

U.S. Department of Labor

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



BRB Nos. 18-0190 BLA
and 18-0191 BLA

CATHLEEN BROCK)
(o/b/o and Widow of EARL BROCK))

Claimant-Petitioner)

v.)

IKERD BANDY COMPANY,)
INCORPORATED)

and)

DATE ISSUED: 12/21/2018

SECURITY INSURANCE COMPANY OF)
HARTFORD)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order on Remand of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson,
Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (2012-BLA-5538 and 2012-BLA-5718) of Administrative Law Judge John P. Sellers, III, rendered on a miner's subsequent claim² and a survivor's claim³ 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 employer's request to modify the award of benefits issued in both claims and is before the Board for the second time.

In a Decision and Order dated April 28, 2011, Administrative Law Judge Christine L. Kirby awarded benefits in the miner's subsequent claim, finding that he invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)⁴ and that employer did not rebut that presumption. Following the miner's death on September 2, 2011, claimant filed a survivor's claim and the district director determined that claimant was entitled to derivative

¹ Claimant is the widow of the miner, who died on September 2, 2011. Director's Exhibit 66. Claimant is pursuing the miner's claim on behalf of his estate. Director's Exhibit 65.

² The miner's initial claim for benefits, filed on September 4, 1997, was finally denied by the district director on December 19, 1997, because the miner failed to establish any of the elements of entitlement. Director's Exhibit 1. The miner's second claim, filed on February 12, 2001, was denied by Administrative Law Judge Thomas F. Phalen, Jr. because the miner failed to establish any element of entitlement. Judge Phalen's decision was affirmed by the Board on appeal. *Brock v. Ikerd Bandy Co.*, BRB No. 05-0312 BLA (Aug. 4, 2005) (unpub.); Director's Exhibit 2. The miner's current subsequent claim was filed on September 3, 2008. Director's Exhibit 4.

³ The survivor's claim does not include a filing date-stamp by the Department of Labor, but was signed by claimant on September 22, 2011. Director's Exhibit 65.

⁴ Section 411(c)(4) of the Act provides a presumption of total disability/and or death due to pneumoconiosis, if claimant establishes that 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).⁵

Employer requested modification on August 17, 2011, and the case was assigned to Judge Sellers (the administrative law judge), who issued a Decision and Order Granting Employer's Request for Modification in Miner's Claim and Denying Award of Benefits in Survivor's Claim. Upon consideration of claimant's appeal, the Board affirmed, as unchallenged by the parties, the administrative law judge's determination that the miner invoked the Section 411(c)(4) presumption.⁶ *Brock v. Ikerd Bandy Co.*, BRB Nos. 16-0262 BLA and 16-0263 BLA, slip op. at 5 n.9 (Jan. 4, 2017) (unpub.). Relevant to rebuttal of the presumption, the Board also affirmed the administrative law judge's finding that employer disproved the presumed fact of clinical pneumoconiosis. *Id.* at 9. The Board vacated, however, the administrative law judge's determination that employer disproved the presumed fact of legal pneumoconiosis, based on Dr. Rosenberg's opinion. *Id.* at 12. The Board held that "it [was] unclear from the administrative law judge's discussion whether he considered the adequacy of Dr. Rosenberg's explanation for his conclusion that the miner's restrictive lung disease is not due to coal dust exposure in light of the regulatory definition of legal pneumoconiosis."⁷ *Id.* Thus, the Board vacated the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption in the miner's claim pursuant 20 C.F.R. §718.305(d)(1)(i), and his determination that employer was entitled to modification of the award of benefits in the miner's claim. *Id.*

With respect to the survivor's claim, the Board also vacated the administrative law judge's findings that benefits were precluded under Section 422(*l*), and that Dr. Rosenberg's opinion established that no part of the miner's death was due to clinical or

⁵ 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).

⁶ Because the miner invoked the presumption, he established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

⁷ The Board affirmed, as unchallenged on appeal, the administrative law judge's determination that the opinions of Drs. Dahhan, Broudy, Rasmussen, Baker, and Hussain were entitled to "reduced probative weight" on the issue of legal pneumoconiosis. *Brock v. Ikerd Bandy Co.*, BRB Nos. 16-0262 BLA and 16-0263 BLA, slip op. at 10 n.14 (Jan. 4, 2017) (unpub.).

legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2). *Brock*, BRB Nos. 16-0262 BLA and 16-0263 BLA, slip op. at 12. Thus, the Board vacated the administrative law judge's finding that employer was entitled to modification of the award of benefits in the survivor's claim. *Id.*

On remand, the administrative law judge again credited Dr. Rosenberg's opinion that the miner did not have legal pneumoconiosis and found that employer rebutted the Section 411(c)(4) presumptions of total disability and death due to pneumoconiosis in the miner's and the survivor's claims, respectively. The administrative law judge therefore found that employer was entitled to modification, based on a mistake in fact pursuant to 20 C.F.R. §725.310. He further determined that granting modification would render justice under the Act. Accordingly, the administrative law judge denied benefits in the miner's claim and the survivor's claim.

Claimant appeals, asserting that the administrative law judge erred in crediting Dr. Rosenberg's opinion and finding that employer rebutted the Section 411(c)(4) presumption.⁸ Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.

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.⁹ 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).

The Miner's Claim

The administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request

⁸ Claimant asserts that the administrative law judge erred in not finding that the miner was totally disabled. Claimant's Brief at 7. Claimant's argument is misplaced, as the administrative law judge specifically found that the miner was totally disabled and invoked the Section 411(c)(4) presumption.

⁹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

for modification is filed, “any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility.” *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); see *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825 (6th Cir. 2001); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Because the miner invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis in his subsequent claim, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,¹⁰ or 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).

In order to disprove that the miner had legal pneumoconiosis, employer must establish that he did not suffer from a chronic obstructive or restrictive lung disease or impairment that was “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.”¹¹ 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). The administrative law judge determined that Dr. Rosenberg’s opinion was sufficient to satisfy employer’s burden of proof. Decision and Order on Remand at 12. Dr. Rosenberg explained that the miner did not have legal pneumoconiosis because he could not detect any anatomical changes in the miner’s lungs by which coal dust exposure could have caused the miner’s restrictive lung disease or impairment. Employer’s Exhibit 1. The administrative law judge found that Dr. Rosenberg’s opinion was supported by the more credible x-ray evidence showing no opacities, interstitial fibrosis or pleural abnormalities that could possibly be attributed to coal dust exposure.¹² Decision and Order on Remand at 13; Employer’s Exhibit 1.

¹⁰ 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). 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).

¹¹ There is no evidence that the miner had an obstructive lung disease or impairment.

¹² Although claimant contends that the administrative law judge erred in discrediting Dr. Rasmussen’s opinion that the miner had x-ray evidence of interstitial fibrosis, the Board previously affirmed the administrative law judge’s finding that Dr. Rasmussen’s opinion was entitled to “reduced probative weight” on the issue of legal pneumoconiosis. *Brock*, BRB Nos. 16-0262 BLA and 16-0263 BLA, slip op. at 10; n.14; see *infra* at 4 n.7; Director’s Exhibit 12. The Board’s holding constitutes the law of the case and claimant

Claimant contends that Dr. Rosenberg's opinion is entitled to no weight because he did not examine the miner.¹³ Claimant's Brief at 6. There is no merit to claimant's contention. A non-examining physician's opinion may be sufficient to rebut the Section 411(c)(4) presumption if it is found to be reasoned and documented. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Collins v. J&L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999). The administrative law judge concluded that Dr. Rosenberg's opinion was reasoned and documented in view of his rationale and the objective evidence. Decision and Order on Remand at 13.

The Board is not empowered to reweigh the evidence and must limit its review to contentions of error that are specifically raised by the parties. 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Although claimant's brief generally alleges that Dr. Rasmussen's opinion is more credible, it does not explain why the administrative law judge erred in relying on Dr. Rosenberg's rationale to find that employer disproved the existence of legal pneumoconiosis. Claimant's Brief at 6-7; *see Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21. We therefore affirm the administrative law judge's finding that employer disproved the presumed fact of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). As employer established that the miner did not have legal or clinical pneumoconiosis, we affirm the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). Thus, because claimant has raised no other issues with respect to the grant of modification with respect to the miner's subsequent claim, we affirm the administrative law judge's determination that employer established a basis for modification pursuant to 20 C.F.R. §725.310, and we further affirm the denial of benefits in the miner's subsequent claim. Decision and Order on Remand at 14.

has not shown that an exception to the doctrine applies here. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

¹³ The administrative law judge noted in his prior Decision and Order that while Dr. Rosenberg "did not physically examine the [m]iner, he reviewed extensive documentation concerning his medical condition." Decision and Order Granting Employer's Request for Modification in Miner's Claim and Denying Award in Survivor's Claim at 19; *see* Employer's Exhibit 1.

The Survivor's Claim

Because claimant invoked the Section 411(c)(4) presumption in the survivor's claim, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis, or 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); *see* Decision and Order on Remand at 16. The administrative law judge observed that medical opinion evidence in the survivor's claim was "essentially the same" as in the miner's claim, and that any "slight alteration" of the evidence "did not alter the outcome of his analysis. Decision and Order on Remand at 16. Relying on his determinations that employer disproved both legal and clinical pneumoconiosis, the administrative law judge found that employer rebutted the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i). *Id.* Because we have rejected claimant's contention that Dr. Rosenberg's opinion is not credible on the issue of legal pneumoconiosis, and claimant raises no other challenge to the administrative law judge's findings and grant of modification, we affirm the administrative law judge's denial of benefits in the survivor's claim.¹⁴ 30 U.S.C. §921(c)(4) (2012); *see Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21.

¹⁴ Based on our affirmance of the denial of benefits in the miner's claim, we affirm the administrative law judge's finding that claimant is not entitled to derivative survivor's benefits pursuant to Section 422(*I*). 30 U.S.C. §932(*I*); Decision and Order on Remand at 26.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge