U.S. Department of Labor

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

BRB Nos. 19-0352 BLA
and 19-0357 BLA

VIVIAN BRADLEY o/b/o and Widow of DWIGHT BRADLEY	)	
Claimant-Respondent	)	
v.	)	
MILLER BROTHERS COAL LLC	)	
and	)	
NATIONAL UNION FIRE/CHARTIS	)	DATE ISSUED: 05/29/2020
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

Kyle Johnson (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2015-BLA-05388 and 2018-BLA-05309), of Administrative Law Judge Joseph E. Kane 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 claim filed on August 14, 2013, and a survivor's claim filed on October 7, 2016.[1]

The relevant procedural history is as follows: In the miner's claim, after the district director issued a Proposed Decision and Order awarding benefits, employer requested a hearing and the claim was referred to the Office of Administrative Law Judges (OALJ) and assigned to Administrative Law Judge Alice M. Craft. Judge Craft held a hearing on August 31, 2016, at which the miner testified. The miner died on September 22, 2016, while his claim was pending before Judge Craft. Director's Exhibit 75. At the parties' request, the miner's claim was remanded to the district director, who consolidated it with claimant's survivor's claim and issued a Proposed Decision and Order awarding benefits in both claims. Employer again requested a hearing and the consolidated claims were forwarded to the OALJ and assigned to Administrative Law Judge Joseph E. Kane (the administrative law judge), who held a consolidated hearing on March 14, 2018, and issued the decision that is the subject of the current appeal.

The administrative law judge found the miner worked for twenty-six years in surface coal mine employment, including over fifteen years in conditions substantially similar to those in an underground mine, and had a totally disabling respiratory or pulmonary impairment. He therefore found claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further determined employer did not rebut the presumption and awarded benefits in the miner's claim. Because the miner was entitled to benefits at the time of his death, the administrative law judge found claimant

[1] Claimant, the miner's widow, is pursuing his claim as well as her survivor's claim. Director's Exhibits 72, 73.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[3]

On appeal, employer challenges the administrative law judge's finding that at least fifteen years of the miner's surface coal mine employment occurred in conditions substantially similar to those in an underground mine. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

The Miner's Claim - Invocation of the Section 411(c)(4) Presumption

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish the miner had at least fifteen years of "employment in one or more underground coal mines," or surface coal mine employment in conditions "substantially similar" to those in an underground mine. 30 U.S.C. §921(c)(4). The "conditions . . . will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (Kethledge, J., concurring); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th

[3] 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*) (2012).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had twenty-six years of surface coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 20-27.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

At the March 14, 2018 hearing, the administrative law judge stated his decision would be based on the record made that day, consisting of the evidentiary record already compiled, including Director's Exhibits 1 to 93, the testimony from any witnesses, and any additional evidence the parties submitted at the hearing which the administrative law judge admitted. 2018 Hearing Transcript at 5. At that time, claimant's counsel noted the transcript of the August 31, 2016 hearing before Judge Craft appeared to be missing from the record. *Id*. Employer's counsel offered to provide the missing transcript through the following exchange:

> Employer's Counsel: Well, if it's not in there, we can file it as one of our exhibits post-hearing.
>
> Judge Kane: Sure.
>
> Employer's Counsel: I'm fine with that. I'll check my records as well to see if I have it. Maybe we can do a-
>
> Judge Kane: I don't seem to have it. . . . Well, 1 through 93 will be received in evidence, but if you have [the 2016 Transcript], I guess we can – you can move to submit it.

2018 Hearing Transcript at 5-6.

The parties then confirmed their stipulated facts and contested issues. Employer conceded the miner worked twenty-six years in coal mine employment but did not challenge the nature of his employment or otherwise assert, at any point in the hearing, it did not occur in conditions substantially similar to those in an underground mine. 2018 Hearing Transcript at 12. At the conclusion of the hearing, the administrative law judge granted the parties sixty days to submit additional evidence and until June 14, 2018, to submit post-hearing briefs. *Id*. at 22.

Despite its representation it would submit the August 31, 2016 hearing transcript to the administrative law judge, employer did not do so. Employer also did not submit a post-hearing brief or otherwise argue at any point before the administrative law judge the miner was not regularly exposed to coal mine dust during his surface coal mine employment. Decision and Order at 3.

In his Decision and Order Awarding Benefits, the administrative law judge stated:

> . . . as noted at the hearing before me on March 14, 2018 . . . the record does not include the transcript of the August 31, 2016 hearing before Administrative Law Judge (ALJ) Craft. However since the record includes the deposition of the [m]iner taken on April 29, 2014, I have proceeded with this Decision and Order.

Decision and Order at 3 n.3; 2018 Hearing Transcript at 7. After considering the miner's April 29, 2014 deposition testimony, claimant's April 29, 2014 deposition and March 14, 2018 hearing testimony, and Dr. Rosenberg's notations regarding the miner's coal mine dust exposure, the administrative law judge found the miner worked over fifteen years in dust conditions substantially similar to those in an underground mine. Decision and Order at 4, 19-20; Director's Exhibit 23; Employer's Exhibits 1, 18; 2018 Hearing Transcript at 14-21.

Employer now argues on appeal the administrative law judge erred in finding at least fifteen years of the miner's employment occurred in dust conditions substantially similar to those in an underground mine without considering the miner's testimony from the August 31, 2016 hearing before Judge Craft. Employer's Brief at 4-6. Employer requests the case be remanded for the administrative law judge to consider selective portions of the 2016 hearing transcript it now asserts establish claimant did not meet her burden.[6] *Id.*

We reject employer's request for a remand because employer failed to properly preserve its argument by first raising it before the administrative law judge. *See Maples v. Texports Stevedores Co.*, 23 BRBS 303 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331 (5th Cir. 1991); *Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (June 25, 2019) (declining to consider employer's argument where it was not timely raised before the administrative law judge). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging).

Generally, a party may not raise a new issue on appeal. *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986). An exception to this rule is where a pure question of law is concerned and failure to address it would result in a miscarriage of justice. *Martinez v. Mathews*, 544 F.2d 1233 (5th Cir. 1976). However, the issue employer now raises is not a pure question of law, but instead is a factual one which requires a determination by an

[6] It appears employer has a copy of the 2016 transcript as its brief to the Board specifically references the miner's testimony in that transcript. Employer's Brief at 5.

administrative law judge. Moreover, declining to consider the issue will not result in a miscarriage of justice. Employer had an opportunity to raise its arguments to the administrative law judge and submit the evidence on which it now relies but failed to do so. Thus, employer has waived this argument. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba*, 9 BLR at 1-75; *Lyon v. Pittsburg & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984). Consequently, we decline to address employer's argument on appeal.

As employer has not otherwise challenged the administrative law judge's finding that the miner's 2014 deposition testimony and Dr. Rosenberg's statements establish at least fifteen years of the miner's surface coal mine employment occurred in conditions substantially similar to those in an underground mine, we affirm this determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19-20; Director's Exhibit 23; Employer's Exhibit 1. Consequently, we affirm his determination claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. We also affirm as unchallenged the administrative law judge's finding employer failed to rebut the presumption. *Skrack*, 6 BLR at 1-711. We thus affirm the award of benefits in the miner's claim.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found claimant established each element necessary to demonstrate entitlement under Section 422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order at 28. Because we have affirmed the award of benefits in the miner's claim and employer raises no specific challenge to the award in the survivor's claim, we affirm the administrative law judge's determination that claimant is entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); 20 C.F.R. §802.211(b); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack*, 6 BLR at 1-711; Decision and Order at 28.

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