U.S. Department of Labor

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

BRB No. 19-0274 BLA

BONNIE S. KEEN (Widow of JIMMIE G. KEEN) Claimant-Respondent v. ISLAND CREEK KENTUCKY MINING, (CONSOL MINING COMPANY, INCORPORATED) Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/27/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Catherine Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for employer.

Cynthia Liao (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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-05706) of Administrative Law Judge Morris D. Davis rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on November 19, 2013.[1]

The administrative law judge credited the miner with twenty years of qualifying coal mine employment,[2] as stipulated by the parties, and found the miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the constitutionality of the 411(c)(4) presumption. It also argues the administrative law judge erred in finding the miner was totally disabled and therefore erred in finding claimant invoked the presumption. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, filed a limited response, urging the Board to reject employer's contention that the Section 411(c)(4) presumption is unconstitutional.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359, 361-62 (1965).

[1] Claimant is the widow of the miner, who died on October 13, 2013. Director's Exhibit 8.

[2] The miner's coal mine employment occurred in Virginia. Hearing Transcript 13. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] 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. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 5-6. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-201 (2010). We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

Invocation of the 411(c)(4) Presumption

To invoke the Section 411(c)(4) presumption, claimant must prove the miner was totally disabled "at the time of his death." 20 C.F.R. §718.305(b)(1)(iii). The miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by qualifying pulmonary function studies,[4] arterial blood gas studies, evidence

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

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 administrative law judge must weigh the relevant 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).

The administrative law judge found the only pulmonary function study, conducted on May 11, 2012, did not produce qualifying values and thus did not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6; Director's Exhibit 9. He also noted that there are no arterial blood gas studies and no evidence of cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 14. But he found the medical opinion evidence established total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14-16. Employer argues the administrative law judge erred in weighing the medical opinions. Employer's Brief at 7-13. We disagree.

Dr. Sutherland treated the miner since 1986 for chronic obstructive pulmonary disease (COPD) and opined he suffered from severe shortness of breath such that he was totally and permanently disabled from working in any capacity. Director's Exhibit 10. Drs. Fino and Rosenberg concluded that while the miner had a mild obstructive lung impairment he was not disabled from a respiratory or pulmonary perspective. Director's Exhibit 9; Employer's Exhibit 1.

The administrative law judge discounted the opinions of Drs. Fino and Rosenberg, noting they did not discuss any evidence postdating the May 11, 2012 pulmonary function study, did not address whether the miner retained the pulmonary capacity to return to his previous coal mine employment after May 2012, and specifically did not address evidence demonstrating the miner required supplemental oxygen during the months prior to his death. Decision and Order at 14-15. In contrast, he found Dr. Sutherland's opinion consistent with the doctor's treatment notes documenting COPD, hypoxia with exertion, and the miner's requirement for continuous supplemental oxygen,[5] all of which supported Dr. Sutherland's opinion the miner could not perform his previous coal mine employment and was therefore totally disabled. *Id.*; Director's Exhibit 9.

[5] During his October 8, 2013, examination, Dr. Sutherland noted the miner was "currently on oxygen 2 1iters/minute" and needed to maintain this level of oxygen twenty-four hours a day, seven days a week. Director's Exhibit 9. Dr. Sutherland's treatment notes indicate the miner was on this level of oxygen since August 7, 2013. *Id.*

Employer does not challenge the administrative law judge's discrediting of Drs. Fino's and Rosenberg's opinions for failing to adequately address the miner's condition during the nearly year and a half period before his death. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer contends, however, the administrative law judge erred in crediting Dr. Sutherland's opinion because the physician "did not rely on objective or subjective evidence to support [his] conclusion." Employer's Brief at 9. It also argues the administrative law judge improperly substituted his own opinion for that of the medical experts in finding the miner's need for continuous supplemental oxygen supports a finding of total disability. *Id.* at 11-13. We disagree.

A medical opinion may support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer the miner is unable to do his last coal mine employment. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000). The administrative law judge permissibly found Dr. Sutherland's opinion consistent with his treatment notes demonstrating the miner had hypoxia with exertion and his requirement for supplemental oxygen. Decision and Order at 15-16. He concluded Dr. Sutherland's "objective and clinical findings" demonstrated the miner could not return to his previous coal mine employment. *Id*. at 15. Thus, rather than substituting his own opinion for that of the medical experts, the administrative law judge considered the relevant evidence and permissibly found the miner's treatment records support Dr. Sutherland's diagnosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). It is the administrative law judge's prerogative to weigh the conflicting evidence, and the Board may not reweigh it. *Compton*, 211 F.3d at 211. We therefore affirm the administrative law judge's finding that the medical opinion evidence established total disability.[6] 20 C.F.R. §718.204(b)(2).

Weighing the totality of the probative medical evidence, the administrative law judge permissibly found claimant established the miner was totally disabled by a pulmonary or respiratory impairment.[7] 20 C.F.R. §718.204(b)(2); Decision and Order at

[6] Employer contends Dr. Sutherland relied upon inaccurate coal mine employment and smoking histories for the miner. Employer's Brief at 10. Employer also notes that Dr. Sutherland's treatment notes do not mention clinical pneumoconiosis. *Id.* These assertions, even if accurate, concern only the questions of the etiology of the miner's impairment or the cause of his disability, and have no bearing on the issue of whether the miner had a totally disabling respiratory impairment.

[7] Considering the evidence as a whole, the administrative law judge found it supported the conclusion that, while the miner may not have been totally disabled at the

15. We therefore affirm his finding that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis,[8] 20 C.F.R. §718.305(d)(2)(i), or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found employer failed to establish rebuttal by either method.

In addressing rebuttal of clinical pneumoconiosis, the administrative law judge considered the x-ray, computed tomography (CT) scan, and biopsy evidence. Although he found the x-ray and CT scan evidence did not establish clinical pneumoconiosis, the administrative law judge credited Dr. Caffrey's opinion that the biopsy evidence established the disease.[9] Decision and Order at 18-19; Director's Exhibit 9. He therefore found employer failed to disprove the miner had clinical pneumoconiosis. *Id.*

Employer asserts only that the preponderance of the x-ray evidence proves the miner did not have clinical pneumoconiosis. Employer's Brief at 16. Employer's statement amounts to a request for the Board to reweigh the evidence, which we cannot do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm

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time of his May 11, 2012 pulmonary function test, he was totally disabled by August 2013, as reflected by his need for supplemental oxygen. Decision and Order at 15.

[8] "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). "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).

[9] The administrative law judge noted Drs. Fino and Rosenberg also found clinical pneumoconiosis based upon Dr. Caffrey's biopsy findings. Decision and Order at 18; Director's Exhibit 9; Employer's Exhibit 1.

the administrative law judge's finding that employer failed to establish the miner did not have clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i)(A).

Employer's failure to disprove clinical pneumoconiosis precludes finding the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention that the administrative law judge erred in finding it failed to disprove the existence of legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). To disprove legal pneumoconiosis, employer must establish claimant does not have 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); *see Minich*, 25 BLR at 1-155 n.8.

The administrative law judge considered the opinions of Drs. Fino and Rosenberg. He found Dr. Fino did not address the cause of the miner's obstructive pulmonary impairment. Decision and Order at 20; Director's Exhibit 9. He similarly found Dr. Rosenberg did not address whether the miner's obstructive impairment was related to his coal mine dust exposure. Decision and Order at 20; Employer's Exhibit 1. The administrative law judge therefore found the opinions of Drs. Fino and Rosenberg were not adequately reasoned and did not establish that the miner did not have legal pneumoconiosis. *Id.* at 20-21.

Employer points to no specific error in the administrative law judge's consideration of the opinions of Drs. Fino and Rosenberg, asserting only its belief that their opinions establish the miner did not have legal pneumoconiosis. Employer's Brief at 16. The Board must limit its review to contentions of error the parties specifically raise. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). We therefore affirm the administrative law judge's finding that employer failed to rebut the presumed existence of legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i)(A).

With respect to the second method of rebuttal, the administrative law judge considered the opinions of Drs. Caffrey, Fino, and Rosenberg. He found that Drs. Caffrey and Rosenberg did not address whether the miner's COPD, which was presumed to constitute legal pneumoconiosis, played any role in the miner's respiratory death. Decision and Order at 22; Director's Exhibit 9; Employer's Exhibit 1. The administrative law judge further found Dr. Fino's opinion was conclusory and insufficient to establish that the miner's pneumoconiosis played no part in his death. Decision and Order at 22. He therefore found employer did not establish the miner's pneumoconiosis played no part in his death. *Id.* at 23.

Employer contends the administrative law judge should have credited the opinions of Drs. Fino and Rosenberg. Employer's Brief at 17. It again, however, fails to allege any error in regard to the administrative law judge's bases for discrediting their opinions. *See Cox* 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21. We therefore affirm his finding employer failed to establish that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); *Copley*, 25 BLR at 1-89.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge