U.S. Department of Labor

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

BRB Nos. 14-0247 BLA
14-0247 BLA-A
14-0248 BLA
and 14-0248 BLA-A

RUTH HORN (o/b/o and widow of FRANK B. HORN) Claimant-Respondent Cross-Petitioner v. MOUNTAIN COUNTY COAL CORPORATION and A.T. MASSEY, c/o WELLS FARGO DISABILITY MANAGEMENT Employer/Carrier-Petitioner Employer/Carrier-Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/26/2015 DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jeffery S. Goldberg (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, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant[1] cross-appeals, the Decision and Order (2011-BLA-5018, 2011-BLA-5787) of Administrative Law Judge John P. Sellers, III awarding benefits on claims 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 miner's subsequent claim filed on July 1, 2009,[2] and a survivor's claim filed on November 22, 2010.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[3] the administrative

[1] Claimant is the surviving spouse of the deceased miner, who died on November 5, 2010. Director's Exhibit 4 (Survivor's Claim). Unless indicated as being associated with the survivor's claim, all cited exhibits are from the miner's claim.

[2] The miner initially filed a claim for benefits on November 13, 2003. Director's Exhibit 1. Administrative Law Judge Larry S. Merck denied benefits on December 1, 2006, because the evidence did not establish the existence of pneumoconiosis or total disability. *Id.* Upon review of claimant's appeal, the Board affirmed Judge Merck's finding that total disability was not established. *F.H.* [*Horn*] *v. Martin Cnty. Coal Corp.*, BRB No. 07-0350 BLA (Dec. 20, 2007) (unpub.). The Board, therefore, affirmed Judge Merck's denial of benefits. *Id.*

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

law judge credited the miner with twenty-three and one-half years of qualifying coal mine employment,[4] and found that the new evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[5] The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

The administrative law judge also considered claimant's survivor's claim. The administrative law judge noted that the amendments to the Act revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). The administrative law judge held that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits in the miner's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board instruct the administrative law judge to take official notice of several documents pertaining to the credibility of Dr. Wheeler's x-ray interpretations, if the Board vacates the administrative law judge's weighing of the rebuttal evidence regarding clinical pneumoconiosis. In her cross-appeal, claimant contends that, should the Board remand the case for further consideration, the administrative law judge should consider additional factors in his weighing of the x-ray and medical opinion evidence.

[4] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibits 1, 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] Because the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

Neither employer nor the Director has filed a response to claimant's cross-appeal.[6]

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. 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).

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

Employer argues that the administrative law judge erred in finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[7]

The administrative law judge considered the new medical opinions of Drs. Rasmussen, Jarboe, and Tuteur. Drs. Rasmussen and Jarboe diagnosed the miner with a totally disabling respiratory impairment, based upon the miner's severely reduced diffusing capacity.[8] Director's Exhibit 12; Employer's Exhibit 1. However, Dr. Tuteur opined that the miner did not have a totally disabling respiratory impairment based upon the miner's "essentially normal" pulmonary function studies. Employer's Exhibit 4 at 25. In making his assessment, Dr. Tuteur opined that the miner's diffusing capacity was "uninterpretable data" and "not reflective of impairment of oxygen gas exchange." *Id.*

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had twenty-three and one-half years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 18, 20.

[8] Dr. Rasmussen observed that the miner's "single breath carbon monoxide diffusing capacity was markedly reduced to 32% of predicted," and that "[t]he American Thoracic Society consider[s] such a diffusing capacity indicative of severe and disabling chronic lung disease." Director's Exhibit 12. Dr. Rasmussen, therefore, concluded that the miner "clearly does not retain the pulmonary capacity to perform his regular coal mine employment." *Id.* Dr. Jarboe concluded that the miner had a "severe reduction in diffusion capacity," and was "totally and permanently disabled from a pulmonary standpoint." Employer's Exhibit 1. Dr. Jarboe opined that the miner would not be able to perform sustained labor, even of a mild degree . . . ." *Id.*

The administrative law judge credited the opinions of Drs. Rasmussen and Jarboe, that the miner was totally disabled from a pulmonary standpoint, over Dr. Tuteur's contrary opinion, stating that:

> I find more persuasive the opinions of Drs. Rasmussen and Jarboe that the [m]iner's reduced diffusion capacity is a reliable measure of pulmonary impairment, and that based upon the [m]iner's significantly reduced diffusion capacity he lacked the pulmonary capacity to do all but sedentary work. While Dr. Tuteur fully explained his reasons for not believing the diffusion capacity valuable, his opinion that diffusing capacity is unreliable as a measure of impairment is clearly the minority view among the three physicians. Furthermore, I find it significant that Dr. Rasmussen stated that the American Medical Association and the American Thoracic Society both consider a reduced diffusing capacity as evidence of a pulmonary impairment, thus further relegating Dr. Tuteur's view to a minority status not only among the three physicians who submitted new medical reports but apparently among physicians in general.

Decision and Order at 39.

Employer argues that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Jarboe because the doctors improperly based their assessments of the miner's pulmonary impairment on the results of diffusion capacity studies. Employer asserts that diffusing studies "are not included in the rubric of testing that the [Department of Labor] has considered relevant to assess disability." Employer's Brief at 9. We disagree. A physician's opinion that a claimant is disabled due to a diffusing capacity abnormality may constitute a valid basis for an administrative law judge's finding of total disability under the Act. *See Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-23-24 (4th Cir. 1991). In this case, the administrative law judge permissibly credited the opinions of Drs. Rasmussen and Jarboe that the miner suffered from a diffusion capacity abnormality that rendered him totally disabled from a pulmonary standpoint. Decision and Order at 39. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Moreover, the administrative law judge properly weighed the medical opinion evidence with the pulmonary function and blood gas study evidence, and found that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 40. This finding is, therefore, affirmed.

In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).[9]

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both legal and clinical pneumoconiosis,[10] or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method.

In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge noted that there was "no dispute" that the miner suffered from "a severe form of pulmonary fibrosis as well as emphysema." Decision and Order at 49-50. The administrative law judge, therefore, noted that in order to establish rebuttal of the presumption, employer would be required to prove that the miner's twenty-three

[9] In light of our affirmance of the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), we also affirm his determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Employer contends that the administrative law judge erred in finding that claimant established a change in the applicable condition of entitlement, because he failed to compare the new medical evidence with the evidence submitted in the prior claim to determine whether the new evidence differs qualitatively. We disagree. The Sixth Circuit has held that, under the version of 20 C.F.R. §725.309(d) applicable to claims filed after January 19, 2001, such as this one, no such comparison is required to establish a change in an applicable condition of entitlement. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486, 25 BLR 2-135, 2-147 (6th Cir. 2012).

[10] "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).

and one-half years of coal mine dust exposure "did not play a significantly contributing, or substantially aggravating role, in the development of either of these two conditions." *Id.* at 50.

In considering whether employer satisfied its burden of establishing that the miner's emphysema was not a form of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Jarboe and Tuteur. In a May 16, 2005 medical report, Dr. Jarboe diagnosed idiopathic fibrosis, and bullous emphysema due to the miner's cigarette smoking.[11] Director's Exhibit 1 (Employer's Exhibit 2). Dr. Tuteur diagnosed "fibrosing emphysema," which he attributed to cigarette smoking, gastroesophageal reflux disease (GERD), and the aspiration of gastric acid. Employer's Exhibit 4 at 17-18. Dr. Tuteur opined that the miner's emphysema was not due to coal mine dust exposure. *Id.*

The administrative law judge discounted the opinions of Drs. Jarboe and Tuteur, that claimant does not suffer from legal pneumoconiosis, because he found that the doctors failed to adequately explain how they eliminated the miner's twenty-three years of coal mine dust exposure as a contributory factor to the miner's emphysema. Decision and Order at 56. The administrative law judge also accorded less weight to Dr. Tuteur's opinion, that the miner's emphysema was due in part to GERD, because the doctor acknowledged that he did not know for sure whether the miner had aspirated stomach acid. *Id.*; Employer's Exhibit 4 at 17. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Jarboe and Tuteur. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Jarboe and Tuteur, that the miner's emphysema was due solely to smoking, or due to a combination of smoking and GERD, because neither physician adequately explained how they eliminated the miner's twenty-three and one-half years of coal mine dust exposure as a source of his emphysema. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 56. The administrative law judge, therefore, properly discounted the opinions of Drs. Jarboe and Tuteur.[12] *See Director, OWCP v. Rowe*, 710

[11] In a subsequent 2010 report, and during a 2013 deposition, Dr. Jarboe acknowledged that a CT scan revealed some "emphysematous changes," but did not otherwise address the etiology of the emphysema. Employer's Exhibits 1, 2.

[12] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Jarboe and Tuteur, any error he may have made in according less weight to their opinions for other reasons would be harmless. *See Kozele*

F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because the administrative law judge permissibly discredited the opinions of Drs. Jarboe and Tuteur, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that the miner did not suffer from pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Accordingly, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that the miner's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge permissibly found that his reason for discrediting Dr. Tuteur's opinion, that the miner was not totally disabled by a respiratory impairment, also undermined the doctor's opinion that coal mine dust exposure did not contribute to that impairment.[13] *See Scott v. Mason Coal Co.*, 289 F.3d 262, 269, 22 BLR 2-373, 2-383 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 57.

The administrative law judge noted that, while Dr. Jarboe opined that the miner's reduced diffusing capacity rendered him totally disabled from a pulmonary standpoint, the doctor attributed the miner's total disability solely to idiopathic fibrosis. Decision and Order at 57. The administrative law judge noted that Dr. Jarboe based his opinion, in part, on studies demonstrating that a severe reduction in diffusing capacity is not characteristic of a coal dust induced lung disease. Employer's Exhibit 1. The administrative law judge, however, questioned Dr. Jarboe's reliance upon the studies,

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v. Rochester and Pittsburgh Coal Co., 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Jarboe and Tuteur.

[13] As previously discussed, the administrative law judge permissibly discredited Dr. Tuteur's conclusion that the miner was not totally disabled because it was based upon his questionable premise that a reduced diffusion capacity is not a reliable measure of pulmonary impairment.

noting that Dr. Rasmussen had questioned their validity.[14] Decision and Order at 57. Because employer does not challenge this basis for the administrative law judge's questioning of Dr. Jarboe's opinion, it is affirmed.[15] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by proving that the miner's totally disabling impairment did not arise out of, or in connection with his coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1).

Because claimant established invocation of the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits in the miner's claim is affirmed.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(*l*) of the Act: that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order at 59. Because we affirm the award of benefits in the miner's claim, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(*l*).[16] 30 U.S.C. §932(*l*).

[14] Dr. Rasmussen questioned the studies relied upon by Dr. Jarboe, noting that they had been based on asymptomatic working miners. Claimant's Exhibit 4 at 32. Dr. Rasmussen explained that, had the studies involved impaired miners, the results would have been different. *Id.* Dr. Rasmussen further opined that there is no "anatomical basis" for concluding that pulmonary fibrosis and emphysema cannot cause an impaired diffusion capacity. *Id.* at 25-26, 32.

[15] We also note that, while Dr. Jarboe diagnosed emphysema, a condition determined by the administrative law judge to constitute legal pneumoconiosis, he did not address its contribution to the miner's pulmonary disability.

[16] In view of our affirmance of the administrative law judge's award of benefits, we need not address the arguments raised in claimant's cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge