

U.S. Department of Labor

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



BRB No. 17-0326 BLA

BETTY L. KIRK)
(Widow of PAUL KIRK))

Claimant-Respondent)

v.)

LAUREL RUN MINING COMPANY)

Employer-Petitioner)

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

Party-in-Interest)

DATE ISSUED: 05/08/2018

DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2013-BLA-5465) of Administrative Law Judge Richard A. Morgan 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 claim¹ filed on March 29, 2012 and is before the Board for the second time.

In his initial decision, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption based on his findings that the miner had 38.85 years of coal mine employment, including 26.6 years in underground mines, and suffered from a totally disabling respiratory or pulmonary impairment.² 30 U.S.C. §921(c)(4) (2012). He denied benefits, however, because while all the physicians agree that the miner had clinical pneumoconiosis, employer established that pneumoconiosis played no part in the miner's death. 20 C.F.R. §718.305(d)(2)(ii).

Pursuant to claimant's appeal, the Board vacated the administrative law judge's determination that employer rebutted the presumption pursuant to 20 C.F.R. §718.305(d)(2)(ii) because he did not adequately explain the weight he accorded the conflicting medical opinions, as required by the Administrative Procedure Act (APA).³ *Kirk v. Laurel Run Mining Co.*, BRB No. 15-0377 BLA (July 8, 2016) (unpub.). The Board further held that, although employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis pursuant to 20

¹ Claimant is the widow of the miner, who died on March 16, 2011. Director's Exhibit 7. The miner filed three claims during his lifetime, all of which were denied. Living Miner (LM) Closed Claims 1-3. Accordingly, claimant cannot establish entitlement to benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), 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 Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where a claimant establishes that the miner had fifteen or more 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); *see* 20 C.F.R. §718.305.

³ The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

C.F.R. §718.305(d)(2)(i), on remand the administrative law judge should begin his analysis by considering whether employer also established that the miner did not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(A).⁴ *Kirk*, BRB No. 15-0377 BLA, slip op. at 6.

On remand, the administrative law judge found that employer failed to disprove that the miner had legal pneumoconiosis and further failed to establish that no part of his death was due to pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i), (ii). Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer does not contest that claimant invoked the Section 411(c)(4) presumption and that it failed to disprove that the miner had clinical and legal pneumoconiosis.⁵ Rather, employer contends that the administrative law judge erred in finding that it failed to establish that no part of the miner's death was due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits.⁶ The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.

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.⁷ 33 U.S.C. §921(b)(3), as incorporated into the Act

⁴ The Board explained that performing the rebuttal analysis in the order set forth in the regulation satisfies the statutory mandate to consider all relevant evidence, and provides a necessary framework for considering whether employer established that "no part of the miner's death was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(2)(ii). *Kirk v. Laurel Run Mining Co.*, BRB No. 15-0377 BLA (July 8, 2016) (unpub.); citing *Minich v. Keystone Mining Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

⁵ These findings are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁶ Claimant also filed a cross-appeal, which was dismissed at her request on Aug. 15, 2017. *Kirk v. Laurel Run Mining Co.*, BRB 17-0326 BLA-A (Aug. 15, 2017) (Order) (unpub.).

⁷ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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 that the miner’s death was due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,⁸ or that “no part of the miner’s death was caused by pneumoconiosis as defined in § 718.201.” 20 C.F.R. §718.305(d)(2)(i), (ii).

Upon finding that employer did not disprove that the miner had legal and clinical pneumoconiosis at 20 C.F.R. §718.305(d)(2)(i), the administrative law judge considered the evidence relevant to whether employer established that no part of the miner’s death was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(2)(ii). Decision and Order on Remand at 3-15. The miner’s treatment records reflect that he was admitted to the hospital on March 11, 2011 in respiratory distress. Decision and Order on Remand at 14; Director’s Exhibit 10. X-rays and computed tomography (CT) scans conducted during his hospitalization revealed coal workers’ pneumoconiosis, severe chronic obstructive pulmonary disease (COPD)/emphysema, interstitial fibrosis, and a large mass with the appearance of cancer, while a bronchial biopsy performed on March 15, 2011 confirmed the presence of bilateral Stage IV small cell carcinoma of the lungs. *Id.* The miner died the following day, on March 16, 2011. *Id.* His death certificate, completed by Dr. Hanna, lists the immediate cause of death as “small cell carcinoma,” due to or as a consequence of “acute exacerbation of chronic obstructive pulmonary disease,” due to or as a consequence of “coal workers’ pneumoconiosis.” Decision and Order on Remand at 14; Director’s Exhibit 7.

The record also contains the opinions of Drs. Rasmussen, Abraham, Rosenberg, Caffrey, and Swedarsky, all of whom agree that the primary cause of the miner’s death was carcinoma of the lung. Decision and Order on Remand at 17; Claimant’s Exhibits 1, 4, 21; Employer’s Exhibits 1-5, 7, 8. The physicians disagree, however, as to whether pneumoconiosis hastened the miner’s death. Based on objective studies obtained during his 2008 examination, Dr. Rasmussen opined that the combination of clinical

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). “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).

pneumoconiosis, and legal pneumoconiosis in the forms of dust-related diffuse interstitial fibrosis and emphysema, caused the miner to develop pulmonary artery hypertension resulting in a totally disabling gas exchange impairment. Claimant's Exhibits 1; 4 at 20-22, 24, 30-32, 35-36. He explained that the miner's death from lung cancer would not have occurred as early if the cancer had not been superimposed on the miner's underlying disabling pneumoconiosis, which had already severely compromised his ability to transport oxygen. Decision and Order on Remand at 17-18; Claimant's Exhibit 4 at 50-53, 58-59. Dr. Abraham similarly opined that a lung disease that limits oxygenation to the body, such as the miner's pneumoconiosis-related interstitial fibrosis, would have hastened his death from cancer. Decision and Order on Remand at 20; Claimant's Exhibit 21. In contrast, Drs. Rosenberg, Caffrey, and Swedarsky opined that the miner's pneumoconiosis played no role in his death. The administrative law judge determined that the opinions of Drs. Rosenberg, Caffrey, and Swedarsky are not well-reasoned and well-documented and, therefore, found them insufficient to establish that no part of the miner's death was caused by pneumoconiosis. Decision and Order on Remand at 18-21.

We reject employer's contention that in finding Dr. Rosenberg's opinion inadequately explained, the administrative law judge erred by "erroneous[ly] intermingling" the issues of total disability and death causation. Employer's Brief at 17-22. Dr. Rosenberg opined that the miner suffered from simple clinical coal workers' pneumoconiosis and "potentially had legal pneumoconiosis" in the form of emphysema due in part to coal mine dust exposure. Employer's Exhibit 3. After reviewing Dr. Rasmussen's opinion, Dr. Rosenberg agreed that the miner did not have evidence of cancer in 2008 and opined that the significant respiratory impairment demonstrated by Dr. Rasmussen's 2008 blood gas study was likely due to emphysema. Employer's Exhibits 7, 8. Dr. Rosenberg further opined, however, that the miner's emphysema did not play a role in his death, and that his clinical pneumoconiosis was "on the mild side" and also did not contribute to his death. Rather, he opined that the miner's extensive cancer constricted his airways, resulting in marked respiratory distress with limited reserve, and ultimately caused his death. Employer's Exhibit 7 at 13-15.

Despite Dr. Rosenberg's conclusion that the miner would have died at the same time and in a similar fashion irrespective of his coal workers' pneumoconiosis, Employer's Exhibits 7 at 17; 8 at 2, the administrative law judge observed that he did not provide an opinion as to whether the miner's "significant" impairment, demonstrated on the qualifying 2008 blood gas study, was totally disabling. Decision and Order on Remand at 18. Nor did he address whether such a totally disabling pulmonary impairment that was present before the miner's cancer would have hastened his death from cancer. *Id.* As the administrative law judge noted, claimant established that the miner suffered from a totally

disabling respiratory impairment based in part on the 2008 blood gas study.⁹ *Id.* Moreover, employer failed to establish that the miner's disabling respiratory impairment is not legal pneumoconiosis. Decision and Order on Remand at 13. Therefore, the administrative law judge rationally concluded that Dr. Rosenberg's failure to adequately address whether the miner's pre-existing disabling impairment in oxygen transfer would have hastened his death undermined the physician's conclusion that the miner's pneumoconiosis had no role in his death. *See 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 on Remand at 18-19.

Nor is there merit to employer's alternative argument that Dr. Rosenberg addressed whether the miner's pre-existing totally disabling gas exchange impairment would have hastened his death from lung cancer. Employer's Brief at 19-22. Contrary to employer's argument, Dr. Rosenberg did not state that the miner's "cancer was so widespread it cut off the large airways" and therefore "[a]ny blood gas abnormality would have played no part in causing or hastening death because the severity of the cancer precluded air reaching those parts of the lungs." Employer's Brief at 22. While Dr. Rosenberg stated that the miner's tumor constricted his airways, he did not state that the miner's airways were completely obstructed by cancer or otherwise explain why the miner's disabling gas exchange impairment would not have contributed to his respiratory insufficiency and hastened his death. Employer's Exhibit 7 at 13-14. For the foregoing reasons, we affirm the administrative law judge's permissible conclusion that Dr. Rosenberg's opinion is not well-reasoned and therefore is insufficient to establish rebuttal. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012); *Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 668, 25

⁹ On September 25, 2008, Dr. Rasmussen conducted a complete pulmonary evaluation of the miner, consisting of a physical examination, chest x-ray, arterial blood gas study, pulmonary function study, and an electrocardiogram. The resting and exercise portions of the miner's arterial blood gas study yielded qualifying values and demonstrated a "very severe impairment in lung function as reflected by his marked reduction in single breath diffusing capacity and his marked impairment in oxygen transfer during this very light exercise." Claimant's Exhibit 1. In adjudicating the miner's claim, Administrative Law Judge Romano relied on the September 25, 2008 arterial blood gas study to conclude that the miner established total respiratory disability. In this survivor's claim, the administrative law judge adopted Judge Romano's total disability determination and found that total respiratory disability was established. *See* Decision and Order on Remand at 17 n.9.

BLR 2-725, 2-740 (6th Cir. 2015); Decision and Order on Remand at 18; Employer's Exhibits 3, 7, 8.

Likewise, we reject employer's assertion that the administrative law judge erred in his consideration of Dr. Caffrey's opinion that pneumoconiosis did not hasten the miner's death. Employer's Brief at 17-19, 22-23. The administrative law judge permissibly discredited Dr. Caffrey's opinion, in part, because he did not diagnose legal pneumoconiosis, which conflicted with the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order on Remand at 18; Employer's Exhibit 1 at 2.

Finally, the administrative law judge permissibly discredited Dr. Swedarsky's opinion that it was unlikely that pneumoconiosis hastened the miner's death because Dr. Swedarsky did not review any clinical records and thus was unaware that the miner had a disabling gas exchange impairment due to pneumoconiosis in 2008, before he was diagnosed with cancer in 2011. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); Decision and Order on Remand at 20-21. As the administrative law judge permissibly discredited the only physicians' opinions supportive of employer's burden to establish that no part of the miner's death was due to pneumoconiosis, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(ii).¹⁰ *See* 20 C.F.R. §718.305(d)(2)(ii).

¹⁰ Because employer bears the burden to prove that no part of the miner's death was due to pneumoconiosis, we need not address its arguments regarding the weight the administrative law judge accorded to the contrary opinions of Drs. Rasmussen and Abraham. *See* 20 C.F.R. §718.305(d)(2)(ii); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the alleged "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge