U.S. Department of Labor

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

BRB Nos. 18-0321 BLA
and 18-0322 BLA

JULIE Y. PARKS o/b/o and Widow of BRIAN K. PARKS	)	
Claimant-Respondent	)	
v.	)	
PRIME PROCESSING, INCORPORATED	)	DATE ISSUED: 08/23/2019
and	)	
NEW HAMPSHIRE INSURANCE/CHARTIS	)	
Employer/Carrier-Petitioners	)	
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 Benefits in Miner's and Survivor's Claims of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits in Miner's and Survivor's Claims (2016-BLA-05545 and 2016-BLA-05592) of Administrative Law Judge Larry S. Merck, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on December 23, 2014 and a survivor's claim filed on February 19, 2016.[1]

The administrative law judge accepted the parties' stipulation to 31 years of coal mine employment, and found 27 years was spent as a railroad car loader in conditions substantially similar to those in an underground mine. Because employer conceded total respiratory disability, he further found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge determined employer did not rebut the presumption and awarded benefits. In the survivor's claim, he found claimant derivatively entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[3]

On appeal, employer challenges the administrative law judge's determination that at least 15 years of the miner's surface coal mine employment was in conditions substantially similar to those in an underground mine. It also challenges the administrative law judge's finding it did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.

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[1] The district director made an initial finding of entitlement in the miner's claim. Miner's Claim (MC) Director's Exhibits 2, 20. While employer's request for a hearing was pending, the miner died. MC Director's Exhibit 8. Claimant, the miner's widow, is pursuing the miner's claim as well as her survivor's claim. Survivor's Claim (SC) Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption the miner is totally disabled due to pneumoconiosis if he has at least fifteen 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 impairment. 30 U.S.C. §921(c)(4) (2012); as implemented by 20 C.F.R. §718.305.

[3] Under Section 422(*l*) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

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).

The Miner's Claim

Invocation of the Section 411(c)(4) Presumption – Substantial Similarity of Surface Coal Mine Employment

In light of employer's concession the miner had a totally disabling pulmonary impairment, to invoke the Section 411(c)(4) presumption claimant had to establish at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 20 C.F.R. §725.305(b)(1)(i). "The 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." 20 C.F.R. §718.305(b)(2).

In finding claimant met her burden, the administrative law judge considered the miner's Employment History and Description of Coal Mine Work forms, Dr. Forehand's medical report, and claimant's hearing testimony about her husband's work. The miner's Employment History form shows he worked in "prep" from August 6, 1981 to 2008, and in transportation "sweep[ing] up" from 2008 to December 12, 2014. Director's Exhibit 3. He indicated he was exposed to dust, gases, or fumes at both jobs. *Id.* On the Description of Coal Mine Work form, the miner listed only his work as a sweeper operator from 2008 to December 12, 2014, and described his duties as removing spillage from trucks hauling coal on the main highway between the mine and the tipple. Director's Exhibit 4.

Dr. Forehand examined the miner at the request of the Department of Labor on February 11, 2015, and reported the miner's most recent coal mine job was as a sweeper operator on coal haulage roads between 2008 and December 12, 2014. Director's Exhibit 10. He also noted the miner previously loaded coal cars for 27.5 years and diagnosed both

[4] 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 (1989) (en banc); Director's Exhibit 5.

clinical pneumoconiosis and legal pneumoconiosis,[5] "substantially contributed to by [the miner's] occupational history of prolonged overexposure to hazardous silica and coal dust working as a railroad car loader operator for 27 years." *Id*.

Claimant testified that her husband was always a surface miner. Hearing Transcript at 18. She initially stated that she could not remember exactly how many years he worked as a railroad car loader, but then indicated he did that job for at least 10 to 15 years. *Id*. at 30-31. She also testified he drove a "cleanup truck" during the last 4 years of his coal mine employment. When asked if that meant the miner loaded railroad cars during the remaining 27 of his 31 years of coal mine employment, claimant replied: "However many. That's what I said. I can't remember years like that."[6] *Id*. at 32. Regarding his coal dust exposure, she testified he hand-loaded railroad cars two or three times per week and came home so black with coal dust she could only see his eyes and mouth. *Id*. at 18. She barely recognized him on the days she went to the mine to pick up his paycheck because his "face was so blacked out" after loading railroad cars. *Id.* at 24-25. He came home covered in coal dust until "the last few years" when he was a sweeper operator. *Id*. at 19. The miner "didn't come home clean [when he was a sweeper operator] but he wasn't as black as when he was loading railroad cars." *Id*. at 19, 31, 33.

The administrative law judge relied on Dr. Forehand's report and claimant's testimony to find the miner had over 15 years of coal mine employment in conditions substantially similar to those in an underground mine. Decision and Order at 8-9. Specifically, he found Dr. Forehand's report of 27 years as a railroad car loader resulting in "prolonged overexposure to hazardous silica and coal dust" to be "very credible." *Id*. at 8. Although claimant "was not a good historian" on the specific number of years her husband worked as a railroad car loader, the administrative law judge found her testimony

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[5] 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). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). 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).

[6] Claimant testified at the hearing she experienced "some memory loss" due to being under anesthesia for 8 hours during a surgical procedure. Hearing Transcript at 31.

regarding his coal dust exposure while working in that job to be "consistent and credible." *Id*. Thus, the administrative law judge concluded the miner "worked as a railroad car loader operator around 27 years under conditions substantially similar to that of underground coal mine employment." *Id*.

Employer contends Dr. Forehand's report cannot establish substantial similarity of the miner's surface employment to the conditions in an underground coal mine, as the physician did not describe the actual conditions of the miner's work. Employer's Brief at 12. It also alleges claimant's testimony is deficient because she did not have first-hand knowledge of the actual dust conditions the miner experienced nor could she say whether they were similar to those in an underground mine.[7] *Id*.

Employer's arguments, in part, mischaracterize the applicable standard for assessing whether surface mining conditions are substantially similar to underground mining conditions. Claimant is not required to prove the dust conditions aboveground were identical to those underground, *see* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013), nor does she "have to prove that [the miner] was around surface coal dust for a full eight hours on any given day for that day to count." *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481 (7th Cir. 2001). Claimant need only establish the miner was "regularly exposed to coal-mine dust" while working at surface mines.[8] 20 C.F.R. §718.305(b)(2). To the extent employer's arguments are based on a misstatement of claimant's burden of proof under 20 C.F.R. §718.305(b)(2), they are rejected.

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[7] We reject employer's argument that *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001) "demonstrates that the claimant's testimony is not adequate proof on this issue." Employer's Brief at 12-13; Decision and Order at 8. While *Summers* held a miner's testimony regarding his dust exposure was sufficient to establish substantial similarity, it did not hold that the testimony of a widow, such as that provided in this case, is inherently deficient. *See Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (affirming the administrative law judge's finding of substantial similarity based, in part, on widow's testimony that the miner's face and clothes were very dusty when he returned home from work).

[8] The Department of Labor explained in the preamble to 20 C.F.R. §718.305(b)(2), "[t]he 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." 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013).

We also reject employer's assertion that Dr. Forehand's report and claimant's testimony do not constitute substantial evidence supporting the administrative law judge's finding of more than 15 years of qualifying coal mine employment. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). He acted within his discretion in finding "very credible" Dr. Forehand's report that the miner spent 27 years as a coal loader resulting in prolonged exposure to silica and coal dust.[9] *See Underwood*, 105 F.3d at 949. He also acted within his discretion in crediting claimant's uncontradicted testimony regarding the extent to which the miner was covered in coal dust when he returned from work loading coal into railroad cars and when she saw him at the mine site.[10] *See Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) ("a claimant's dust exposure evidence will be inherently anecdotal" because claimants "generally do not control . . . technical information about the mines in which the miner worked" (*quoting* 78 Fed. Reg. 59,105 (Sept. 25, 2013)); *Doss v. Itmann Coal Co.*, 53 F.3d 654, 658 (4th Cir. 1995). We therefore affirm the administrative law judge's determination that claimant's testimony and Dr. Forehand's report establish the miner worked in conditions substantially similar to those in underground mines for 27 years. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-490 (6th Cir. 2014). Consequently, we affirm his finding claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis, or "no part

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[9] There is also no merit to employer's contention the administrative law judge failed to identify the "documentary evidence" he relied on in addition to Dr. Forehand's report. Employer's Brief at 12, *quoting* Decision and Order at 8. He fully reviewed the miner's Employment History and Description of Coal Mine Work forms. Decision and Order at 7-8. The Employment History form corroborates Dr. Forehand's statement the miner worked loading railroad cars for approximately 27 years, followed by several years as a sweeper operator. MC Director's Exhibits 3, 10; Hearing Transcript at 30-33. Employer has not identified any evidence contradicting that relied on by the administrative law judge.

[10] To the extent claimant credibly testified that her husband was covered in coal dust after work, employer's suggestion that she did not have sufficient knowledge of his coal dust exposure is without merit. Employer's Brief at 12.

of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01 (4th Cir. 1995). The administrative law judge found employer failed to rebut the presumption by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must demonstrate the miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). Employer relied on the opinion of Dr. Zaldivar who determined the miner did not have legal pneumoconiosis, but suffered from a progressive restrictive impairment secondary to idiopathic pulmonary fibrosis.[11] Survivor's Claim (SC) Employer's Exhibit 1. The administrative law judge noted Dr. Zaldivar based his opinion on "the progression of the restriction in the ventilatory tests, as well as the low diffusion, all of which are diagnostic o[f] interstitial pulmonary fibrosis, unrelated to his occupation." Decision and Order at 11; SC Employer's Exhibit 1. He found, however, Dr. Zaldivar's reliance on the restrictive nature of the miner's impairment inadequately explained in light of the Department of Labor's recognition that coal dust exposure can cause a purely restrictive impairment. Decision and Order at 11, *citing* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,920, 79,937-39 (Dec. 20, 2000).

Employer argues the administrative law judge erred in finding Dr. Zaldivar relied solely on the fact that the miner's impairment was purely restrictive in nature to exclude the presence of legal pneumoconiosis. Employer's Brief at 14-18. Regardless of whether this contention has merit, we affirm the discrediting of Dr. Zaldivar's opinion on the source

[11] Dr. Zaldivar diagnosed a disabling restrictive impairment caused solely by idiopathic pulmonary fibrosis. SC Employer's Exhibit 1. He based his opinion on radiological evidence of linear densities of interstitial fibrosis appearing in the miner's lower lung zones beginning in 2011, and the "very rapid deterioration of [the miner's] ventilatory capacity" between 2011 and his death in 2015. *Id.* He further observed the miner's smoking was a risk factor for the development of interstitial lung disease. *Id.* He concluded: "The pulmonary impairment is entirely due to pulmonary fibrosis, which has the characteristic in this case of idiopathic with the basal predominant interstitial disease that progressed to the entire lung over a period of very few years. . . . The miner did not have legal pneumoconiosis. His pulmonary fibrosis was not [at] all related to his work as a coal miner for the reasons I explained." *Id.*

of the miner's idiopathic interstitial fibrosis and restrictive impairment, as the administrative law judge provided a valid alternative rationale for his finding. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). He reasonably determined that although Dr. Zaldivar identified the factors leading him to conclude coal dust played no part in the miner's impairment, he failed to adequately explain why the miner's "many years" of coal mine dust exposure were not a contributing or aggravating factor.[12] Decision and Order at 12; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (administrative law judge rationally discredited opinions of physicians who did not adequately explain why the miner's interstitial fibrosis was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment). Accordingly, we affirm the administrative law judge's finding Dr. Zaldivar's opinion does not satisfy employer's burden to affirmatively establish the absence of legal pneumoconiosis. 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Minich*, 25 BLR at 1-159 n.8.

Because the administrative law judge rationally discredited the only opinion supportive of employer's burden, we affirm his finding employer did not disprove legal pneumoconiosis.[13] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Barber*, 43 F.3d at 900-01. We therefore affirm the administrative law judge's determination employer did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.

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[12] Dr. Zaldivar completely ruled out coal mine employment as a factor in the miner's impairment. SC Employer's Exhibit 1 at 12, ¶4. The administrative law judge reasonably discredited that specific rationale as inadequately explained on its own terms. Decision and Order at 12. The rebuttal standard thus played no role in that determination and any argument that the administrative law judge held employer to a heightened burden to disprove the existence of legal pneumoconiosis would be misplaced. *See* 20 C.F.R. §718.202(a)(4) (physician determination on the existence of legal pneumoconiosis "must be supported by a reasoned medical opinion").

[13] Employer's allegation that the opinions of Drs. Forehand, Gaziano, and Patel are insufficient to establish legal pneumoconiosis is without foundation. Employer's Brief at 18; MC Director's Exhibit 10; MC Claimant's Exhibit 4. As previously indicated, because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to affirmatively disprove both legal and clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01 (4th Cir. 1995).

Total Disability Causation

The administrative law judge next addressed whether employer established rebuttal by proving "no part" of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). He rationally found that the same reasons he provided for discrediting Dr. Zaldivar's opinion that the miner did not suffer from legal pneumoconiosis also undermined his opinion that the miner's disabling respiratory impairment was not caused by pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 12. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by disproving disability causation. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 12.

Because claimant invoked the Section 411(c)(4) presumption and employer did not rebut it, we affirm the award of benefits in the miner's claim.

The Survivor's Claim

The administrative law judge correctly determined claimant established each fact necessary for entitlement under Section 422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death.[14] 30 U.S.C. §932(*l*) (2012); Decision and Order at 13. We therefore affirm the award of benefits in the survivor's claim.

[14] Employer's argument that claimant is not derivatively entitled to survivor's benefits because the award in the miner's claim is not supported by substantial evidence is rendered moot by our affirmance of the award of benefits in the miner's claim. In addition, based on claimant's derivative entitlement to survivor's benefits, we need not address employer's argument that she cannot establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge