U.S. Department of Labor

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

BRB No. 14-0299 BLA

PATRICIA A. TOBIN (Widow of JAMES E. TOBIN)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 05/29/2015
CYPRUS CUMBERLAND RESOURCES	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

Paul F. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-5689) of Administrative Law Judge Drew A. Swank, 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 25, 2010.[1] In a Decision and Order dated May 14, 2014, the administrative law judge adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the miner worked in underground coal mine employment for twenty-eight years. The administrative law judge further found that the evidence was sufficient to establish that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, therefore, claimant was entitled to the rebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). However, based on his determination that the opinions of Drs. Rosenberg and Zaldivar established that smoking, and not coal mine dust exposure, caused the miner's pulmonary impairments, the administrative law judge found that employer rebutted the presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that employer established rebuttal of the amended Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), responds and maintains that the denial of benefits must be vacated because the administrative law judge failed to properly examine the validity of the reasoning of employer's experts. The Director also contends that the administrative law judge's discussion of the medical science that employer's experts relied upon in forming their opinions was inadequate. Employer responds, urging affirmance of the denial of benefits.

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,

[1] Claimant, Patricia A. Tobin, is the widow of the miner, James E. Tobin, who died on October 2, 2006. Director's Exhibit 11. The miner filed a claim for federal black lung benefits on May 18, 1994, which was denied on October 6, 1994. Director's Exhibit 1. Accordingly, claimant is not entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.

[2] Under amended Section 411(c)(4) of the Act, a miner's death is presumed to be 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 suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

and in accordance with applicable law.[3] 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 Amended Section 411(c)(4) Presumption

The administrative law judge initially considered whether claimant established the existence of clinical pneumoconiosis,[4] and found that claimant failed to satisfy her burden, as the record did not contain any analog x-ray, biopsy or autopsy evidence relevant to 20 C.F.R. §718.202(a)(1), (2).[5] Decision and Order at 10-11. The

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, because the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 8; Director's Exhibit 6.

[4] The regulation at 20 C.F.R. §718.201(a)(1) provides:

> "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. 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).

[5] The administrative law judge observed that employer submitted Dr. Wheeler's negative reading of an x-ray, dated October 27, 2005. Based on Dr. Wheeler's written comment, that the National Institute for Occupational Safety and Health began allowing "ILO classification of PA digital 'soft copy'" in October of 2012, the administrative law judge determined that the x-ray was digital. Employer's Exhibit 1; Decision and Order at 10. The administrative law judge also noted that the admission of a digital x-ray is governed by 20 C.F.R. §718.107. Decision and Order at 10. However, the administrative law judge made no finding as to whether employer established that the digital x-ray was medically acceptable and relevant to the diagnosis of pneumoconiosis, as required by 20 C.F.R. §718.107(b), and did not indicate whether he gave any weight to Dr. Wheeler's reading.

administrative law judge next addressed the amended Section 411(c)(4) presumption available to claimant at 20 C.F.R. §718.202(a)(3). Upon finding that claimant established that the miner had at least fifteen years of underground coal mine employment, and a totally disabling respiratory or pulmonary impairment at the time of his death, the administrative law judge determined that claimant was entitled to the benefit of the amended Section 411(c)(4) presumption. *Id.* at 16. The administrative law judge observed specifically that "the presence of legal pneumoconiosis as required by 20 C.F.R. §718.202(a) is established by the presumption contained at 20 C.F.R. §718.305." *Id.*

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

In addressing the issue of rebuttal, the administrative law judge considered the medical opinions of employer's experts, Drs. Rosenberg and Zaldivar, and stated, "they successfully demonstrate how the deceased miner's long history of smoking and not his exposure to coal mine dust caused his pulmonary impairments."[6] Decision and Order at 21. The administrative law judge also determined that the contrary opinion of claimant's expert, Dr. Begley, was entitled to little weight because he "gave no rationale, basis, or support for his opinion that both tobacco smoke and coal dust inhalation caused the pulmonary impairments in this particular coal miner."[7] *Id.* The administrative law judge further observed:

> Employer has successfully rebutted the presumption as provided for by 20 C.F.R § 718.305(D)(ii) [sic], and [c]laimant has therefore failed to prove by a preponderance of the evidence that the deceased miner's death was contributed to or hastened by his coal workers' pneumoconiosis. As such, [c]laimant has not met her burden with regard to the required elements of her claim, and therefore she is not entitled to benefits.

Decision and Order at 21 (internal citations omitted).

Claimant argues that the administrative law judge erred in shifting the burden to claimant to establish that the miner's death was due to pneumoconiosis, and in crediting the opinions of Drs. Rosenberg and Zaldivar. These contentions have merit. Based on

[6] Drs. Rosenberg and Zaldivar opined that the miner's disabling obstructive disease was due solely to smoking, and that coal dust exposure did not play a role in the miner's impairment, disability or death. Employer's Exhibits 2, 3, 5, 7.

[7] Dr. Begley opined that the miner's totally disabling respiratory impairment, and death, were related to smoking and coal dust exposure. Claimant's Exhibits 1, 2.

the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption, the burden of proof shifted to employer to rebut the presumption by affirmatively establishing that the miner did not have legal pneumoconiosis[8] and clinical pneumoconiosis, or by establishing that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201(a). 20 C.F.R. §718.305(d)(2).

Rather than assess whether the opinions of employer's experts were sufficient to rebut the amended Section 411(c)(4) presumption, the administrative law judge weighed Dr. Begley's opinion against the opinions of Drs. Rosenberg and Zaldivar, and found it insufficient to establish a causal connection between coal dust exposure and the miner's totally disabling respiratory impairment. Decision and Order at 20-21; Claimant's Exhibits 1, 2. In so doing, the administrative law judge improperly placed the burden of proof on claimant to establish that the miner had legal pneumoconiosis and that the miner's death was due to legal pneumoconiosis. Because the administrative law judge's rebuttal analysis does not conform to 20 C.F.R. §718.305(d)(2), we must vacate his finding that employer successfully rebutted the amended Section 411(c)(4) presumption.

Claimant further contends that the administrative law judge erred in crediting the opinions of Drs. Rosenberg and Zaldivar, despite their reliance on premises contrary to the discussion of sound medical science by the Department of Labor (DOL) in the preamble to the 2001 revisions to the regulations. Claimant argues that the physicians' reliance on the decline in the miner's FEV_1/FVC ratio to preclude the identification of coal dust inhalation as a cause of claimant's respiratory impairment, conflicts with the DOL's view that an impairment caused by coal dust exposure could be detected through a decrease in the FEV_1/FVC ratio. Similarly, the Director asserts that the administrative law judge did not adequately address whether the opinions of Drs. Rosenberg and Zaldivar were reasoned and supported by adequate documentation.

Dr. Rosenberg diagnosed severe chronic obstructive pulmonary disease (COPD) and attributed the miner's obstructive lung disease solely to smoking, because the pulmonary function studies showed a marked reduction in the FEV_1/FVC ratio, the blood gas studies showed CO_2 retention classic for a smoking-related form of COPD and, at times, the miner demonstrated a bronchodilator response consistent with an impairment related to smoking, rather than coal dust exposure. Employer's Exhibits 2 at 4-7, 5 at 26-27. With respect to Dr. Rosenberg's opinion, the administrative law judge stated:

[8] "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).

> Doctor Rosenberg analyzed, at great length, the medical literature regarding utilizing the ratio between FEV_1 and FVC measured during spirometric testing to determine whether smoking or coal dust inhalation caused a person's specific pulmonary impairment. As the deceased miner in this case had a "markedly decreased" FEV_1 and FVC ratio, Dr. Rosenberg concluded that smoking, and not coal dust inhalation, caused his pulmonary impairments.

Decision and Order at 19; Employer's Exhibit 2 at 4-8 (internal citations omitted). The administrative law judge concluded that Dr. Rosenberg's opinion was "persuasive" because it was based on the miner's "diagnostic tests" and on "published medical studies." Decision and Order at 21.

Claimant and the Director allege that Dr. Rosenberg's premise, that coal dust exposure causes proportional decrements in the FEV_1/FVC ratio, conflicts with the scientific evidence endorsed by the DOL in the preamble to the 2001 revised regulations. The DOL relied, in particular, on the summary of the medical literature developed by the National Institute for Occupational Safety and Health (NIOSH) in conjunction with its determination of a permissible dust exposure limit. The DOL stated:

> [I]n developing its recommended dust exposure standard, NIOSH carefully reviewed the available evidence on lung disease in coal miners. NIOSH also considered the strength of the evidence, including the sampling and statistical analysis techniques used, and concluded that the science provided a substantial basis for adopting a permissible dust exposure limit. NIOSH summarized its findings . . . as follows: "In addition to the risk of simple CWP [coal workers' pneumoconiosis] and PMF [progressive massive fibrosis], epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, especially FEV1 *and the ratio of FEV1/FVC*."

65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000), *quoting* NIOSH *Criteria Document* 4.2.3.2 (citations omitted) (emphasis added).

In addition, as the Director observes, even if Dr. Rosenberg's identification of smoking as the cause of the decrement in the miner's FEV_1/FVC ratio is correct:

> [I]t is entirely consistent with Dr. Rosenberg's theory that both coal mine dust exposure and cigarette smoking played a part in the miner's markedly reduced FEV[1]/FVC ratio. That is, coal mine dust could have caused a

> proportionate reduction in the FEV1 and FVC values, and smoking could have caused the remaining reduction in the FEV1.

Director's Brief at 3. We agree that the administrative law judge also did not consider statements made by Dr. Rosenberg that appear to detract from his opinion that smoking was the sole cause of the miner's respiratory impairment. Dr. Rosenberg acknowledged that: a miner who smokes could have COPD due to both smoking and coal mine dust exposure; the effects of smoking and coal dust exposure may be additive in causing COPD; smoking does not cancel out the impact of coal dust exposure on the development of a pulmonary impairment; none of the pulmonary function studies that he relied on were validated; only one pulmonary function study demonstrated a bronchodilator response that was consistent with smoking; and because that study was not validated, it could have erroneously reflected a bronchodilator response. Employer's Exhibit 5 at 32, 36, 105, 108-10, 118. Thus, we vacate the administrative law judge's decision to credit Dr. Rosenberg's opinion. *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).

The administrative law judge also considered the opinion of Dr. Zaldivar. He diagnosed smoker's emphysema, bronchospasm and lung cancer, and stated that the miner did not have clinical or legal pneumoconiosis. Employer's Exhibit 3. Dr. Zaldivar further indicated that the miner's coal mine employment did not cause or contribute to his death. *Id*. The administrative law judge observed that Dr. Zaldivar "reviewed a variety of recent, post-[p]reamble medical studies to demonstrate that the damage to the lungs caused by smoking is different than the damage caused by coal dust inhalation." Decision and Order at 19. As was the case with Dr. Rosenberg's opinion, the administrative law judge concluded that Dr. Zaldivar's opinion was "persuasive" because it was based on the miner's "diagnostic tests" and "published medical studies." Decision and Order at 21.

Having credited Dr. Zaldivar's opinion on the same grounds as he credited Dr. Rosenberg's opinion, the administrative law judge's consideration of Dr. Zaldivar's conclusions reflects the same flaws. The Director is correct in alleging that the administrative law judge did not fully assess the documentation underlying Dr. Zaldivar's exclusion of coal dust exposure as a contributing cause of the miner's emphysema. The administrative law judge identified Dr. Zaldivar's citation to more recent, post-preamble medical literature as a factor that made his opinion more persuasive, but the administrative law judge did not determine whether this literature actually pertained to differentiating between the effects of smoking and coal dust exposure on the lungs, or

solely to the effects of smoking.[9] Employer's Exhibit 7 at 7-9. Furthermore, as the United States Court of Appeals observed in *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013), an expert's reliance on medical science set forth in medical literature more recent than the preamble to the 2001 revised regulations is significant only if the expert "testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble." Accordingly, we vacate the administrative law judge's crediting of Dr. Zaldivar's conclusion that coal dust exposure and pneumoconiosis played no role in the miner's death. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002).

Because we have vacated the administrative law judge's credibility findings with respect to the opinions of Drs. Rosenberg and Zaldivar, we must also vacate the administrative law judge's determination that these opinions were sufficient to prove that no part of the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). On remand, the administrative law judge must reconsider his finding that employer rebutted the amended Section 411(c)(4) presumption. In contrast to the rebuttal analysis that he used in his prior Decision and Order, the administrative law judge should initially consider whether employer has established rebuttal at 20 C.F.R. §718.305(d)(1)(i) by affirmatively disproving the presumed existence of legal *and* clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B); *see Minich v. Keystone Mining Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting). The administrative law judge should first determine whether employer has affirmatively established the absence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Performing the rebuttal analysis in the order set forth in the regulation satisfies the statutory mandate to consider all relevant evidence, and provides a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii), the second rebuttal prong, which allows employer to rebut the presumption by affirmatively establishing that no part of the miner's death

[9] The Director also asserts that Dr. Zaldivar's statement, that no new literature has been published "regarding black lung or silica since the Federal Register stated that smoking and coal dust produced damage in the same fashion in the lungs," is incorrect. Employer's Exhibit 7 at 8. In support of this argument, the Director states that NIOSH published an Intelligence Bulletin in 2011 in which it reported that "new findings strengthen [the] conclusions and recommendations" set forth in the 1995 NIOSH publication that the DOL cited in the preamble to the 2001 revised regulations. Director's Letter Brief at 5 n.6, *quoting Current Outcomes, A Review of Information Published Since 1995*, NIOSH Intelligence Bulletin 64 (2011) (available at www.cdc.gov/niosh/docs/2011-172).

was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. *See Minich*, slip op. at 10-11.

If the administrative law judge finds that employer has failed to establish the absence of legal pneumoconiosis, he should next determine whether employer has affirmatively established the absence of clinical pneumoconiosis arising out of coal mine employment at Section 718.305(d)(1)(i)(B). Because the administrative law judge previously put the burden on claimant to prove that he has clinical pneumoconiosis, the administrative law judge must address and weigh all relevant evidence on remand, including the medical opinions of record, while placing the burden on employer to disprove the existence of clinical pneumoconiosis.[10]

If the administrative law judge finds that employer has failed to establish that claimant does not have legal and clinical pneumoconiosis, he must consider whether employer has rebutted the presumed fact of death causation at 20 C.F.R. §718.305(d)(2)(ii). Employer can accomplish this by proving 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).

Finally, when weighing the opinions of Drs. Rosenberg and Zaldivar on remand, the administrative law judge may consider whether the physicians have relied on premises inconsistent with the preamble. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011). The administrative law judge should also render a finding on the other factors relevant to the probative value of these opinions, including the physicians' explanations for their conclusions and the documentation underlying their medical judgments.[11] *See Clark*, 12 BLR at 1-151;

[10] Dr. Wheeler's reading of the digital x-ray dated October 27, 2005, could be relevant to the issue of the existence of clinical pneumoconiosis. Before weighing this evidence, however, the administrative law judge must determine whether employer has met the requirements of 20 C.F.R. §718.107(b). In addition, the Director states that the administrative law judge may take official notice of certain documents regarding the credibility of Dr. Wheeler's reading of the digital x-ray dated October 27, 2005. Director's Letter Brief at 5-6.

[11] Because employer bears the burden of proof, the administrative law judge must determine whether the opinions of Drs. Rosenberg and Zaldivar, employer's experts, are reasoned and documented, irrespective of the weight accorded to the opinion of Dr. Begley, claimant's expert. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 80, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Fields v. Island Creek Coal Co., 10 BLR 1-19, 1-21 (1987). In so doing, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the Administrative Procedure Act, 30 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-161, 1-165 (1989).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge