's Claim (2013-BLA-5877 and 2013-BLA-5878) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) rendered 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 claim filed on August 24, 2012, and a survivor's claim[1] filed on April 19, 2013.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] in the miner's claim, the administrative law judge credited the miner with 18.93 years of underground coal mine employment. The administrative law judge found that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), thereby entitling claimant to invoke the rebuttable presumption that the miner's disability was due to pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim. The administrative law judge then found that claimant was derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[3]

On appeal, employer contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption in the miner's claim. In the survivor's claim, employer asserts that if the Board vacates the miner's award, it must remand the survivor's claim for further consideration of the evidence. Neither claimant

[1] Claimant is the widow of the miner, who died on April 2, 2013. Director's Exhibit 38. In addition to her claim for survivor's benefits, claimant is pursuing the miner's claim on behalf of his estate. Director's Exhibit 31.

[2] Pursuant to Section 411(c)(4), a miner's total disability is presumed to be due to pneumoconiosis if the miner 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 also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), *see* 20 C.F.R. §718.305.

[3] Section 422(*l*) provides that the 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 that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

nor the Director, Office of Workers' Compensation Programs, has filed a substantive response with regard to the miner's claim or the survivor's claim in this appeal.[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 rational, supported by substantial evidence, and in accordance with applicable law.[5] 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
Rebuttal of the Section 411(c)(4) Presumption

Because claimant 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,[6] or by establishing 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

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[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of underground coal mine employment, the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[6] Clinical pneumoconiosis is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

We affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

A. Legal Pneumoconiosis

Employer argues that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. Employer's Brief at 3-15. In addressing this issue, the administrative law judge considered Dr. Jarboe's medical opinion.[7] Decision and Order at 16-17, 24-27; Director's Exhibit 12; Employer's Exhibit 7. The administrative law judge found that Dr. Jarboe's opinion was unpersuasive and not well-reasoned and, therefore, did not rebut the presumed fact of legal pneumoconiosis. Decision and Order at 26-27.

In his report dated February 24, 2013 and supplemental report dated June 28, 2015, Dr. Jarboe opined that the miner did not have legal pneumoconiosis but suffered from a disabling obstructive impairment caused by his history of "cigarette smoking and reactive airways disease (asthma)." Director's Exhibit 12; Employer's Exhibit 7 at 10. Referring to studies indicating that miners characteristically have only very mild increases in residual volume due to the inhalation of coal dust, Dr. Jarboe opined that the miner's marked elevation of residual volume resulted from a long history of cigarette smoking. *Id*. Dr. Jarboe further opined that the presence of a reversible airways disease, evidenced by the miner's improvement in FEV_1 and FVC values after the administration of a bronchodilator, was indicative of impairment due to asthma or cigarette-induced bronchial hyper-reactivity, rather than coal dust. Referencing recent studies that contrasted the potential effects of inhaling cigarette smoke versus coal dust, Dr. Jarboe concluded that the miner's airflow obstruction was the result of a combination of cigarette smoking and reactive airways disease. *Id*.

[7] The administrative law judge also considered Dr. Habre's medical opinion. Decision and Order at 15-16, 23-24, 27; Director's Exhibit 10. Because Dr. Habre opined that the miner had legal pneumoconiosis, the administrative law judge noted that his opinion does not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *Id*. Accordingly, we decline to address employer's contentions of error regarding the administrative law judge's consideration of Dr. Habre's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer contends that the administrative law judge failed to provide a valid reason for finding Dr. Jarboe's opinion insufficient to rebut the presumed fact of legal pneumoconiosis, and did not satisfy the duty of rational explanation imposed by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer asserts that Dr. Jarboe is a highly qualified pulmonary expert who, contrary to the administrative law judge's findings, relied on objective evidence specific to the miner, and adequately explained why he did not diagnose legal pneumoconiosis. Employer's Brief at 3-13. Employer's arguments lack merit.

The administrative law judge determined that Dr. Jarboe relied upon studies indicating that miners have very minor elevations of residual volume to conclude that the miner's elevated residual volume is inconsistent with an obstructive impairment caused by coal dust inhalation. Decision and Order at 24-27; Director's Exhibit 12; Employer's Exhibit 7. While Dr. Jarboe attributed the miner's "marked elevation of residual volume" to cigarette smoking, the administrative law judge permissibly discounted his opinion because she found that it was based, in part, upon relative risk and statistical probabilities, rather than the miner's particular condition. Decision and Order at 26; *see Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345-46, 25 BLR 2-549, 2-568 (10th Cir. 2014); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

The administrative law judge additionally determined that Dr. Jarboe excluded a diagnosis of legal pneumoconiosis based, in part, on the miner's response to bronchodilators on pulmonary function testing. Decision and Order at 24, 26-27; Director's Exhibit 12; Employer's Exhibit 7. Noting that some reversibility on pulmonary function testing following the administration of bronchodilators does not preclude the presence of pneumoconiosis, the administrative law judge found that Dr. Jarboe failed to adequately explain why a response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. Decision and Order at 26-27, *citing Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle,* 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th

Cir. 2002). Since the administrative law judge provided valid bases for discrediting Dr. Jarboe's opinion, the only opinion supportive of employer's burden, we affirm her finding that employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[8] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

B. Disability Causation

The administrative law judge next considered whether employer could establish rebuttal by showing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 28-30. The administrative law judge rationally discounted Dr. Jarboe's opinion because the physician did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the presence of the disease. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-451-52; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 29. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's respiratory disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Ogle*, 737 F.3d at 1071, 25 BLR at 2-446-47. Consequently, we affirm the administrative law judge's award of benefits in the miner's claim.

The Survivor's Claim

After concluding that the miner was entitled to benefits, the administrative law judge correctly determined that the miner's widow met the prerequisites for derivative entitlement to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[9] Decision and

[8] Employer additionally argues that the administrative law judge failed to resolve the conflict in the evidence regarding the length of the miner's smoking history. Employer asserts that the administrative law judge "failed to validly explain" why she credited the miner with only 19 pack-years of smoking when the record contains evidence of as much as 40 years of smoking. Employer's Brief at 7-8. We need not address this argument, however, as employer has not shown how any error in the administrative law judge's calculation of the miner's smoking history affected her weighing of Dr. Jarboe's opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). As discussed *supra*, the administrative law judge permissibly discounted Dr. Jarboe's opinion for reasons other than reliance on an inaccurate smoking history, thus any error is harmless. *See Larioni*, 6 BLR at 1-278.

[9] To establish entitlement under Section 422(*l*), claimant is required to prove that: the survivor's claim was filed after January 1, 2005 and was pending on or after March

Order at 30-31. Because employer raises no specific challenge to claimant's derivative entitlement to benefits, we affirm the administrative law judge's award of survivor's benefits. *See Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 32.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

23, 2010; she is an eligible survivor of the miner; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*).