U.S. Department of Labor

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

BRB Nos. 19-0334 BLA
and 19-0335 BLA

ETTA HENSLEY (Widow of and o/b/o WENDELL H. HENSLEY)	)	
Claimant-Petitioner	)	
v.	)	
R & R COAL COMPANY, INCORPORATED	)	
and	)	DATE ISSUED: 06/25/2020
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
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 Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Etta Hensley, Wallins Creek, Kentucky.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, District of Columbia, for employer/carrier.

Edward Waldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, 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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals,[1] without the assistance of counsel,[2] the Decision and Order Denying Benefits (2017-BLA-06211, 2017-BLA-06212) of Administrative Law Judge Lauren C. Boucher rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on October 21, 2015,[3] and a survivor's claim filed on March 26, 2016.[4]

The administrative law judge initially noted the district director's determination the miner had thirteen years of coal mine employment. She found the evidence did not establish total disability, the element of entitlement previously adjudicated against the miner in his prior claim. 20 C.F.R. §718.204(b)(2). She therefore found claimant did not

[1] Claimant is the widow of the miner, who died on February 20, 2016. Director's Exhibit 14. Claimant is pursuing the miner's claim on behalf of his estate in addition to pursuing her survivor's claim.

[2] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on claimant's behalf that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] The miner filed five previous claims, three of which were withdrawn and two of which were denied. Director's Exhibits 1-5. On August 21, 2014, the district director denied the miner's most recent prior claim, filed on December 19, 2013, because the evidence did not establish the miner was totally disabled. Director's Exhibit 5.

[4] Claimant's appeal in the miner's claim was assigned BRB No. 19-0334 BLA, and her appeal in the survivor's claim was assigned BRB No. 19-0335 BLA. By Order dated May 17, 2019, the Board consolidated these appeals for purposes of decision only. *Hensley v. R & R Coal Co.*, BRB Nos. 19-0034 BLA and 19-0035 BLA (May 17, 2019) (unpub. Order).

establish a change in an applicable condition of entitlement, 20 C.F.R. §725.309, and denied benefits in the miner's claim.[5]

In the survivor's claim, the administrative law judge also found claimant did not establish the miner was totally disabled and thus was unable to invoke the Section 411(c)(4) presumption the miner died due to pneumoconiosis.[6] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found claimant did not establish the miner had pneumoconiosis and thus could not establish his death was due to the disease and denied survivor's benefits. 20 C.F.R. §718.205(b).

On appeal, claimant generally challenges the denial of benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (Director), filed a limited response asserting the administrative law judge erred in finding the miner was not totally disabled and requesting that the denial of benefits be vacated and the case remanded for further consideration. Employer filed a reply brief urging the Board to reject the Director's arguments.

When a claimant files an appeal without the assistance of counsel, the Board considers whether the decision and order is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

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[5] Because the miner's claim was denied, claimant was not eligible for derivative survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

[6] The administrative law judge considered the presumption at Section 411(c)(4) of the Act in relation to the survivor's claim only. However, under Section 411(c)(4), claimant is entitled to a presumption in both the miner's claim and her own claim that the miner was totally disabled due to pneumoconiosis at the time of his death and/or his death was due to pneumoconiosis if the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground coal mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8.

Miner's Claim

When a miner files an application 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."[8] 20 C.F.R. §725.309(c); *see 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's prior claim was denied for failure to establish total disability, claimant had to submit new evidence to establish this element in order to obtain a review of the miner's claim on the merits. 20 C.F.R. §725.309(c). Moreover, claimant must establish the miner had at least fifteen years of qualifying coal mine employment and total disability in order to invoke the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

The miner alleged over fifteen years of coal mine employment. Director's Exhibit 7; Director's Brief at 2 n.1. Although the administrative law judge noted the district director's finding of thirteen years of coal mine employment, she did not make a specific determination regarding the length of the miner's coal mine employment as she is required to do under the regulations. 20 C.F.R. §725.455(a) ("any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge."); *Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985) (when a party requests a formal hearing after a district director's proposed decision, an administrative law judge must proceed de novo and independently weigh the evidence to reach his or her own findings on each issue of fact and law.).

A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine 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 cor pulmonale with right-sided

[8] To establish entitlement in the miner's claim, 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).

congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the evidence supporting a finding of total disability against the 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).

Considering the evidence submitted with the miner's current claim, the administrative law judge noted there were two pulmonary function studies dated September 16, 2015, and November 9, 2015. Director's Exhibits 17, 45. She found both studies qualifying for total disability,[9] but gave less weight to the November 9, 2015 study because it was administered while the miner was hospitalized for an acute respiratory illness.[10] Decision and Order at 8-9. The administrative law judge concluded the pulmonary function study evidence supported a finding that the miner was totally disabled.[11] *Id*. at 9; 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge found the one blood gas study, dated November 11, 2015, non-qualifying for total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 9-10; Director's Exhibit 17. She further found no evidence of cor pulmonale with right-sided congestive heart failure and that the two medical opinions did not establish total

[9] A "qualifying" pulmonary function study or blood-gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] This pulmonary function study is contained in the miner's treatment records, so it is not subject to the quality standard requiring that pulmonary function studies "shall not be performed during or soon after an acute respiratory or cardiac illness." 20 C.F.R. §718.101(b); Appendix B to 20 C.F.R. Part 718. However, the administrative law judge was nevertheless required to determine whether the study can reliably establish total disability. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000) ("Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator must still be persuaded the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue."). We see no error in the administrative law judge's permissibly finding the November 9, 2015 pulmonary function study is entitled to little weight. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

[11] We affirm, as unchallenged, the administrative law judge's finding claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

disability. 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 12. The administrative law judge specifically noted that while Drs. Vuskovich and Rosenberg imply the "[m]iner's lung cancer became totally disabling at some point, neither [doctor] explicitly concludes that [the miner] had a disabling pulmonary impairment."[12] *Id.*; *see* Employer's Exhibits 7, 8, 9.

Weighing the qualifying pulmonary function study against the non-qualifying blood gas study and the "unanimous agreement" of the medical opinions that the miner "did not suffer a totally disabling respiratory or pulmonary impairment," the administrative law judge found the "contrary probative evidence" outweighed the "lone probative qualifying pulmonary function test." Decision and Order at 13. Thus, the administrative law judge found claimant failed to establish total disability and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2); 20 C.F.R. §725.309(c); Decision and Order at 12-13.

The Director contends the administrative law judge did not adequately explain why claimant did not prove the miner was totally disabled based on the qualifying pulmonary function study evidence. Director's Brief at 1. We agree that the administrative law judge did not adequately explain her determination. The administrative law judge summarily concluded, without further explanation, that the qualifying September 16, 2015 pulmonary function study was outweighed by the non-qualifying November 11, 2015 blood gas study and the medical opinion evidence, but did not explain her weighing of the evidence[13] as

[12] Dr. Vuskovich reviewed the miner's medical records, which included a March 28, 2012 pulmonary function study, as well as the qualifying September 16, 2015 pulmonary function study. Employer's Exhibit 7. He stated that as of March 28, 2012, the miner was not totally disabled. *Id*. He further stated that as of March 28, 2012, the miner's "ventilatory capacity was stable and normal . . . [and] showed that [the miner] did not have a progressively worsening occupational pulmonary disease such as legal pneumoconiosis ([but] he did have progressively worsening lung cancer that would destroy his pulmonary system and kill him)." *Id*. Dr. Rosenberg also reviewed the miner's medical records and concluded he was not disabled in 2012. Employer's Exhibit 8. However, Dr. Rosenberg noted the miner was subsequently diagnosed with lung cancer and developed "cavitating masses [in his lungs] which progressed over time" and during this same time "his pulmonary function tests deteriorated." *Id*.

[13] Non-qualifying blood gas studies do not necessarily call into question valid and qualifying pulmonary function studies as the tests measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Director's Brief at 1.

the Administrative Procedure Act[14] requires. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The Director specifically contends the administrative law did not adequately explain why the medical opinions "constituted contrary probative evidence that defeated the qualifying pulmonary function testing." Director's Brief at 2. Drs. Vuskovich and Rosenberg concluded the miner was not totally disabled in 2012, but indicated his pulmonary capacity declined as his lung cancer progressed. Employer's Exhibits 7, 8, 9. The relevant inquiry in this case, however, is whether, under the Act, the miner had a totally disabling respiratory or pulmonary impairment "at the time of his death" in 2016. 20 C.F.R. §§718.305(b)(1)(iii), 718.204(a), (b), (c). Thus, the administrative law should explain her weighing of the medical opinion evidence, in conjunction with the other evidence in the case, , considering the relevant inquiry.

Additionally, to the extent the administrative law judge considered whether the miner was disabled before or after the development of his cancer, she conflated the issues of total disability and disability causation. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the evidence establishes the miner had a totally disabling respiratory or pulmonary impairment "at the time of death," *see* 20 C.F.R. §718.204(a), while the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of whether the Section 411(c)(4) presumption is rebutted.

Because the administrative law judge's weighing of the evidence is not adequately explained in accordance with the APA, we vacate her findings claimant did not establish total disability[15] and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309. We therefore vacate the administrative judge's denial of benefits in the miner's claim.

[14] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 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).

[15] We affirm the administrative law judge's finding that claimant is unable to invoke the irrebuttable presumption the miner was totally disabled due to pneumoconiosis at Section 411(c)(3) of the Act, as there are no x-rays, autopsy or biopsy evidence, CT scans or medical opinions diagnosing the miner with complicated pneumoconiosis. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304.

On remand, the administrative law judge must reconsider whether claimant invoked the Section 411(c)(4) presumption in the miner's claim. She must first determine the length of the miner's coal mine employment. She must then reweigh the evidence and determine whether the miner had a totally disabling respiratory or pulmonary impairment "at the time of [his] death." 20 C.F.R. §718.204(a), (b)(2). If claimant establishes the miner had at least fifteen years of qualifying coal mine employment and total disability, she is entitled to invoke the Section 411(c)(4) presumption. If the presumption is invoked, the administrative law judge must consider whether the employer rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). If claimant is unable to establish total disability on remand, the administrative law judge may reinstate the denial of benefits in the miner's claim. If claimant establishes total disability but not fifteen years of qualifying coal mine employment, benefits are precluded in the miner's claim because claimant is unable to affirmatively establish he had pneumoconiosis, as discussed below.[16] 20 C.F.R. §718.202(a).

Survivor's Claim

Because we vacate the administrative law judge's denial of benefits in the miner's claim, we also vacate her denial of benefits in the survivor's claim.[17] However, in the interest of judicial economy, we address the administrative law judge's finding that claimant did not prove the miner had pneumoconiosis and therefore was unable to establish the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b).

In considering whether the miner had clinical pneumoconiosis,[18] the administrative law judge noted there are five interpretations of three chest x-rays. Decision and Order at

[16] The administrative law judge indicated claimant relies on the same evidence in both the miner's and survivor's claim, except for the miner's death certificate. Similarly, employer relies on the same evidence in both claims, except that Dr. Rosenberg issued separate reports for each claim (Employer's Exhibits 8, 9). Decision and Order at 3-4.

[17] If benefits are awarded in the miner's claim, the administrative law judge must determine if claimant is entitled to derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(l) (2012). If benefits are not awarded in the miner's claim, the administrative law judge must reconsider whether claimant can invoke the Section 411(c)(4) presumption in her survivor's claim and, if so, whether employer rebutted it.

[18] 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.

19. None of the readings are positive for complicated pneumoconiosis. Decision and Order at 18-19. Because each interpreting physician is dually qualified as a B reader and Board-certified radiologist, she considered their readings entitled to equal probative weight based on their qualifications. *Id.* at 19.

Dr. Alexander read the February 25, 2009 x-ray positive for simple pneumoconiosis, while Dr. Meyer read it negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 11. The administrative law judge found the February 25, 2009 x-ray in equipoise for simple pneumoconiosis based on the equal number of positive and negative readings. Decision and Order at 19. The administrative law judge found the May 28, 2015 x-ray negative for simple pneumoconiosis based on Dr. Meyer's sole negative reading of that film. Decision and Order at 19; Employer's Exhibit 1. Dr. DePonte read the September 16, 2015 x-ray positive for simple pneumoconiosis, while Dr. Meyer read it negative for the disease. Director's Exhibit 45; Employer's Exhibit 12. The administrative law judge found the September 16, 2015 x-ray in equipoise for simple pneumoconiosis. Decision and Order at 19.

Because one x-ray was negative and two x-rays in equipoise for simple pneumoconiosis, the administrative law judge concluded claimant did not satisfy her burden to establish clinical pneumoconiosis based on the x-ray evidence. Decision and Order at 19. As the administrative law judge performed both a qualitative and quantitative review of the conflicting readings and explained her credibility findings, we affirm her determination. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993).

We also see no error in the administrative law judge's determination that claimant did not establish clinical or legal pneumoconiosis based on any of the other evidence of record. The administrative law judge noted the miner's hospitalization and treatment records indicate he had a history of pneumoconiosis and/or chronic obstructive pulmonary disease (COPD). Decision and Order at 26, *citing* Director's Exhibits 16 at 96-97, 101, 103; Director's Exhibit 17 at 7, 49, 56, 58; Claimant's Exhibits, 4, 6. However, because the hospitalization and treatment records "do not provide a specific basis" or "any reasoning" regarding how the diagnoses of pneumoconiosis and COPD were made, the administrative law judge permissibly found "these records do not reflect a reasoned

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§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). This definition encompasses 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).

diagnosis that can independently support a finding of pneumoconiosis." Decision and Order at 26; *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).

The administrative law judge accurately found the biopsy evidence consisting of a "bronchial washing report" dated July 19, 2011, does not mention pneumoconiosis. Claimant's Exhibit 1. The four CT scans, dating from 2011 to 2015, were interpreted as showing fibrosis, pulmonary nodules, and lesions, but there are no specific findings of pneumoconiosis. Claimant's Exhibits 3, 5; Employer's Exhibits 2, 3, 4, 5; *see* Decision and Order at 24. The administrative law judge also correctly found no physician attributed the miner's radiographic fibrosis to coal mine dust exposure. Decision and Order at 27. Further, she accurately noted neither Dr. Vuskovich nor Dr. Rosenberg opined that the miner had clinical or legal pneumoconiosis and the miner's death certificate does not mention pneumoconiosis. Decision and Order at 26-27; Director's Exhibits 14, 42; Employer's Exhibits 7, 9.

Because substantial evidence supports the administrative law judge's finding claimant did not affirmatively prove the miner had clinical or legal pneumoconiosis, we affirm it.[19] 20 C.F.R. §718.202(a). We therefore affirm the administrative law judge's finding claimant is unable to establish the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b); Decision and Order at 27.

[19] However, if claimant is able to invoke the Section 411(c)(4) presumption in the miner's claim on remand, the administrative law judge must reconsider the evidence with the burden of proof on employer to establish the miner did not have clinical or legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge