BRB No. 13-0520 BLA

VERDIE VANDYKE (Widow of WILLIE M. VANDYKE)	)	
Claimant-Respondent	)	
v.	)	
BEATRICE POCAHONTAS COMPANY/ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 07/15/2014
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 - Award of Survivor's Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Survivor's Benefits (11-BLA-5681) of Administrative Law Judge Richard T. Stansell-Gamm, rendered 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 June 11, 2010.[1] Director's Exhibit 2.

After crediting the miner with at least thirty-five years of qualifying coal mine employment,[2] the administrative law judge found that the blood gas study evidence established that the miner was totally disabled by a pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

---

[1] Claimant is the widow of the miner, who died on January 21, 2010. Director's Exhibit 8. The miner filed four claims during his lifetime, all of which were denied. (unnumbered exhibits).

[2] The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibits 3-6. Accordingly, this case arises with the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[3] Congress enacted amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), which affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this survivor's claim, Congress reinstated Section 411(c)(4) of the Act, which provides that if a survivor establishes that the miner had at least fifteen years of underground coal mine employment or surface mine employment in conditions substantially similar to those of an underground mine, and suffered from a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. *Id.* 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

On appeal, employer challenges the administrative law judge's finding that rebuttal of the presumption was not established. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[4]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, rational, 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).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of clinical and legal pneumoconiosis,[5] or by proving that the miner's death did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). To prove that the miner's death did not arise from his coal mine employment, employer had to establish "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)(ii); 78 Fed. Reg. at 59,115. The administrative law judge found that employer did not establish rebuttal by either method. Decision and Order at 59-62.

After finding that employer disproved the existence of clinical pneumoconiosis, the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis. In determining whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the pathology opinions of Drs.

---

[4] Because employer does not challenge the administrative law judge's findings that the miner had over fifteen years of qualifying coal mine employment, that the evidence established total disability, and that claimant established invocation of the Section 411(c)(4) presumption, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] "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 to that deposition caused by dust exposure in 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).

Caffrey and Swedarsky, and the medical opinion of Dr. Tuteur.[6] Dr. Caffrey opined that the miner suffered from moderate centrilobular emphysema, together with congestive heart failure. Relevant to the cause of the miner's emphysema, Dr. Caffrey opined that "[c]oal dust can cause emphysema, but it is certainly not the major cause of emphysema." Employer's Exhibit 1 at 3. Dr. Swedarsky similarly diagnosed mild to moderate emphysema and congestive heart failure. Regarding the cause of the miner's emphysema, Dr. Swedarsky stated that "[e]mphysema is related to cigarette smoking" and that, therefore, "[the miner] may have smoked cigarettes." Employer's Exhibit 2 at 6. Dr. Tuteur reviewed the medical evidence of record, including the pathology reports of Drs. Caffrey and Swedarsky, and concluded that the miner suffered from mild emphysema. Dr. Tuteur opined that the miner also had a respiratory impairment, in the form of an intermittent gas exchange impairment at rest, but stated that this impairment was due to cardiac disease, and was unrelated to coal mine dust exposure. Employer's Exhibit 6 at 7.

The administrative law judge found that Dr. Caffrey did not render a specific determination as to the cause of the miner's emphysema. Decision and Order at 17-18. The administrative law judge considered Dr. Swedarsky's reasoning as to the cause of the miner's emphysema, that the miner "may" have smoked cigarettes, to be speculative and entitled to diminished probative value. Finally, the administrative law judge determined that Dr. Tuteur did not address the cause of the miner's emphysema, and that his opinion regarding the cause of the miner's gas exchange impairment was not well reasoned. The administrative law judge therefore held that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 18, 56-57, 59.

Employer does not specifically challenge the administrative law judge's bases for finding that the opinions of Drs. Caffrey, Swedarsky, and Tuteur, are not sufficient to disprove the existence of legal pneumoconiosis. Because employer provides the Board with no basis upon which to review the administrative law judge's findings, we affirm the administrative law judge's determination that employer did not disprove the existence of

---

[6] The administrative law judge also considered, and discounted, the pathology opinion of Dr. Dennis, diagnosing simple coal workers' pneumoconiosis and focal areas of progressive massive fibrosis, and the miner's treatment and hospitalization records, which variously documented and diagnosed a history of "black lung," coal workers' pneumoconiosis, chronic obstructive pulmonary disease (COPD), and COPD due to pneumoconiosis. Decision and Order at 6-9, 12-13, 57-58. Employer does not object to the administrative law judge's consideration of this evidence as it cannot assist employer to meet its burden to disprove the existence of pneumoconiosis.

legal pneumoconiosis.[7] *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

In addressing whether employer rebutted the Section 411(c)(4) presumption by establishing that no part of the miner's death was caused by pneumoconiosis, the administrative law judge again considered the opinions of Drs. Caffrey, Swedarsky, and Tuteur.[8] Dr. Caffrey opined that the miner suffered from moderate centrilobular emphysema, as identified on each of the ten slides he reviewed, together with congestive heart failure, and that he had a respiratory impairment that was probably due to a combination of these conditions. Dr. Caffrey stated that the miner died from cardiac arrest, as a result of coronary artery sclerosis with associated ventricular fibrillation and congestive heart failure, and that the miner's coal mine dust exposure played no role. Employer's Exhibit 1 at 4. The doctor explained that the anthracotic pigment shown on the autopsy slides he reviewed could not be classified as coal workers' pneumoconiosis, and could not have caused any discernable pulmonary disability, because the coal dust deposits did not stimulate the production of reticulin or collagen. Employer's Exhibit 1 at 3-4.

Dr. Swedarsky also opined that the miner died a cardiac death. Dr. Swedarsky stated that he could rule out coal mine dust exposure as playing any role in the miner's death because the miner's emphysema, as seen on the slides he reviewed, was too mild to have interfered with respiratory function. Employer's Exhibit 8 at 20, 29.

Dr. Tuteur reviewed the medical evidence of record, including the pathology reports of Drs. Caffrey and Swedarsky. Based on his assessment of the pathology evidence, Dr. Tuteur opined that the miner suffered from mild emphysema that was not of sufficient severity to cause any clinically significant impairment of pulmonary function.[9] Employer's Exhibits 6 at 6; 9 at 20, 30-31. Dr. Tuteur opined that, therefore,

---

[7] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

[8] The administrative law judge also considered the opinions of Drs. Piriz and Goss, that coal mine dust exposure contributed to the miner's death, but found them to be not credible. Decision and Order at 60. However, their opinions cannot assist employer to meet its burden to establish that coal mine dust exposure played no role in the miner's death.

[9] Dr. Tuteur stated that the miner's emphysema was "described by all prosectors as mild," and that "this was agreed upon by all . . . reviewing pathologists." Employer's

it was not the miner's lung disease that led to his death, but the miner's dramatically advanced heart disease of multiple etiology. Employer's Exhibit 9 at 28-30. Thus, Dr. Tuteur concluded that coal mine dust exposure played no role in the miner's death. Employer's Exhibit 9 at 31.

Evaluating the medical evidence, the administrative law judge initially found that the pathology evidence was in conflict regarding the severity of the miner's emphysema and its potential impact on the miner's lung function and, consequently, on his death. Decision and Order at 18. The administrative law judge observed that while Dr. Caffrey diagnosed moderate centrilobular emphysema that was sufficient to cause a respiratory impairment, Dr. Swedarsky opined that the miner's emphysema was insufficient to have contributed to a respiratory or pulmonary impairment. Decision and Order at 13-17, 18. Finding that Drs. Caffrey and Swedarsky had both prepared reasoned and documented opinions on this issue, and are equally well qualified, the administrative law judge found that the pathology evidence is "inconclusive" regarding the severity of the miner's emphysema. Decision and Order at 17-18. Relevant to the cause of the miner's death, the administrative law judge found that the opinion of Dr. Caffrey was inadequately reasoned because he did not discuss the miner's emphysema and definitively determine that legal pneumoconiosis was not a contributing factor. Decision and Order at 60. The administrative law judge also declined to credit the opinions of Drs. Swedarsky and Tuteur, that because the miner did not have a respiratory impairment, coal mine dust exposure could not have contributed to his death. The administrative law judge found that both opinions were premised on a pathology determination of mild emphysema which is not established in the record. Decision and Order at 61. Thus, the administrative law judge concluded that employer did not establish rebuttal by showing that the miner's death was not due to pneumoconiosis. Decision and Order at 60-61.

Employer initially asserts that the administrative law judge mischaracterized the opinion of Dr. Caffrey in finding the pathology evidence to be in equipoise regarding the severity of the miner's emphysema and its impact on the miner's lung function. Employer asserts that Dr. Caffrey's opinion is too equivocal to be credible, and that Dr. Caffrey's reliance on information contained on the miner's death certificate, which was not credited by the administrative law judge, tainted his opinion. Employer's Brief at 11-

---

Exhibits 6 at 6; 9 at 19. However, as the administrative law judge observed, based on their slide reviews, Dr. Caffrey diagnosed moderate emphysema, and Dr. Swedarsky diagnosed mild to moderate emphysema. Employer's Exhibits 1, 2, 4. The administrative law judge found that Dr. Tuteur did not explain how he arrived at his assessment in light of the conflicting pathology evidence he reviewed. Decision and Order at 59.

14. We disagree. A doctor's use of cautious language does not necessarily reflect equivocation; it is the administrative law judge's task to evaluate the strength of the doctor's opinion. *See Perry v. Mynu Coals, Inc*., 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763-64, 21 BLR 2-587, 2-606 (4th Cir. 1999). In this case, Dr. Caffrey accurately noted that the miner's death certificate lists the immediate cause of death as cardiac arrest, due to or as a consequence of end stage chronic obstructive pulmonary disease, with coal workers' pneumoconiosis and diabetes mellitus listed as other significant conditions contributing to death. Employer's Exhibit 1 at 3; Director's Exhibit 8. Dr. Caffrey concluded that "[a]pparently, from that information and since the autopsy slides definitely show a moderate degree of centrilobular emphysema, the patient did have a respiratory impairment. This was probably from the emphysema and congestive heart failure." Employer's Exhibit 1 at 3. The administrative law judge reasonably credited that opinion as evidence that the miner had a respiratory impairment that was due, in part, to emphysema. *See Mays*, 176 F.3d at 763-64, 21 BLR at 2-606; Decision and Order at 18. Moreover, employer has not shown how Dr. Caffrey's opinion regarding the severity of the miner's emphysema is undermined by his reference to the miner's death certificate in his report. The administrative law judge credited the death certificate regarding the circumstances of the miner's death; he discredited only the conclusion on the death certificate, that coal workers' pneumoconiosis was a contributing factor to the miner's death, because it was unexplained. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 60; Employer's Brief at 12.

Employer next argues that the administrative law judge erred in finding that the opinions of Drs. Caffrey, Swedarsky and Tuteur are not sufficient to establish rebuttal by showing that the miner's death was not due to pneumoconiosis, pursuant to 30 U.S.C. §921(c)(4). Employer's Brief at 11-17. Contrary to employer's argument, the administrative law judge permissibly discredited the opinions of Drs. Swedarsky and Tuteur, eliminating all possible pulmonary diseases, including those caused by coal mine dust exposure, as a contributing factor to the miner's death, as inconsistent with the conflicting pathology evidence regarding the severity of the miner's emphysema and its potential impact on the miner's lung function. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark,*12 BLR at 1-155; Decision and Order at 61. The administrative law judge also acted within his discretion in discounting Dr. Caffrey's opinion, that coal mine dust exposure played no role in the miner's death, because, having concluded that the miner had a respiratory impairment due, in part, to emphysema, Dr. Caffrey then failed to specifically address either the cause of the emphysema or its role in the miner's death. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 60-61. In asserting that Drs. Caffrey, Swedarsky and Tuteur offered well-reasoned opinions as to

the cause of the miner's death, Employer's Brief at 15-17, employer is asking the Board to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that employer failed to establish that no part of the miner's death was caused by pneumoconiosis pursuant to Section 411(c)(4).

Because claimant established invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge properly awarded benefits. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order - Award of Survivor's Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge