U.S. Department of Labor

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

BRB No. 16-0013 BLA

NYOKA MATNEY o/b/o VERNON R. MATNEY	)	
Claimant-Respondent	)	
v.	)	
McNAMEE RESOURCES, INCORPORATED	)	
and	)	
	)	DATE ISSUED: 09/26/2016
WEST VIRGINIA CWP FUND	)	
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 Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith, Charleston, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-5551) of Administrative Law Judge Dana Rosen rendered on a request for modification of the denial of a subsequent claim[1] filed on May 21, 2007 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the third time.

In the initial decision issued on November 20, 2008, Administrative Law Judge Jeffry Tureck denied benefits because the miner did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Director's Exhibit 56. On appeal, the Board vacated Judge Tureck's denial of benefits in light of the amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), affecting claims filed after January 1, 2005. Noting that the miner filed his claim after January 1, 2005, that the miner alleged eighteen years of coal mine employment, and that Judge Tureck found a total respiratory disability established, the Board remanded the case for consideration of whether the miner was entitled to invocation of the presumption at Section 411(c)(4).[2] *Matney v. McNamee Resources, Inc*., BRB No. 09-0768 BLA (Aug. 18, 2010)(unpub.); Director's Exhibit 70.

On remand, due to Judge Tureck's retirement, the case was reassigned to Administrative Law Judge Robert B. Rae. Director's Exhibit 72. Applying Section 411(c)(4), Judge Rae found that the miner's underground coal mine employment spanned over fifteen years and that the new medical evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Judge Rae, therefore, determined that the miner invoked the rebuttable presumption of total disability due to pneumoconiosis, and demonstrated a change in an

[1] The miner's initial claim for benefits, filed on May 16, 1990, was finally denied by the district director on November 9, 1990, because the miner did not establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 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 or pulmonary impairment are established. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii).

applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Judge Rae further determined, however, that employer rebutted the presumption. Consequently, benefits were denied.

Following the miner's appeal and employer's cross-appeal, the Board affirmed, as unchallenged, Judge Rae's findings of at least fifteen years of underground coal mine employment, the existence of a totally disabling respiratory impairment at Section 718.204(b), and a change in an applicable condition of entitlement at Section 725.309. Further, the Board rejected employer's contention that retroactive application of the amendments constituted a due process violation and an unconstitutional taking of private property, and affirmed Judge Rae's application of Section 411(c)(4) to this claim. Holding that substantial evidence supported Judge Rae's finding that employer established rebuttal of the Section 411(c)(4) presumption because the evidence established that the miner did not have pneumoconiosis, the Board affirmed the denial of benefits. *Matney v. McNamee Resources, Inc*., BRB Nos. 12-0174 BLA and 12-0174 BLA-A (Dec. 12, 2012)(unpub.); Director's Exhibit 93.

Claimant,[4] the miner's widow, filed a request for modification on December 21, 2012, on the ground of a mistake in Judge Rae's determination of fact that the miner did not have pneumoconiosis. Director's Exhibit 94. In support of her modification request, claimant submitted the miner's death certificate and autopsy report. Director's Exhibits 94, 109. On February 19, 2014, the district director issued a Proposed Decision and Order denying the request for modification. Director's Exhibit 113. Claimant requested a hearing, and the case was assigned to Judge Dana Rosen (the administrative law judge). Director's Exhibit 115. Claimant subsequently requested a determination on the record, and the administrative law judge issued her Decision and Order on September 18, 2015, which is the subject of this appeal.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

[4] The miner died on March 24, 2012, and claimant is pursuing the miner's claim on his behalf. Director's Exhibits 102, 109.

The administrative law judge accepted the parties' stipulation that the miner had 17.5 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). Thus, the administrative law judge found that claimant was entitled to invocation of the Section 411(c)(4) presumption, and further found that employer failed to establish rebuttal. The administrative law judge concluded that claimant was entitled to modification, based on a change in conditions pursuant to 20 C.F.R. §725.310, and that granting modification would render justice under the Act. Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.[5]

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.[6] 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).

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established invocation of the presumption of total disability due to pneumoconiosis at 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).

[6] 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); Director's Exhibit 1.

establishing that the miner had neither legal[7] nor clinical pneumoconiosis, or by establishing that "no part of the miner's 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). The administrative law judge found that employer failed to establish rebuttal by either method and, thus, awarded benefits.

In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge initially considered the newly-submitted autopsy evidence, consisting of reports from Drs. DiBernardo and Oesterling. In his autopsy report dated March 27, 2012, Dr. DiBernardo diagnosed "simple coal workers' pneumoconiosis, mild to moderate, bilateral lungs,"[8] as well as mild anthracosis of mediastinal lymph nodes and moderate to focally severe centrilobular emphysema. Director's Exhibit 109. Dr. Oesterling reviewed the miner's autopsy slides and provided

[7] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[8] In his microscopic description of the right lung, Dr. DiBernardo found emphysema, and indicated:

> Additionally, there is anthracotic pigment noted throughout the sections. Some areas of the pulmonary interstitium have moderately dense anthracotic pigment deposition, consistent with anthracosis (prominent in the upper and lower lobe sections). There are no micronodules or macronodules noted. Marked fibrosis is not seen. There is no evidence of infection, inflammation or malignancy.

In his microscopic description of the left lung, Dr. DiBernardo again found emphysema, and indicated:

> Additionally, there is anthracotic pigment noted throughout the sections. Some areas of the pulmonary interstitium have mildly dense anthracotic pigment deposition, consistent with anthracosis (less prominent when compared to the right lung). There are no micronodules or macronodules noted. Marked fibrosis is not seen. Acute inflammatory cells are focally noted within alveolar spaces, consistent with early acute bronchopneumonia. There is no evidence of infection or other abnormality.

Director's Exhibit 109.

a report dated December 28, 2013. Dr. Oesterling noted mild centrilobular pulmonary emphysema and respiratory bronchiolitis associated with smoking, and concluded that:

> [the miner] showed evidence of mild anthracotic interstitial cuffing surrounding small airways and their vasculature. He did not show evidence of macular or micronodular coal workers' pneumoconiosis thus there is no progressive massive fibrosis, an entity resulting from severe micronodular disease. This is a very low level of the disease process and would not result in functional abnormalities in the lungs. Therefore coal workers' disease did not produce any respiratory disability nor did it contribute to his death.

Director's Exhibit 112.

After reviewing Dr. DiBernardo's completed autopsy report, Dr. Oesterling provided a supplemental report, noting that "[Dr. DiBernardo's] diagnoses remain[ed] unchanged" and were "still quite similar to those in my previous report." Employer's Exhibit 1. Dr. Oesterling opined that the miner had mild anthracotic cuffing throughout the lung and pleural surfaces, but did not have coal workers' pneumoconiosis. Stating that "[a]gain I have noted the extreme emphysema present," he concluded,

> Therefore I find no reason to change my initial impressions and they remain the same as are those submitted by [the] prosector with the exception of my additional comments on the smokers' macrophages and the smoking related changes.[9]

Employer's Exhibit 1 at 2.

In evaluating the pathology reports, the administrative law judge credited Dr. DiBernardo's autopsy report, and discounted the opinion of Dr. Oesterling. Specifically, the administrative law judge found that Dr. DiBernardo made a "sufficient" finding of clinical pneumoconiosis, as he diagnosed simple coal workers' pneumoconiosis and anthracosis.[10] Decision and Order at 41; Director's Exhibit 109. In contrast, the

[9] Dr. Oesterling stated that "while the prosector did comment on the floating island in [the miner's] emphysematous lung, he did not associate [it] with tobacco smoke inhalation nor did he report any evidence of smokers' macrophages." Employer's Exhibit 1.

[10] 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

administrative law judge found Dr. Oesterling's reports to be "inconsistent" and entitled to less weight. Decision and Order at 41; Director's Exhibit 112; Employer's Exhibit 1. The administrative law judge concluded that the pathology evidence was insufficient to establish rebuttal of the presumed fact of clinical pneumoconiosis. Decision and Order at 41. The administrative law judge further found that the more recent and probative pathology evidence outweighed the x-ray[11] and CT scan[12] evidence of record, which was performed at least five years prior to the autopsy. Decision and Order at 41-42.

Employer challenges the administrative law judge's crediting of Dr. DiBernardo's opinion over that of Dr. Oesterling. Employer argues that Dr. DiBernardo's finding of "anthracosis of mediastinal lymph nodes, mild" does not represent changes in the lungs and, therefore, is not diagnostic of pneumoconiosis. Employer also maintains that because Dr. Oesterling did not diagnose pneumoconiosis in either of his reports, the administrative law judge erred in finding that Dr. Oesterling's reports and diagnoses were inconsistent. Employer's Brief at 9-14. Employer's arguments lack merit.

Contrary to employer's argument, the administrative law judge permissibly determined that Dr. DiBernardo's diagnosis of "simple coal workers' pneumoconiosis, mild to moderate, bilateral lungs" represented a finding of clinical pneumoconiosis in the lung tissue, which was in addition to his finding of anthracosis in the lymph nodes. Director's Exhibit 109. We also reject employer's argument that the administrative law judge substituted her opinion for that of Dr. Oesterling in determining that the physician's

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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).

[11] The administrative law judge considered seven interpretations of three x-rays dated May 26, 1990; August 21, 2007; and December 5, 2007. Director's Exhibits 1, 20, 17, 42; Decision and Order at 13-15, 41-42. One interpretation from May 26, 1990 was read as positive for pneumoconiosis, while the six remaining interpretations were read as negative for pneumoconiosis.

[12] The administrative law judge considered two CT scans. The CT scan dated December 22, 2004 was read by Dr. Meyer, who noted no evidence of pneumoconiosis, but observed emphysema in the base of the lungs. The CT scan dated April 30, 2007 was read by Dr. Hoffman as showing severe bullous emphysema. Director's Exhibits 18, 46, 56 at 4; Decision and Order at 15-16, 42-43.

finding of "a very low level of the disease process" in his December 28, 2013 report was a diagnosis of coal workers' pneumoconiosis when read in concert with his subsequent statement that "[t]herefore, coal workers' disease did not produce any respiratory disability." The administrative law judge reasonably concluded that coal workers' pneumoconiosis was the disease process to which Dr. Oesterling referred, especially when coupled with Dr. Oesterling's statement in his 2014 report that Dr. DiBernardo's diagnoses "are still quite similar to those in my previous report," in light of Dr. DiBernardo's diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 1. Furthermore, contrary to employer's argument, the administrative law judge did not "overlook" Dr. Oesterling's statement in his subsequent opinion that "[he found] no reason to change his initial impressions" after reviewing the autopsy report. Rather, the administrative law judge considered both reports in their entirety and determined that the reports were inconsistent rather than clarifying. Since Dr. Oesterling's second report did not retract any of the statements made in his first report, or explain that the findings in the first report did not constitute a diagnosis of clinical pneumoconiosis, the administrative law judge's findings and inferences were reasonable.

As the fact finder's inferences and credibility assessments are entitled to deference, we hold that the administrative law judge permissibly accorded less weight to the opinion of Dr. Oesterling, based on the lack of clarity and consistency in his reports. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co*., 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the pathology evidence supported a finding of clinical pneumoconiosis and outweighed the negative x-ray evidence of record. Consequently, we affirm further her finding that this evidence was insufficient to carry employer's burden to disprove the presumed fact of clinical pneumoconiosis.

Employer also contends that the administrative law judge erred in finding that the medical opinions of Drs. Castle and McSharry failed to disprove the existence of clinical pneumoconiosis.[13] We disagree. Although Drs. Castle[14] and McSharry[15] opined that the

[13] The administrative law judge also considered the opinion of Dr. Forehand that the miner was totally disabled due to clinical and legal pneumoconiosis, as well as cigarette smoking. Director's Exhibit 17. Because employer bears the burden of rebutting the Section 411(c)(4) presumption, error, if any, in the administrative law judge's consideration of Dr. Forehand's opinion is harmless. *See* 30 U.S.C. §902(b);

miner did not have clinical pneumoconiosis, Employer's Exhibits 2, 3, the administrative law judge determined that their opinions were based on the premise that the pathological evidence was negative for clinical pneumoconiosis, contrary to the administrative law judge's finding.[16] Decision and Order at 45-46. Thus, the administrative law judge permissibly found that the opinions of Drs. Castle and McSharry were unpersuasive and entitled to little weight. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423, 1-416 (1983). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her findings that the medical opinion evidence did not disprove the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), and

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Johnson v. Jeddo-Highland Coal Co., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[14] Dr. Castle opined that the miner did not have clinical pneumoconiosis, based on the lack of radiographic findings of coal workers' pneumoconiosis and the lack of definitive pathologic findings of coal workers' pneumoconiosis. Dr. Castle also opined that the miner did not have legal pneumoconiosis, finding that the miner's physiologic changes of severe airway obstruction with reversibility, hyperinflation, gas trapping, and severe reduction in diffusing capacity were solely related to tobacco smoke-induced bullous emphysema. Employer's Exhibit 2.

[15] Dr. McSharry found no evidence of clinical or legal pneumoconiosis. He stated that the autopsy findings are not evidence of pneumoconiosis in his understanding, as there was no specific report of scarring of lung tissue and "the presence of staining of the pleura and lymph nodes with anthracotic pigment does not mean that pneumoconiosis was present." Employer's Exhibit 3. Dr. McSharry opined that "Dr. Oesterling's later interpretation of the pathology specimens appears to have a defensible basis, and I agree with his interpretation within the limits of my understanding of pathology and coal workers' pneumoconiosis." *Id.* Dr. McSharry diagnosed a severe respiratory impairment that was "typical smoking-related emphysema" and not related to the miner's coal mine employment. *Id.*

[16] Dr. Castle based his opinion that the miner did not have clinical pneumoconiosis on negative radiographic evidence and "the lack of definitive pathologic findings of coal workers' pneumoconiosis." Employer's Exhibit 2 at 19. Dr. McSharry based his opinion that the miner did not have clinical pneumoconiosis on negative chest radiographs and a determination that the autopsy findings did not diagnose pneumoconiosis. Employer's Exhibit 3.

that employer failed to rebut the presumed fact of pneumoconiosis.[17] 20 C.F.R. §718.305(d)(1)(i).

Employer also asserts that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption by establishing that "no part of the miner's 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)(ii). Employer specifically contends that the opinions of Drs. Castle and McSharry are sufficient to establish this second method of rebuttal. Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Castle and McSharry because neither physician diagnosed the miner with pneumoconiosis, and she found no "specific and persuasive reasons" for concluding that the physicians' opinions on the issue of disability

[17] Employer's failure to disprove the presumed fact of clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, we need not address employer's contentions of error regarding the administrative law judge's finding that employer also failed to disprove the presumed fact of legal pneumoconiosis. Employer's Brief at 14-15, 19-28.

causation were independent of their opinions regarding the existence of pneumoconiosis. Decision and Order at 49 n.35; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 503, BLR (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70, 22 BLR 2-372, 2-382-84 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden of establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii). We also affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a basis for modification under 20 C.F.R. §725.310 and that granting modification would render justice under the Act. Decision and Order at 34, 53; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, we affirm the award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge