U.S. Department of Labor

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

BRB No. 23-0173 BLA

MADELINE RUSSELL (Widow of GARNET RUSSELL)	)	
Claimant-Respondent	)	
v.	)	
GHB COALS, INCORPORATED	)	
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/27/2024
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Chris M. Green and Wesley A. Shumway (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judge.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2021-BLA-05111) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on December 2, 2019.[1]

The ALJ credited the Miner with twenty years of underground coal mine employment or surface coal mine employment in conditions substantially similar to those in an underground mine, and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and total disability, both prerequisites for invoking the Section 411(c)(4) presumption. It also argues he erred in finding it failed to rebut the presumption. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review 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.[3] 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, 362 (1965).

[1] Claimant is the widow of the Miner, who died on February 10, 2019. Director's Exhibit 8.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface 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); *see* 20 C.F.R. §718.305.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West

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

A miner was totally disabled if he had a pulmonary or respiratory impairment which, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the medical opinions and the evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14-19. Employer argues the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 18-20.

The ALJ considered the medical opinions of Drs. Brown, Basheda, and Zaldivar. Decision and Order at 14-19; Director's Exhibit 15; Employer's Exhibits 1-4. He found Dr. Brown did not address the issue of total disability. Decision and Order at 16, 19; Director's Exhibit 15. We affirm this finding as unchallenged. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ correctly found Dr. Basheda opined the Miner was totally disabled due to hypoxemia, Employer's Exhibits 1 at 20; 3 at 18, while Dr. Zaldivar determined he was totally disabled due to a collapsed lung and shallow breathing. Employer's Exhibit 4 at 40-41. The ALJ determined the opinions of Drs. Basheda and Zaldivar support a finding of total disability and are reasoned and documented. Decision and Order at 19. Thus, he found the Miner was totally disabled at the time of his death. *Id.*

Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 14; Director's Exhibits 2, 3, 6.

[4] The ALJ found there is no pulmonary function study evidence, no arterial blood gas study evidence, and no evidence the Miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 15.

Employer argues the opinions of Drs. Basheda and Zaldivar do not support a finding of total disability because they opined the Miner's total disability was not due to intrinsic lung damage, but rather due to an extrinsic condition. Employer's Brief at 18-20. This argument is not persuasive. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 10-11 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023). Thus the ALJ did not err in finding the medical opinions of Drs. Basheda and Zaldivar support total disability. Decision and Order at 19. Because Employer does not otherwise challenge the ALJ's finding that their opinions are reasoned and documented, we affirm it. *Skrack*, 6 BLR at 1-711.

As Employer raises no further argument, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence, 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19, and his determination that Claimant established total disability overall at 20 C.F.R. §718.204(b)(2). Decision and Order at 19.

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in either underground coal mines or surface coal mines "in conditions substantially similar to those in underground mines." 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered the Miner's employment history form (CM-911a), testimony from Claimant's son, and the district director's Proposed Decision and Order denying benefits. Decision and Order at 4; Director's Exhibits 2, 3, 32; Hearing Tr. at 12-15. He summarily found the Miner had twenty years of coal mine employment based on the evidence of record.[5] Decision and Order at 4.

[5] Employer argued before the ALJ that the Miner had 10.6 years of coal mine employment. Employer's Post-Hearing Brief at 3-5.

Because the ALJ did not consider all relevant evidence[6] and did not adequately explain his method of calculating the length of the Miner's coal mine employment, his finding does not comport with the Administrative Procedure Act (APA),[7] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), and thus we cannot affirm it. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204 (2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Further, to the extent the ALJ intended to adopt the district director's finding, this was improper. With only one exception, not applicable here, "any findings or determinations made with respect to a claim by a district director shall not be considered by the [ALJ]." 20 C.F.R. §725.455(a). When a party requests a formal hearing after a district director's proposed decision, an ALJ must proceed *de novo* and independently weigh the evidence to reach his or her own findings on each issue of fact and law. *See Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985).

Based on the foregoing error, we must vacate the ALJ's findings that the Miner had twenty years of coal mine employment and therefore that Claimant invoked the Section 411(c)(4) presumption. We remand the case for further consideration of this issue.

Remand Instructions

On remand, the ALJ must determine the length of the Miner's coal mine employment using any reasonable method of computation and taking into consideration all relevant evidence, including the Miner's Social Security Earnings Records. *See Muncy*, 25 BLR at 1-27. He must address Employer's post-hearing arguments on length of the Miner's coal mine employment. Employer's Post-Hearing Brief at 3-5. Further, he must adequately explain his findings as the APA requires. *Wojtowicz*, 12 BLR at 1-165.

[6] As Employer notes, the ALJ did not consider the Miner's Social Security Earnings Records. Employer's Brief at 20; Director's Exhibit 6.

[7] The Administrative Procedure Act requires that every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If Claimant establishes fifteen years of qualifying coal mine employment, he will have invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. 20 C.F.R. §718.305. The ALJ must then consider whether Employer rebutted the presumption. 20 C.F.R. §718.305(d)(2). If Claimant establishes less than fifteen years of coal mine employment, the ALJ must address whether Claimant has established the Miner had pneumoconiosis arising out of coal mine employment and that the Miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). As the burdens of proof on remand may shift, we decline to address the issues of disease and death causation.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge