BRB No. 13-0504 BLA

RHEBA F. DAVID
(Widow of MORGAN H. DAVID)

Claimant-Petitioner

v.

LUZERNE COAL CORPORATION

and

OLD REPUBLIC GENERAL INSURANCE CORPORATION

Employer/Carrier-Respondents

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

Party-in-Interest

DATE ISSUED: 07/30/2014

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

James W. Creenan (Creenan & Baczkowski), Murrysville, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenburg Traurig, LLP), Washington, D.C., for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (2011-BLA-05161) of Administrative Law Judge Thomas M. Burke denying benefits on a survivor's claim filed on December 12, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge initially considered the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[2] The administrative law judge found that claimant established that the miner worked for 20.5 years in surface coal mine employment, but failed to establish that the miner's work was done in conditions comparable to those in an underground mine. Therefore, the administrative law judge found that claimant did not establish at least fifteen years of qualifying coal mine employment and, thus, could not invoke the amended Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

The administrative law judge also considered whether claimant could establish entitlement to benefits, without the assistance of the amended Section 411(c)(4) presumption, pursuant to 20 C.F.R. Part 718. The administrative law judge found that the autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge, however, found that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[3] Accordingly, the administrative law judge denied benefits.

[1] Claimant is the surviving spouse of the miner, who died on December 13, 2007. Director's Exhibit 1.

[2] Relevant to this survivor's claim, amended Section 411(c)(4) provides a presumption that, a miner's death was due to pneumoconiosis, if the miner had at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of 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.

[3] The Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The language previously found at 20 C.F.R. §718.205(c) is now set forth in 20 C.F.R. §718.205(b).

On appeal, claimant challenges the administrative law judge's finding that she did not prove that the miner had fifteen years of qualifying coal mine employment. Claimant contends, therefore, that the administrative law judge erred in finding that she did not establish invocation of the amended Section 411(c)(4) presumption. In the alternative, claimant asserts that the administrative law judge erred in finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Presumption – Length of Qualifying Coal Mine Employment

With respect to whether claimant could invoke the amended Section 411(c)(4) presumption of death due to pneumoconiosis, the administrative law judge initially noted that "[c]laimant bears the burden of demonstrating" that the miner's 20.5 years of surface coal mine employment "were spent working 'in conditions substantially similar to conditions in an underground mine.'" Decision and Order at 17, *quoting Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The administrative law judge further indicated that in *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), the United States Court of Appeals for the Seventh Circuit held that this burden was satisfied when the claimant "'clearly delineated, in objective terms, the . . . conditions on the surface of the mine' in unrebutted testimony that he had been 'probably exposed to as much dust there as [he was] working underground,' and the shop in which he had worked was 'one of the dustiest areas,' causing him to 'always' leave work 'covered with coal dust.'" Decision and Order at 17, *quoting Summers*, 272 F.3d at 479, 22 BLR at 2-275.

The administrative law judge then acknowledged claimant's testimony that the miner's clothing and exposed skin were covered in coal dust when he returned from

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Decision and Order at 18 n.5; Director's Exhibit 4.

work, and that "she remembered him coming home sweaty[,] as well as dusty, which she took to mean he was not sitting in an air-conditioned bulldozer or dragline cab all day, but was rather exposed to the elements and outside air." Decision and Order at 17. The administrative law judge also noted, however, that claimant testified that she has memory problems, that the miner did not discuss his job duties with her and that, according to employer, the miner's job duties involved sitting in an enclosed cab, operating various machines. *Id.* The administrative law judge concluded that claimant had not carried her burden to show that the miner's work was performed in conditions comparable to those in an underground mine, in light of her "own admissions that the miner did not speak about his work and that she has problems with her memory." *Id.*, *citing Muncy*, 25 BLR at 1-29.

Claimant argues that the administrative law judge's finding must be vacated, as he misapplied the burden of proof and did not properly weigh claimant's testimony regarding the dust conditions that the miner experienced in his job at the surface mine. Claimant's contentions have merit, in part.

Regarding the administrative law judge's application of the burden of proof, claimant alleges that once she put forth evidence that the miner was exposed to coal dust, the administrative law judge should have shifted the burden to employer to rebut this evidence. We hold that the administrative law judge properly stated that the rebuttable presumption of death due to pneumoconiosis is not invoked unless a claimant establishes that the miner worked at least fifteen years in conditions substantially similar to the conditions in an underground mine and that the miner had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b)(2); *see Muncy*, 25 BLR at 1-29. Thus, the administrative law judge also determined correctly that claimant has the burden of producing evidence regarding the miner's coal dust exposure and the burden of persuading the trier-of-fact, by a preponderance of the evidence, that the miner was regularly exposed to coal dust. 30 U.S.C. §921(c)(4); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Muncy*, 25 BLR at 1-29.

As claimant alleges, however, the administrative law judge did not provide an adequate rationale for determining that claimant's testimony was insufficient to establish that the miner's surface coal mine employment was in conditions substantially similar to those in an underground mine. Subsequent to the issuance of the administrative law judge's Decision and Order, the Department of Labor promulgated a revised version of 20 C.F.R. §718.305, in which it set forth the standard for establishing substantial similarity. The text of 20 C.F.R. §718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to

coal-mine dust while working there."[5] 20 C.F.R. §718.305(b)(2); *see Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2- (6th Cir. 2013); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).

As previously indicated, in the present case, the administrative law judge discredited claimant's testimony, citing claimant's statements that the miner did not talk to her about his work and that her memory is faulty, and employer's assertion that the miner performed his various jobs in vehicles with enclosed cabs. Decision and Order at 17. A review of the hearing transcript indicates, however, that claimant's testimony differs from the administrative law judge's characterization. Although the administrative law judge accurately reported that claimant said that the miner did not talk about his work when he was at home, the administrative law judge did not acknowledge her accompanying statement that "I knew what he did when he went to work," or the following colloquy with her attorney:

> Q. Ma'am, to be clear, you did not intend to say you had no idea what your husband did at the mine?
>
> A. No, no, I don't mean that. It just wasn't an hour by hour of what he did in the daytime. I knew what he did. I knew he worked in a coal mine. I knew he worked on the bulldozer. I knew when he was on the drag line, that kind of stuff.

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[5] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013).

Hearing Transcript at 19. In addition, the administrative law judge observed correctly that claimant said she has problems with her memory, which she testified was due to fibromyalgia, but he did not consider that claimant's statement was made in the context of her responses to questions on cross-examination regarding the dates and locations of the miner's coal mine employment. *Id*. at 35-36. Thus, it is not clear that there is an adequate foundation for the administrative law judge's determination that claimant's trouble remembering this type of information affected the credibility of her testimony that, when the miner returned from work each day, "his clothes were black" and "he was just covered with dirt and black coal dust." *Id*. at 20-21.

Similarly, in observing that employer contradicted claimant's testimony by suggesting that the miner was not exposed to coal dust because he performed his work in air-conditioned vehicles, the administrative law judge did not acknowledge claimant's statements that "I never heard that [the] air-conditioned [cab was] closed up where he didn't get dust because he came home covered with it," and that, on hot days, the miner returned home sweaty, wearing dirty clothes. Hearing Transcript at 37-38. In light of the administrative law judge's omission of relevant testimony from consideration, and of an adequate rationale for his finding regarding claimant's memory, we must vacate the administrative law judge's determination that claimant failed to establish that the miner's surface mine employment was in conditions substantially similar to those in an underground mine. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Marcum v. Director, OWCP,* 11 BLR 1-23, 1-24 (1987). On remand, the administrative law judge should consider, in accordance with 20 C.F.R. §718.305(b), whether claimant has established the requisite fifteen years of qualifying coal mine employment necessary to invoke the amended Section 411(c)(4) presumption, based on his consideration of all relevant evidence. *See Muncy*, 25 BLR at 1-29.

If, on remand, the administrative law judge finds that claimant establishes at least fifteen years of qualifying coal mine employment, he must determine whether the miner suffered from a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). If the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will be entitled to invoke the rebuttable presumption of death due to pneumoconiosis under amended Section 411(c)(4). If the administrative law judge finds that claimant is entitled to invocation of the presumption of death due to pneumoconiosis at 20 C.F.R. §718.305, the regulations provide that the burden of proof shifts to employer to establish rebuttal by establishing both that the miner did not have pneumoconiosis, or that the miner's death did not arise, in whole or in part, out of dust exposure in his coal mine employment. 20 C.F.R. §718.305(d)(2); *see Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

II. Death Due to Pneumoconiosis – Without Benefit of the Presumption

In the interest of judicial economy, we also address claimant's allegations of error regarding the administrative law judge's consideration of her survivor's claim, without benefit of the rebuttable presumption of death due to pneumoconiosis. To establish entitlement to survivor's benefits under 20 C.F.R. §718.205, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Pursuant to 20 C.F.R. §718.205(b), death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (b)(2). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989). Failure to establish any one of these requisite elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In considering whether claimant established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b), the administrative law judge evaluated the death certificate authored by Dr. Reilly, the coroner, and the medical opinions of Drs. Wecht, Oesterling and Renn. On the death certificate, Dr. Reilly identified arteriosclerotic heart disease with congestive heart failure as the immediate cause of the miner's death.[6] Director's Exhibit 4; Claimant's Exhibit 8. Dr. Wecht performed the miner's autopsy and diagnosed coal workers' pneumoconiosis (CWP), chronic obstructive pulmonary disease (COPD), and hypertensive and arteriosclerotic heart disease. Claimant's Exhibit 6. Dr. Wecht indicated that the miner's CWP "was the basis for his [COPD]" and was a substantial contributing factor in the miner's death. *Id*. At his deposition, Dr. Wecht testified that the miner had both heart disease and lung disease and that the "disease process in the lungs contributes to, enhances [and] aggravates the problems caused by the heart disease, and that is how it comes to be, in my opinion, a substantial contributing factor to [the miner's] death." Claimant's Exhibit 7 at 23. In contrast, although Dr. Oesterling, who reviewed the autopsy slides, and Dr. Renn who reviewed the autopsy report, agreed with Dr. Wecht's diagnosis of COPD, both opined that the inhalation of coal mine dust did not cause, contribute to, or hasten the miner's death. Employer's Exhibits 4, 5, 8.

[6] All of the doctors agreed that arteriosclerotic heart disease with congestive heart failure, as listed on the death certificate, was the immediate cause of the miner's death. Director's Exhibits 8, 9, 11; Claimant's Exhibits 4, 5, 6, 7; Employer's Exhibits 1A, 1B, 2, 6, 7.

The administrative law judge gave "no weight" to the death certificate prepared by Dr. Reilly because he did not identify the basis for his conclusions, and it was not discernible from the record. Decision and Order at 20. The administrative law judge stated that Dr. Wecht opined that "the primary cause of death was the miner's hypertensive and [arteriosclerotic cardiovascular disease], but CWP contributed by causing COPD, which exacerbated the problems caused by heart disease and forced the miner's heart to work harder, contributing to a right ventricular hypertrophy disproportional to the left." *Id*. The administrative law judge determined that Dr. Wecht's attribution of the miner's COPD to CWP, in part, was not persuasive, stating:

> Not only did the other physicians of record dispute it strongly, but Dr. Wecht's own opinion fails to support the assertion adequately. He said that the miner's cigarette smoking was "definitely" significant "and could well have been the major cause of the emphysema," and noted that in a case as advanced as the miner's, it is impossible to tell whether the emphysema was centrilobular or panlobular – the latter of which, all three doctors of record have said, is caused by cigarette smoke inhalation and not coal dust exposure. Given that even Dr. Wecht has said that there is no way to prove that the miner's COPD was in fact caused by coal dust exposure[,] rather than cigarette smoking, I find that this underlying assumption of Dr. Wecht's foundation has not, in fact, been shown to be true. Thus, even if he were correct in the remaining assumptions underlying his opinion (that the miner's COPD exacerbated his heart problems, the COPD contributed to his right lung hypertrophy, and these exacerbations caused the miner to die sooner than he would have from the heart disease alone), [c]laimant has not proven that coal dust exposure had anything to do with the medical events leading to the miner's death.

Id. at 20, *quoting* Claimant's Exhibit 7.

Claimant maintains that the administrative law judge should have accorded determinative weight to Dr. Wecht's identification of CWP as a contributing cause of death, based on his status as the autopsy prosector. Claimant also alleges that the administrative law judge did not properly consider Dr. Wecht's opinion on the cause of the miner's death, as he did not accurately characterize the physician's statements regarding CWP and COPD as contributing causes of the miner's death. Claimant further asserts that, contrary to the administrative law judge's finding, Dr. Wecht's opinion on the issue of death causation was adequately documented and reasoned.

We reject claimant's argument that Dr. Wecht's opinion was entitled to controlling weight because he performed the miner's autopsy. An administrative law judge is not required to credit the opinion of the autopsy prosector. *See Evosevich v. Consolidation*

Coal Co., 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Cadwallader v. Director, OWCP*, 7 BLR 1-879 (1985); *Dipyatic v. BethEnergy Mines Corp.*, 7 BLR 1-758 (1985). We are also not persuaded that the administrative law judge mischaracterized Dr. Wecht's opinion, as a review of the record indicates that the administrative law judge acted within his discretion as fact-finder in determining that Dr. Wecht based his identification of CWP as a contributing cause of the miner's death on his belief that CWP caused the miner's COPD, which was the mechanism that hastened his death from heart disease. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Claimant's Exhibits 6, 7 at 40-41, 44, 53.

However, claimant's argument that the administrative law judge erred in finding that Dr. Wecht's opinion was unreasoned and undocumented has merit. The administrative law judge discredited Dr. Wecht's opinion because he could not definitively ascertain the extent to which coal dust exposure was responsible for the miner's COPD, which Dr. Wecht identified as a contributing cause of death. Decision and Order at 20. The administrative law judge did not consider that the Board has held that a physician need not be able to specifically apportion the extent to which various causal factors contribute to a respiratory or pulmonary disease, in order to provide a credible opinion regarding the cause of a miner's respiratory or pulmonary disease. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). As long as the physician states that coal dust exposure was a substantial cause of the miner's respiratory or pulmonary disease, and identifies the documentation supporting his or her opinion, an administrative law judge may credit this opinion. *Gross*, 23 BLR at 1-18-19.

In the present case, Dr. Wecht stated that the miner's autopsy results conclusively established the presence of CWP, and that CWP played a significant role in causing the miner's COPD, although smoking was likely the primary cause. Claimant's Exhibit 7 at 12-15, 40-41, 44, 53. Dr. Wecht also noted that he disagreed that the inability to distinguish whether the miner had centrilobular or panlobular emphysema provided a basis for excluding pneumoconiosis and/or coal dust exposure as a substantial causal factor in the miner's COPD. Claimant's Exhibit 7 at 36. Because the administrative law judge did not properly consider whether Dr. Wecht provided a reasoned and documented opinion on the issue of death causation, despite his acknowledgement that he could not specifically apportion the extent to which smoking and coal dust exposure contributed to the miner's COPD/emphysema, we vacate the administrative law judge's finding that claimant did not affirmatively establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *see also Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003).

If the administrative law judge determines, on remand, that claimant has not invoked the rebuttable presumption of death due to pneumoconiosis at 30 U.S.C. §921(c)(4), he must reconsider his finding that claimant failed to establish entitlement on the merits at 20 C.F.R. Part 718. In rendering all of his findings on remand, the administrative law judge must set forth the rationale underlying his conclusions in accordance with the Administrative Procedure Act.[7] *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[7] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).