U.S. Department of Labor

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

BRB No. 21-0129 BLA

CAROL A. LOWE (Widow of LARRY R. LOWE)	)	
Claimant-Petitioner	)	
v.	)	
PENNSYLVANIA MINES CORPORATION	)	DATE ISSUED: 4/27/2022
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Michael J. Parrish, Jr., (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor).

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2020-BLA-05253) on a survivor's claim filed on January 9, 2019, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with 17.64 years of qualifying coal mine employment and found Claimant did not establish the Miner had complicated pneumoconiosis or a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §§718.202, 718.204(b). She therefore found Claimant did not invoke either presumption that the Miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(3), (4) (2018).[2] Considering entitlement under Part 718, she found Claimant established the Miner had pneumoconiosis but did not establish that the Miner's death was due to pneumoconiosis. She therefore denied benefits.

[1] Claimant is the widow of the Miner, who died on October 31, 2018. Director's Exhibits 2, 12; Decision and Order at 3. The Miner filed but withdrew an initial claim for benefits; it therefore is considered not to have been filed. *See* 20 C.F.R. §725.306; Miner's Claim (MC) Responsible Operator Pre Hearing Report (Oct. 28, 2013). The Miner then filed a claim on July 25, 2011, which ALJ Drew Swank denied on January 21, 2014, and the Miner did not appeal. *See Lowe v. Pa. Mines Corp.*, OALJ No. 2012-BLA-6096 (Jan. 21, 2014) (unpub.); Director's Response at 2. As that denial is now final, Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, is not applicable in this case.

[2] Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner's death was due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the Miner's death was due to pneumoconiosis if she establishes he had at least fifteen years of underground or comparable coal mine employment, and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

On appeal, Claimant challenges the ALJ's finding that she did not establish total disability and was therefore unable to invoke the Section 411(c)(4) presumption. Employer filed a response brief urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to vacate the ALJ's finding that Claimant did not invoke the Section 411(c)(4) presumption. The Director contends the ALJ mischaracterized the record and failed to consider all relevant evidence regarding total disability.[3]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order 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 Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ observed "neither party specifically identified" any pulmonary function or blood gas studies on their respective evidence designation forms but Claimant submitted objective tests included as the Miner's "treatment and/or hospitalization records." Decision and Order at 14. Specifically, she noted Claimant submitted an April 17, 2012

[3] We affirm as unchallenged on appeal the ALJ's findings that the Miner had 17.64 years of qualifying coal mine employment and that Claimant neither invoked the irrebuttable presumption that the Miner's death was due to pneumoconiosis under Section 411(c)(3), nor established that the disease hastened the Miner's death under Part 718. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 16 n.11, 20, 22.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the Miner performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4; Decision and Order at 3 n.5.

pulmonary function study yielding results "which qualify for disability under the [Department of Labor] regulations;" [5] an April 3, 2012 blood gas study which produced qualifying values at rest and no exercise values; and an August 16, 2013 blood gas study which produced qualifying values at rest and non-qualifying values with exercise. *Id*. at 11; Claimant's Exhibits 1, 3. The ALJ found that while the pulmonary function study and blood gas studies "generally support" a finding of total disability, none of the studies indicate the circumstances as to when or why the tests were administered or whether the Miner was hospitalized at the time they were conducted.[6] Thus, she stated the objective tests results could not be "fully credit[ed]" to establish total disability. Decision and Order at 11. With regard to the blood gas studies, the ALJ further stated she credited the non-qualifying exercise values over the qualifying resting values. *Id*. at 14 n.10. Consequently, the ALJ concluded Claimant was unable to establish total disability based on the pulmonary function and blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).

The ALJ further found the record contains no evidence of cor pulmonale with right-sided congestive heart failure, the autopsy evidence does not address total disability, and that the parties did not submit any medical opinion evidence for consideration. 20 C.F.R. §718.204(b)(2)(iii), (iv). Decision and Order at 11-15.[7] She therefore concluded Claimant did not establish total disability and could not invoke the Section 411(c)(4) presumption.

Claimant and the Director correctly contend the ALJ erred in stating the circumstances surrounding the administration of the objective tests contained in Claimant's Exhibits 1-3 are unknown. A review of the miner's claim record shows that Drs. Begley, Pickerill, and Fino conducted these tests when they examined the Miner in conjunction

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The ALJ considered these studies to be part of the Miner's treatment records as indicated in Claimant's May 12, 2020 Cover Letter attached to her Evidence Summary Form referencing them as being obtained during the Miner's treatment, but they actually were not, as detailed below.

[7] The ALJ found Dr. Nine's autopsy report, Director's Exhibit 14, did not address total disability. Decision and Order at 15. While Dr. Swedarsky's autopsy report, Employer's Exhibit 3, indicated the Miner had a respiratory impairment, she found he did not address the degree of that impairment or whether it would preclude the Miner's last coal mine employment. *Id.*

with his prior claim.[8] However, although Claimant designated the objective test results that Drs. Begley, Pickerill, and Fino obtained as evidence in her survivor's claim, she did not also designate their overall medical opinions as affirmative medical reports or rebuttal evidence in her survivor's claim as the Director maintains.[9] Director's Response at 3-4 (characterizing Claimant's Exhibits 1-3 as multi-page documents that include the complete pulmonary evaluation reports of Drs. Begley, Fino, and Pickerill). Because the evidence Claimant designated as Claimant's Exhibits 1-3 in this survivor's claim was limited to the various objective test results that Drs. Begley, Fino, and Pickerill obtained, we reject the Director's contention that the ALJ failed to consider the totality of their medical reports at 20 C.F.R. §718.204(b)(2)(iv) in determining whether Claimant is totally disabled.[10] *See*

[8] As explained in more detail in footnote 10 of this decision, while the record from the Miner's prior miner's claim is part of the record in this survivor's claim and information may be drawn from it, Claimant must specifically designate medical evidence from the miner's claim in her survivor's claim in accordance with the evidentiary limitations at 20 C.F.R. §725.414.

[9] *See* Claimant's Exhibit 1 (Dr. Begley's one-page blood gas study results from August 16, 2014); Claimant's Exhibit 2 (Dr. Fino's one-page pulmonary function study results from April 17, 2012); Claimant's Exhibit 3 (Dr. Pickerill's one-page blood gas test results from April 3, 2012); Claimant's May 12, 2020 Evidence Summary Form at 9 (summarizing Claimant's Exhibits 1-3 as results of three objective tests); Claimant's May 12, 2020 Cover Letter attached to Evidence Summary Form (identifying Claimant's Exhibits 1-3 as the Miner's "treatment" records corresponding to the dates of the objective testing); Hearing Transcript at 11 (Claimant's counsel summarizing Claimant's Exhibits 1-3 as records "dated" on the dates that are consistent with the objective studies rather than the dates of the administering physicians' examination reports that the Director cites); Claimant's Closing Brief at 2 (characterizing evidence submitted in support of total disability as "a number of qualifying objective testing [sic]" and summarizing the test results).

[10] Claimant asserts that, because her husband previously filed a miner's claim for benefits, her survivor's claim constitutes a "subsequent claim" and 20 C.F.R. §725.309(c)(2) therefore applies to merge the evidentiary records. Claimant's Brief at 6. Contrary to Claimant's assertion, the evidence in a miner's claim is not automatically made part of the record in a survivor's claim. *Earl Patton Coal Co. v. Patton*, 848 F.2d 668, 672 (6th Cir. 1988) (20 C.F.R. §725.309(c) indicates it does not cover separate claims filed on behalf of the miner's estate and by an eligible survivor in her own right and on her own behalf). Instead, the parties in a survivor's claim must designate the medical evidence from a prior living miner's claim as evidence, in accordance with the limitations of 20 C.F.R.

Earl Patton Coal Co. v. Patton, 848 F.2d 668, 672 (6th Cir. 1988); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007) (en banc); Claimant's Exhibits 1-3. Moreover, any error the ALJ committed in terms of not looking to the medical reports contained in the record of the miner's claim for purposes of understanding the circumstances relating to the administration of the pulmonary function and blood gas studies contained in Claimant's Exhibits 1-3 was harmless as explained below. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

For a pulmonary function study to constitute evidence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), it must produce a qualifying FEV1 value and either an FVC or MVV value equal to or less than the values appearing in the tables set forth in Appendix B, or an FEV1 to FVC ratio equal to or less than 55%. 20 C.F.R. §718.204(b)(2)(i)(A)-(C). Claimant asserted below and the ALJ summarily stated in her decision that the April 17, 2012 pulmonary function study produced "qualifying objective results." Claimant's Closing Brief at 2. But the study is non-qualifying as only the FEV1 value is equal to or less than the applicable table value.[11] 20 C.F.R. §718.204(b)(2)(i)(A)-(C). Thus, Claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Regarding the blood gas study evidence, despite her error in stating the circumstances surrounding the administration of the testing are unknown, the ALJ nonetheless weighed the conflicting test results and found Claimant did not establish total disability. Decision and Order at 14 n.10. Specifically, the ALJ gave greatest weight to the August 16, 2013 non-qualifying exercise test over the qualifying April 3, 2012 and August 16, 2013 resting studies because she found the exercise values were more probative of the Miner's ability to perform the exertional requirements of his usual coal mine employment. Decision and Order at 14 n.10. As no party challenges the ALJ's reliance on the exercise values, we affirm the ALJ's finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Skrack*, 6 BLR at 1-711; *see also Larioni*, 6

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§725.414, in order for it to be included in the record of a survivor's claim. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007) (en banc).

[11] The Miner was sixty-eight years old and sixty-six inches tall at the time of the April 17, 2012 pulmonary function study. Claimant's Exhibit 2. The study yielded an FEV1 value of 1.62, an FVC value of 2.28, and an FEV1/FVC ratio of 71%; it did not report a MVV value. *Id*. Applying the nearest greater height appearing in the Appendix B tables of 66.1 inches denotes a qualifying FEV1 value is equal to or less than 1.62 and a qualifying FVC value is equal to or less than 2.09. 20 C.F.R. Part 718, Appendix B.

BLR at 1-1278; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Because there is no medical opinion evidence, the autopsy evidence did not address total disability, the pulmonary function study evidence is non-qualifying, and the ALJ determined the blood gas study evidence is insufficient to establish total disability, we affirm the ALJ's conclusion that Claimant did not establish the Miner's total disability at 20 C.F.R. §718.204(b)(2). Consequently, we affirm the ALJ's conclusion that Claimant did not invoke the Section 411(c)(4) presumption, and we further affirm the denial of benefits. Decision and Order at 22.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge