U.S. Department of Labor

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

BRB No. 15-0399 BLA

BARBARA BARKER (Widow of CARLOS BARKER) Claimant-Petitioner v. ARCH OF WEST VIRGINIA Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/30/2016 DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2012-BLA-5224) of Administrative Law Judge Richard A. Morgan, rendered on a survivor's claim[1] filed on April 1, 2011, pursuant to the provisions of the Black Lung Benefits Act,

[1] Claimant is the surviving spouse of the miner, who died on October 26, 2010. Director's Exhibit 11. Because the miner was not awarded benefits during his lifetime, claimant is not derivatively entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. 932(*l*) (2012).

as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In his initial Decision and Order issued on July 31, 2013, the administrative law judge found that the miner worked sixteen years in underground coal mine employment and also suffered from a totally disabling respiratory or pulmonary impairment. Based on those determinations and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] In consideration of rebuttal, the administrative law judge found that employer disproved that the miner had legal pneumoconiosis, but failed to establish that he did not suffer from clinical pneumoconiosis. However, because the administrative law judge determined that employer affirmatively established that the miner's death was not due to pneumoconiosis, he found that employer rebutted the Section 411(c)(4) presumption and denied benefits.

Claimant appealed, and the Board affirmed the administrative law judge's determination to assign little weight to the opinion of the autopsy prosector, Dr. Dennis, based, in part, on the suspension of his medical license.[3] *See Barker v. Arch of W. Va.*, BRB No. 13-0511 BLA, slip op. at 5 (June 6, 2014) (unpub.). The Board vacated the denial of benefits, however, because the administrative law judge erred in weighing the evidence on the issue of legal pneumoconiosis on rebuttal. *Id*. at 6-12. Specifically, the Board held that the administrative law judge did not adequately explain his basis for crediting the opinions of Drs. Farney and Oesterling on the issue of the cause of the miner's emphysema. *Id*. at 9. The Board also held that the administrative law judge applied an incorrect rebuttal standard by requiring that employer establish that pneumoconiosis was not a substantially contributing cause of the miner's death, rather than establishing that "no part" of the miner's death was caused by pneumoconiosis, as defined under 20 C.F.R. §718.201. *Id*. at 8-9. Therefore, the Board instructed the

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[2] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if he or she 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 also suffered from a totally disabling respiratory or pulmonary impairment at the time of his or her death. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[3] The Board further affirmed the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Barker v. Arch of W. Va.*, BRB No. 13-0511 BLA, slip op. at 3-6 (June 6, 2014) (unpub.).

administrative law judge, on remand, to reconsider whether the opinions of Drs. Farney and Oesterling were sufficient to disprove that the miner's emphysema constituted legal pneumoconiosis and apply the correct rebuttal standard. *Id*. at 8-10. Moreover, when considering the issue of death causation, the Board instructed the administrative law judge to weigh the opinions of Drs. Farney, Oesterling, and Caffrey, that the miner's death was unrelated to pneumoconiosis, in light of the decision of the United States Court of Appeals for the Fourth Circuit[4] in *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187, 25 BLR 2-601, 2-614 (4th Cir. 2014).[5] *Id*. at 10-11.

On remand, the administrative law judge again found that employer affirmatively established that the miner did not suffer from legal pneumoconiosis, although it was unable to disprove that the miner had clinical pneumoconiosis. The administrative law judge found that employer successfully rebutted the Section 411(c)(4) presumption by establishing that no part of the miner's death was due to legal or clinical pneumoconiosis and he denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that employer rebutted the Section 411(c)(4) presumption of death due to pneumoconiosis. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, has not filed 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. 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 invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing

[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, 1-202 (1989) (en banc); Decision and Order on Remand at 2 n. 3; Director's Exhibit 3.

[5] The Board explained that the Fourth Circuit "has cautioned that a medical opinion that the miner's 'death is purely cardiac in nature' must be carefully evaluated as 'the relationship between severe pulmonary impairment and cardiac functioning is well known. The body is an integrated organism. A part can drag down the whole.'" *Barker*, BRB No. 13-0511 BLA, slip op. at 11, *quoting Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187, 25 BLR 2-601, 2-614 (4th Cir. 2014).

that the miner had neither legal[6] nor clinical[7] 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." 20 C.F.R. §718.305(d)(2); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 138-43 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

I. Legal Pneumoconiosis

In accordance with the Board's instruction, the administrative law judge reweighed the medical opinions of Drs. Farney and Oesterling regarding the etiology of the miner's bullous emphysema to determine whether employer rebutted the presumed fact of legal pneumoconiosis. The administrative law judge found that Dr. Farney's opinion "failed to adequately explain" why the miner's emphysema was due entirely to smoking, "beyond his belief that coal dust is not associated with the disease." Decision and Order on Remand at 13. Thus, the administrative law judge concluded that Dr. Farney's opinion was not well-reasoned on the etiology of the miner's bullous emphysema and gave it "no weight" on the issue of whether the miner had legal pneumoconiosis. *Id*. In contrast, the administrative law judge found that Dr. Oesterling "adequately explained how he concluded that this specific miner's bullous, panlobular, and centrilobular emphysema were not due to coal dust, while repeatedly acknowledging that coal dust *can* cause the disease." *Id*. The administrative law judge therefore concluded that employer disproved that the miner had legal pneumoconiosis, based on

[6] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[7] Clinical pneumoconiosis is defined as:

> [T]hose 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).

Dr. Oesterling's opinion.

Claimant argues that Dr. Oesterling's opinion that claimant does not have legal pneumoconiosis is not credible because it is grounded on Dr. Oesterling's belief that "coal mine dust exposure cannot cause bullous emphysema," contrary to the preamble to the 2001 revised regulations. Claimant's Petition for Review and Brief at 12. We disagree, however, that the administrative law judge was required to discredit Dr. Oesterling's opinion on the issue of legal pneumoconiosis.

On remand, the administrative law judge acknowledged that the preamble "states, 'without qualification or limitation as to a particular form,' that emphysema 'may be legal pneumoconiosis *if it arises from* [*coal mine*] *employment*.'" Decision and Order on Remand at 10, *quoting* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). The administrative law judge also recognized that the preamble "states that 'observations support the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms.'" Decision and Order on Remand at 10; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). Further, the administrative law judge noted that he could reject Dr. Oesterling's opinion if the physician failed to "offer a reason for opining that the miner's emphysema was not substantially aggravated by his coal mine dust exposure beyond [a] belief that coal mine dust exposure cannot cause that condition." Decision and Order on Remand at 10.

In weighing Dr. Oesterling's opinion, the administrative law judge observed that Dr. Oesterling identified centrilobular emphysema progressing to bullous emphysema on histologic slides. Decision and Order on Remand at 5. Dr. Oesterling explained that the emphysema "would have accounted for some of [the miner's] lifetime respiratory distress[.]" Employer's Exhibit 2 at 4. The administrative law judge found that Dr. Oesterling did not exclude a diagnosis of legal pneumoconiosis in this case, based on a view that coal dust exposure cannot cause emphysema, as Dr. Oesterling specifically "testified that severe emphysema, as seen here, '*can be attributed* . . . to coal dust.'" Decision and Order on Remand at 11, *quoting* Employer's Exhibit 6 at 15; *see* Employer's Exhibit 6 at 43, 46-47. Rather, Dr. Oesterling opined that coal dust exposure did not play a role in the miner's emphysema because the histologic slides that evidenced the emphysema revealed no "significant concentration of coal [dust], and thus coal dust would not appear to be the primary etiologic agent in producing this [emphysema] process." Employer's Exhibit 1 at 4; *see* Decision and Order on Remand at 6. In attributing the emphysema to the miner's cigarette smoking history, Dr. Oesterling identified "macrophages now containing a finely stippled cytoplasm which has a tan color . . . typically seen in conjunction with the inhalation of tobacco smoke, and therefore are referred to as smoker's macrophages." Employer's Exhibit 1 at 4.

Contrary to claimant's argument on appeal, the administrative law judge acted

within his discretion in finding that Dr. Oesterling's "reasoning and conclusions do not conflict with the [p]reamble"[8] because he "repeatedly acknowledge[ed] that coal dust *can* cause [emphysema]."[9] Decision and Order on Remand at 13; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012). Moreover, the administrative law judge permissibly credited Dr. Oesterling's opinion as being "well-documented and reasoned," because Dr. Oesterling "adequately explained how he concluded that this specific miner's bullous, panlobular, and centrilobular emphysema were [sic] not due to coal dust." Decision and Order on Remand at 13; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis by establishing that the miner's emphysema was not significantly related to, or substantially aggravated by, coal dust exposure.[10]

II. Death Due to Pneumoconiosis

[8] The administrative law judge noted correctly that a "physician's references to the need for x-ray evidence of nodulation or dust retention [cannot] be reconciled with either the definition of legal pneumoconiosis [at 20 C.F.R. §718.201] or the terms of [20 C.F.R. §718.202(a)(4)]." Decision and Order on Remand at 12. However, the administrative law judge permissibly found that Dr. Oesterling's opinion did not conflict with the regulations because he did not base his opinion solely on a negative x-ray, "but on *pathology* clearly demonstrating minimal dust retention." *Id*. at 12 (emphasis added); *see* 20 C.F.R. §718.202(a)(4); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012). Specifically, the administrative law judge identified that Dr. Oesterling "attributed the miner's emphysema to his extensive smoking history because there was almost no coal dust found in the interstitium, leading the doctor to conclude that this particular obstructive lung disease was not due to coal dust." Decision and Order on Remand at 12; *see* Employer's Exhibit 6 at 43.

[9] Furthermore, the administrative law judge noted correctly that the Department of Labor has "cited, with approval, studies finding that the extent of emphysema is related to the amount of dust in the lungs, and used them as support for including obstructive pulmonary diseases in the definition of legal pneumoconiosis." Decision and Order on Remand at 12, *citing* 65 Fed. Reg. 79,920, 79,941-42 (Dec. 20, 2000).

[10] Because employer failed to disprove the existence of clinical pneumoconiosis, employer is unable to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis pursuant to 20 C.F.R. §§718.202; 718.305(d)(2)(i).

On the issue of death causation, the administrative law judge reconsidered the medical opinions of Drs. Dennis, Caffrey, Oesterling, and Farney. Dr. Dennis, the autopsy prosector, attributed the miner's death to coal workers' pneumoconiosis. Decision and Order on Remand at 13-16; Director's Exhibit 12; Employer's Exhibit 3.

Based on his review of the autopsy slides, Dr. Caffrey opined that coal workers' pneumoconiosis or coal dust "did not play a role in[,] or hasten," the miner's death because "of the paucity of lesions of simple coal workers' pneumoconiosis," instead concluding that the miner's death "was in all likelihood a cardiac death in an individual who had [chronic obstructive pulmonary disease]." Employer's Exhibit 2 at 4

Dr. Oesterling reviewed the autopsy slides and noted "coal workers' pneumoconiosis as a micronodular change primarily limited to the pleural surfaces," and opined that the "coal workers' pneumoconiosis was [not] sufficient to have been a terminal factor in the miner's demise." Employer's Exhibit 1 at 5. He testified that the cause of death was "probably" cardiac arrest, and that emphysema "may have . . . contributed" because the miner "had so much passive congestion, so much pneumonia." Employer's Exhibit 6 at 47. He explained that the miner "would have been hypoxic, but it would have been primarily due to pneumonia, to a much [lesser] degree due to emphysema and not due to coal dust." *Id*.

Dr. Farney reviewed the pathology reports and other evidence in the record. Employer's Exhibit 4. He opined that the miner died due to "numerous co-morbidities[,] including coronary artery disease, diabetes, hypertension and congestive heart failure," and stated that none of these conditions "are occupationally related." *Id.* at 7. Based on the autopsy findings, the pattern evidenced by "serial" arterial blood gas studies, elevated lactate levels, and persistent elevation of brain natriuretic peptide, Dr. Farney determined that the miner "died as a result of inadequate oxygen delivery due to circulation failure[,] but not due to ventilatory failure and inability to oxygenate the blood." *Id*. at 8. He specifically stated that the clinical study evidence "is not consistent with respiratory failure due to emphysema[.]" *Id*.

The administrative law judge assigned "little, if any weight, to Dr. Dennis's opinion because of its rambling, sometimes less than understandable presentation, his lack of information concerning the miner's health, and for the reasons behind the suspension of his medical license." Decision and Order on Remand at 14. In contrast, the administrative law judge found that Dr. Farney's opinion is the most credible, as it is "based upon the most comprehensive review of the medical and pathology evidence," and "is supported by Dr. Oesterling's well-reasoned pathology review and by Dr. Caffrey's opinion." *Id.* at 16.

Furthermore, the administrative law judge distinguished the facts of this case from

those presented in *Collins.* The administrative law judge observed that "in *Collins* the physician's opinion that the miner suffered a purely cardiac death was improperly credited because there was no disputing that the miner suffered from and died of, respiratory failure." Decision and Order on Remand at 16, *quoting Collins*, 751 at 187, 25 BLR at 2-613. The administrative law judge found that Dr. Farney "thoroughly explained" his basis for finding that "the clinical evidence here rules out respiratory failure as a cause of death." *Id*.

Claimant argues that, insofar as the administrative law judge "discounted Dr. Farney's opinion concerning whether the miner's bullous emphysema had been caused by his coal dust exposure," the administrative law judge erred in concluding that Dr. Farney offered a reasoned opinion concerning the cause of the miner's death. Claimant's Petition for Review and Brief at 11-12. Contrary to claimant's argument, a finding by the administrative law judge that a physician's opinion is not well-reasoned on one issue does not necessarily mean that the opinion cannot be credited on a separate issue. *See Luketich v. Director, OWCP*, 8 BLR 1-477, 1-480 n.3 (1986). Rather, the administrative law judge is required to examine the validity of a physician's reasoning on each element of entitlement in light of the studies conducted and the underlying bases for the physician's conclusions. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

In this case, we conclude that the administrative law judge acted within his discretion in crediting Dr. Farney's opinion, as supported by the opinions of Drs. Caffrey and Oesterling, because "[r]egardless of the emphysema's etiology, [Dr. Farney] thoroughly explained how he concluded that the [the miner's] death was caused by congestive heart failure as opposed to respiratory failure." Decision and Order on Remand at 15 n.16; *see Cochran*, 718 F.3d at 324, 25 BLR at 2-265; *Collins*, 751 F.3d at 187, 25 BLR at 2-614; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Thus, as it is supported by substantial evidence, we affirm the administrative law judge's finding that employer met its burden of establishing that no part of the miner's death was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii).[11] We therefore affirm the administrative law judge's finding that employer established rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Bender*, 782 F.3d at 137.

Accordingly, the administrative law judge's Decision and Order on Remand

[11] We affirm, as unchallenged, the administrative law judge's finding that Dr. Dennis's opinion is entitled to no weight on the issue of whether the miner's death was due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge