U.S. Department of Labor

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

BRB No. 14-0244 BLA

WILMA BROWN (Widow of RONALD E. BROWN) Claimant-Respondent v. HERITAGE COAL COMPANY, formerly known as PEABODY COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/22/2015 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Darrell Dunham and Tara Dahl (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5931) of Administrative Law Judge Alice M. Craft rendered on a survivor's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

[1] Claimant is the widow of the miner, who died on October 6, 2009. Director's Exhibit 9. The miner did not file a claim during his lifetime.

944 (2012) (the Act). The administrative law judge credited the miner with at least twenty-one years of underground coal mine employment, and adjudicated this claim, filed on January 28, 2010, pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the weight of the evidence sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and determined that claimant was entitled to invocation of the presumption of death due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Finding that employer failed to establish rebuttal of the presumption, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption. Employer also contends that the administrative law judge's preconceived views of the evidence and her misapplication of the preamble to the regulations deprived employer of a fair hearing. Employer requests that the administrative law judge's decision be vacated and that the case be assigned to a different administrative law judge on remand for a fresh look at the evidence. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response. Employer has filed a reply in support of its position.[3]

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,

[2] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this survivor's claim, amended Section 411(c)(4) provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where a survivor establishes that the miner worked fifteen or more years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and the evidence establishes a totally disabling respiratory or pulmonary impairment. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established more than fifteen years of underground coal mine employment, total respiratory disability pursuant to 20 C.F.R. §718.204(b), and invocation of the presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Because claimant is entitled to invocation of the amended Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, employer must affirmatively prove that the miner did not have either clinical or legal pneumoconiosis,[5] or must establish that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. *See* 20 C.F.R. §718.305(d)(2).

In addressing whether employer disproved the existence of pneumoconiosis, the administrative law judge initially determined that employer successfully rebutted the presumption of clinical pneumoconiosis, finding that the x-ray, CT scan, and medical opinion evidence was negative for clinical pneumoconiosis. Decision and Order at 5-7, 27-28; *see* 20 C.F.R. §718.305(d)(2)(i)(B). In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Tuteur[6] and Rosenberg,[7] the miner's death certificate,[8] and the

[4] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as the miner's last coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Hearing Transcript at 8.

[5] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *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). Legal pneumoconiosis is defined as any chronic lung disease or impairment and its sequelae that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2), (b).

[6] Dr. Tuteur performed a medical records review on May 10, 2011 and was deposed on April 5, 2012. Employer's Exhibits 9, 27. He reviewed Director's Exhibits 1-28 and medical evidence in Employer's Exhibits 1-25. Dr. Tuteur found no evidence of clinical pneumoconiosis, and diagnosed chronic obstructive pulmonary disease (COPD) from cigarette smoking, due to the miner's 52.5 pack-years of smoking. He opined that the miner's COPD "led him to impairment, disability, and a candidate for lung transplantation, which he never received," and "led to recurrent hospitalizations and his death of respiratory failure complicated by ischemic bowel disease." Employer's Exhibit 9 at 7. Dr. Tuteur stated that coal dust exposure did not cause, hasten, or in any way contribute to the miner's death. Employer's Exhibit 9 at 8.

miner's treatment records from 1991 through 2009.[9] Drs. Tuteur and Rosenberg diagnosed chronic obstructive pulmonary disease (COPD) due entirely to the miner's cigarette smoking, and neither doctor affirmatively diagnosed legal pneumoconiosis. Decision and Order at 10-25; Employer's Exhibits 9, 10, 14, 15, 26, 27. While the administrative law judge found that both doctors were well-qualified to provide an opinion, she discredited the opinions of Drs. Tuteur and Rosenberg because she found that they were insufficiently reasoned and inconsistent with the findings of the scientific literature credited by the Department of Labor (DOL) in the preamble to the regulations. The administrative law judge concluded that because Drs. Tuteur and Rosenberg did not credibly explain why they excluded coal dust as a contributing factor to the miner's obstructive disease, their opinions were insufficient to disprove the existence of legal pneumoconiosis. Decision and Order at 29-31; *see* 20 C.F.R. §718.305(d)(2)(i)(A).

Employer asserts that the administrative law judge erred in her analysis of the preamble to the regulations to preclude employer from any meaningful defense of the claim. Employer further contends that the administrative law judge erred in discrediting the opinions of Drs. Tutuer and Rosenberg.

Initially, we reject employer's contention that the administrative law judge erred in giving "binding effect" to the preamble by relying on it as the sole basis to determine the credibility of the medical opinion evidence. Employer's Brief at 13-19. The Board and multiple United States Circuit Courts of Appeals have held that an administrative law judge, as part of the deliberative process, may permissibly evaluate expert opinions in conjunction with DOL's discussion of prevailing medical science in the preamble to the

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[7] Dr. Rosenberg performed a medical records review on May 20, 2011, and was deposed on April 2, 2012. Employer's Exhibits 14, 26. He reviewed the miner's employment records, answers to interrogatories, death certificate, and the medical evidence at Employer's Exhibits 2-5, 17, 23, 24. Dr. Rosenberg determined that the miner did not have clinical or legal pneumoconiosis. He diagnosed a severe disabling airflow obstruction/COPD with an associated oxygenation abnormality. He determined that the miner's emphysema was due to his extensive smoking history and that his death was not caused or hastened by coal dust exposure.

[8] The death certificate lists the cause of death as a bowel infarction associated with respiratory failure. Director's Exhibit 9.

[9] The administrative law judge noted that accounts of the miner's smoking history varied widely, and found that the miner had a 60 pack-year smoking history. Decision and Order at 4.

revised regulations. Contrary to employer's contention, the administrative law judge did not utilize the preamble as a legal rule, or as a "preconceived belief" that coal mine dust must always be deemed a contributing factor in obstructive lung disease. The administrative law judge permissibly consulted the preamble as a statement of medical science studies found credible by DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 25 BLR 2-581 (9th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801, 25 BLR 2-203, 2-210 (6th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

Considering the opinion of Dr. Tuteur, the administrative law judge found that the doctor relied, in part, on the view that coal dust exposure rarely causes a degree of COPD that is clinically significant.[10] Decision and Order at 30. In promulgating the revised definition of pneumoconiosis set forth at 20 C.F.R. §718.201, DOL reviewed the medical literature on that issue and found that there was consensus among medical experts that

[10] Dr. Tuteur acknowledged that both coal dust exposure and cigarette smoking can cause airflow obstruction. Employer's Exhibit 27 at 53. He opined that if a miner with COPD is also a smoker, a doctor cannot rely upon physical examination findings and the miner's physiologic and radiographic characteristics to determine the etiology or etiologies of the COPD. Dr. Tuteur stated that one has to look at the medical literature to see if one can assign likelihood of one cause versus another as the responsible agent. Employer's Exhibit 27 at 54. Dr. Tuteur determined that the miner's COPD was due to smoking, rather than coal dust, based on the miner's heavy smoking history; the relative risk of developing COPD from smoking (20% for persons who smoke throughout their adult life) versus coal dust (1% for miners who never smoked); and findings by the American Thoracic Society and the American Lung Association that approximately 4% of all coal miners in North America develop meaningful pulmonary problems from mining. Employer's Exhibit 9 at 8. Comparing the incidence of coal dust-induced obstruction of 1-2% or less versus the incidence of the same clinical picture among adult cigarette smokers of 20%, Dr. Tuteur concluded that cigarette smoking was the sole cause of the miner's condition. *Id.* He further opined that, while it is possible that the toxins in coal dust and the toxins in cigarette smoke can be additive, in any particular person, the odds of both factors being operative to cause a combined effect are very small. Employer's Exhibit 27 at 102-103.

coal dust-induced COPD is clinically significant and is not rare. *See* 65 Fed. Reg. 79,920, 79,939-45 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103. Accordingly, the administrative law judge acted within her discretion in determining that Dr. Tuteur's opinion was entitled to diminished weight, to the extent that his analysis was inconsistent with the conclusions reached in the medical literature and studies accepted by DOL.[11] *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004).

With respect to Dr. Rosenberg's opinion, the administrative law judge determined that the physician ruled out coal dust exposure as a source of the miner's disabling obstructive pulmonary impairment, in part, because the miner's pulmonary function studies revealed a markedly reduced FEV_1/FVC ratio, which Dr. Rosenberg opined was uncharacteristic of a coal dust-induced lung disease, but was classic for a smoking-related form of COPD. Decision and Order at 30; Employer's Exhibit 14 at 9. The administrative law judge acted within her discretion in according less weight to Dr. Rosenberg's opinion because he relied on the assumption that a significant decrement in the FEV_1/FVC ratio rules out a diagnosis of pneumoconiosis, contrary to the medical science credited by DOL. *See Adams*, 694 F.3d at 801, 25 BLR at 2-210; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103. The administrative law judge also rationally found that Dr. Rosenberg's reliance on a "marked bronchodilator response" on the miner's July 9, 2008 pulmonary function study to rule out coal dust exposure as a causative factor detracted from the probative value of the physician's opinion, as the post-bronchodilator results still qualified for total disability, they revealed an impairment which was only partially reversible. Decision and Order at 30; Employer's Exhibit 3 at 49. Thus, the administrative law judge permissibly concluded that Dr. Rosenberg's opinion was not well-reasoned. Decision and Order at 30-31; *see Crockett Colleries, Inc. v. Barrett*, 478

[11] We find no merit to employer's argument that the administrative law judge failed to address Dr. Tutuer's determination that "the variability of abnormal and normal pulmonary examinations indicated a bronchospastic component to the disease that is inconsistent with a coal dust induced process." Employer's Brief at 23, citing Employer's Exhibit 9 at 7 and Employer's Exhibit 27 at 37, 71-72. In his report, Dr. Tuteur mentioned, without further discussion, that "there is fulfillment of criteria for the diagnosis of chronic bronchitis," and when questioned about the physical examination evidence, Dr. Tuteur stated that "sometimes it was considered normal" and "often it was considered abnormal because of decreased intensity of breath sounds, prolongation of expiration, and resonance." He indicated that this is typical in persons that have COPD with a strong bronchitic component, but added that "one cannot use variability of the findings associated with air flow obstruction to aid in the assignment of etiology." Employer's Exhibit 27 at 37-38, 72.

F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

Noting that the preamble to the revised regulations acknowledges the prevailing view of the medical community that the risks of smoking and coal dust exposure are additive, the administrative law judge acted within her discretion in discrediting the opinions of Drs. Tuteur and Rosenberg primarily because they failed to adequately explain why coal dust exposure could not have contributed, along with cigarette smoking, to the miner's obstructive pulmonary impairment. 65 Fed. Reg. at 79,940; *see Summers*, 272 F.3d at 483, 22 BLR at 2-281; *Obush*, 650 F.3d at 248, 24 BLR at 2-369; *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); Decision and Order at 31. Because the administrative law judge provided multiple valid reasons for discrediting the opinions of Drs. Tuteur and Rosenberg, and substantial evidence supports her credibility determinations, we affirm her finding that employer failed to rebut the presumed fact of legal pneumoconiosis under amended Section 411(c)(4). 20 C.F.R. §718.305(d)(2)(i).

With regard to the second method of rebuttal, the administrative law judge permissibly found that the same reasons she provided for discrediting the opinions of Drs. Tuteur and Rosenberg on the issue of legal pneumoconiosis also undercut their opinions that pneumoconiosis played no part in the miner's death from an infarcted bowel caused, in part, by his COPD. 20 C.F.R. §718.305(d)(2)(ii); *see Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995). Consequently, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumed fact of death due to pneumoconiosis under amended Section 411(c)(4), and affirm her award of benefits.

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

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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JUDITH S. BOGGS
Administrative Appeals Judge