

U.S. Department of Labor

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



BRB Nos. 20-0447 BLA
and 20-0448 BLA

CLARA ELSEA)
(Widow of CHARLES ELSEA))

Claimant-Petitioner)

v.)

WOLVERINE MINING CORPORATION)

and)

OLD REPUBLIC INSURANCE COMPANY)

Employer/Carrier-Respondent)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 08/11/2021

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in Miner's Claim, and Remanding Claimant's Survivor's Claim to District Director of Angela F. Donaldson, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.) Prestonsburg, Kentucky, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP) Washington D.C., for Employer and its Carrier.

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

PER CURIAM:

Claimant¹ appeals Administrative Law Judge Angela F. Donaldson's Decision and Order Denying Benefits in Miner's Claim, and Remanding Claimant's Survivor's Claim to District Director (2009-BLA-05486, 2014-BLA-05018) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves the Miner's subsequent claim filed on June 9, 2008,² and Claimant's survivor's claim filed on May 13, 2013.

The administrative law judge credited the Miner with twelve years of coal mine employment and therefore found Claimant could not invoke the rebuttable presumption of total disability or death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).³ She found the Miner had a totally disabling respiratory or pulmonary impairment, and Claimant therefore established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309.⁴ However, the administrative law judge

¹ Claimant is the widow of the deceased miner and is pursuing his claim as well as her own survivor's claim.

² The district director denied Claimant's initial claim, filed in June 2001, as abandoned. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis, or died due to pneumoconiosis, where the evidence establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

⁴ Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he 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)(1); *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). Because the Miner failed to establish any condition or

determined Claimant failed to establish the existence of clinical or legal pneumoconiosis and therefore denied benefits in the Miner's claim.⁵ Regarding the survivor's claim, the administrative law judge found Claimant was not entitled to derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).⁶ She further determined the survivor's claim should be remanded to the district director to permit Claimant to develop evidence relevant to whether she can establish the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205.⁷

On appeal, Claimant argues the administrative law judge erred in finding she did not establish the existence of legal pneumoconiosis in the Miner's claim. Because she challenges the denial of benefits in the Miner's claim, she maintains she is also entitled to

element of entitlement in his prior claim, Claimant had to submit evidence establishing at least one element in order to obtain review of the merits of the Miner's claim. *Id.*

⁵ "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). "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). The definition includes "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).

⁶ 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*) (2018).

⁷ The district director issued a Proposed Decision and Order awarding benefits in the Miner's claim on January 14, 2009. Director's Exhibit 49. Based on that award, the district director issued a Proposed Decision and Order awarding Claimant derivative survivor's benefits on June 3, 2013. Director's Exhibit 53. At the March 7, 2019 Hearing, Employer recognized Claimant had not had an opportunity to develop evidence concerning the cause of the Miner's death and agreed that, in the event the Miner's claim was denied, the survivor's claim should be remanded to the district director for further evidentiary development. Decision and Order at 36; Hearing Transcript at 10.

derivative survivor's benefits. Employer filed a response brief. The Director, Office of Workers' Compensation Programs, has not participated in the appeal.⁸

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁹ 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).

Miner's Claim

Without the benefit of the statutory presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To prove legal pneumoconiosis, Claimant must establish that he suffers from 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). The United States Court of Appeals for the Sixth Circuit holds a claimant can establish a lung impairment is significantly related to coal mine dust exposure "by showing that [the miner's] disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in

⁸ We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant established fewer than fifteen years of coal mine employment and could not invoke the Section 411(c)(4) presumption, and that she did not establish the Miner had clinical pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 35.

⁹ The record reflects the Miner performed his most recent coal mine employment in Kentucky. Decision and Order at 5; Director's Exhibits 20 at 6, 45 at 33. 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, 1-202 (1989) (en banc).

part’ to mean ‘more than a *de minimis* contribution’ and instead ‘a contributing cause of some discernible consequence.’”).

Claimant argues the administrative law judge erred in rejecting the opinions of Drs. Sikder and Mettu that the Miner had legal pneumoconiosis. Claimant notes Dr. Sikder was the Miner’s treating physician¹⁰ and asserts the administrative law judge applied an incorrect legal standard in finding her opinion equivocal. Specifically, Claimant contends she is not required to establish coal dust exposure as the only cause of the Miner’s chronic pulmonary obstructive disease (COPD). Thus, Claimant maintains that Dr. Sikder’s statement that the Miner’s respiratory impairment was “probably” due to both smoking and coal mine dust exposure is adequate to satisfy her burden her burden to establish the Miner’s respiratory impairment was significantly related to, or substantially aggravated by coal mine dust exposure. Claimant’s Brief at 3-5 (unpaginated) (citing *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 352 (6th Cir. 2007) and *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000)); Decision and Order at 30; Claimant’s Exhibit 8 at 2.

But even if we agreed with Claimant that Dr. Sikder’s opinion is unequivocal, the administrative law judge also found it conclusory because she did not discuss the evidence she relied on and failed to “articulate a basis for her conclusions regarding the etiology of the Miner’s condition.” Decision and Order at 30. The administrative law judge noted Dr. Sikder prepared a report at the onset of her treatment of the Miner in April 2010 in which she noted the Miner had a history of chronic pulmonary obstructive disease (COPD) and “exposure to tobacco and coal dust,” and opined “[h]is COPD is probably caused by both.” Decision and Order at 24, 30; Claimant’s Exhibits 1 at 3, 8 at 2. In reviewing Dr. Sikder’s treatment records, dating from April 2010 to July 2011, the administrative law judge observed that, while “Dr. Sikder concluded the Miner had both pneumoconiosis and COPD, [her records] do not contain any additional information explaining Dr. Sikder’s conclusion regarding the etiology of the Miner’s disabling pulmonary condition.” Decision

¹⁰ An administrative law judge may give controlling weight to a miner’s treating physician’s opinion based on the nature and duration of the physician’s relationship with the miner and the frequency and extent of the physician’s treatment. 20 C.F.R. §718.104(d)(1)-(4). The weight given to a treating physician’s opinion, however, “shall also be based on the credibility of the physician’s opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.” 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get “the deference they deserve based on their power to persuade”). Here, the administrative law judge permissibly concluded that Dr. Sikder’s opinion was developed at the onset of her treatment of Claimant and was also not adequately reasoned. Decision and Order at 30.

and Order at 30 (citing Claimant's Exhibit 1). As Claimant does not specifically challenge the administrative law judge's alternate finding that Dr. Sikder's opinion is inadequately explained, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30.

Similarly, although Claimant generally asserts Dr. Mettu's diagnosis of legal pneumoconiosis is well-reasoned, Claimant's Brief at 5, she does not explain why the administrative law judge erred in discounting Dr. Mettu's opinion for having relied on a grossly inaccurate smoking history when compared to the administrative law judge's finding.¹¹ 20 C.F.R. §§802.211(b), 802.301(a); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *see also Greene v. King James Mining*, 575 F.3d 628, 635-36 (6th Cir. 2009) (affirming administrative law judge's decision to discredit opinion based on inaccurate smoking history); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993) (physician's opinion less probative when based on inaccurate smoking history). We therefore affirm the administrative law judge's finding that Dr. Mettu's opinion is entitled to little weight. Decision and Order at 29.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Claimant's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. We therefore affirm the administrative law judge's finding that Claimant did not establish the Miner had legal pneumoconiosis. Decision and Order at 32, 35. Claimant's failure to establish pneumoconiosis, a requisite element of entitlement, precludes an award of benefits in the Miner's claim.¹² Decision and Order at 29, 35. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

¹¹ Dr. Mettu indicated the Miner had a seventeen pack-year smoking history, while the administrative law judge found he had a forty-five pack-year smoking history. Decision and Order at 8, 29.

¹² Because we affirm the administrative law judge's denial of benefits in the Miner's claim, we need not address Employer's assertion that the administrative law judge erred in discounting the opinions of its medical experts on legal pneumoconiosis. Employer's Brief at 12 n.3.

Survivor's Claim

Because we have affirmed the denial of benefits in the Miner's claim, Claimant is not derivatively entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018). However, we also affirm, as unchallenged, the administrative law judge's determination that the survivor's claim should be remanded to the district director in order for Claimant to develop evidence relevant to whether the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. *See Skrack*, 6 BLR at 1-711; Decision and Order at 36.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits in Miner's Claim, and Remanding Claimant's Survivor's Claim to District Director for further proceedings.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge