U.S. Department of Labor

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

BRB Nos. 20-0017 BLA
and 20-0018 BLA

LILLIE A. TILLER (o/b/o and Widow of HAROLD M. TILLER) Claimant-Petitioner v. LEFT FORK COAL COMPANY INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/24/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Lillie A. Tiller, Vansant, Virginia.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, DC, for Employer/Carrier.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals Administrative Law Judge Paul C. Johnson, Jr.'s Decision and Order Denying Benefits (2015-BLA-05935, 2017-BLA-05224) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[3] This case involves a miner's subsequent claim filed on July 5, 2011,[4] and a survivor's claim filed on September 14, 2015.

The administrative law judge found the Miner had 10.07 years of coal mine employment[5] and, therefore, Claimant could not invoke the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[6] 30 U.S.C.

---

[1] Claimant is the widow of the Miner, who died on July 19, 2014, while his current claim was pending. Miner's Claim (MC) Director's Exhibit 70; Survivor's Claim (SC) Director's Exhibit 9. Claimant is pursuing the Miner's claim on his behalf and her own survivor's claim. SC Exhibit 2

[2] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the administrative law judge's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Claimant's appeal in the Miner's claim was assigned BRB No. 20-0017 BLA and her appeal in her survivor's claim was assigned BRB No. 20-0018 BLA. The Board has consolidated these appeals for purposes of decision only.

[4] The Miner filed four prior claims, each of which was denied. MC Director's Exhibits 1-4. Administrative Law Judge Linda S. Chapman denied the Miner's last claim, filed on August 11, 2006; the Benefits Review Board affirmed the denial. *H.M.T.* [*Tiller*] *v. Left Fork Coal Co., Inc.*, No. 2007-BLA-05785 (May 6, 2009) (unpub.); MC Director's Exhibit 4; *Tiller v. Left Fork Coal Co., Inc*., BRB No. 09-0628 BLA (May 25, 2010) (unpub.).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 30.

[6] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the 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

§921(c)(4) (2012). He further found Claimant did not establish the Miner had pneumoconiosis and therefore was unable to establish a change in an applicable condition of entitlement in the Miner's claim or that his death was due to pneumoconiosis in her survivor's claim. 20 C.F.R. §§718.202(a), 718.205(b), 725.309. Accordingly, the administrative law judge denied benefits in both claims.

On appeal, Claimant generally challenges the denial of benefits. Employer and its carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.

In an appeal filed without the assistance of counsel, the Board considers whether substantial evidence supports the decision below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). 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 law. 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).

Miner's Claim

When a miner files a claim 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."[7] 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 pneumoconiosis, 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). Claimant

---

respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[7] 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).

may establish a change in an applicable condition of entitlement if she invokes the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

Invocation of the Section 411(c)(4) Presumption – Length of Coal Mine Employment

Claimant has 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 administrative law judge's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In the Miner's most recent prior claim, filed on August 11, 2006, Administrative Law Judge Linda S. Chapman denied benefits because he established total disability but not pneumoconiosis, a requisite element of entitlement. *H.M.T.* [*Tiller*] *v. Left Fork Coal Co., Inc.*, No. 2007-BLA-05785, (May 6, 2009) (unpub.). Subsequent to Judge Chapman's decision, Congress passed Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148, §1556 (2010), which reinstated the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b). In consideration of the Miner's appeal, the Board noted the recent change in the law, Judge Chapman's finding of 10.07 years of coal mine employment, and that "there [was] no evidence of, and no allegation that, [the Miner had] at least fifteen years of coal mine employment." *Tiller*, BRB No. 09-0628 BLA, slip. op. at 4-5 n.6. The Board thus held the Miner was not eligible to invoke the Section 411(c)(4) presumption and affirmed the denial of benefits for the Miner's failure to establish the existence pneumoconiosis. *Id*. at 8.

In this subsequent claim, the district director determined the Miner had 10 years of coal mine employment. After the claim was referred to the administrative law judge, he summarily stated in his Decision and Order that "[a]fter reviewing the evidence of record," he found "no reason to disturb Judge Chapman's [length of coal mine employment] finding" of 10.07 years. Decision and Order at 32, *citing* Miner's Claim Director's Exhibits 6, 7, 11. The administrative law judge, however, was required to specifically discuss the evidence and reach an independent determination regarding the Miner's length of coal mine employment after the claim was referred to him for a hearing. *See 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); 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").

While the administrative law judge cited the Miner's application for benefits, Employment History Form, and Social Security Administration earnings records, *see* Director's Exhibits 6, 7, 11, he did not explain how this evidence supports his finding of 10.07 years. 5 U.S.C. §557(c)(3)(A) (Administrative Procedure Act (APA) requires a statement of "findings and conclusions *and the reasons or basis therefor*, on all the material issue of fact, law, or discretion presented . . . .") (emphasis added). Nor did he discuss the Miner's deposition testimony about his coal mine employment, which was submitted to the district director. Director's Exhibit 30; *see* 30 U.S.C. §923(b) (administrative law judge must consider all relevant evidence). Because the administrative law judge did not discuss the relevant evidence,[8] or explain his method of calculating the Miner's length of coal mine employment, we vacate his determination of 10.07 years. Thus, we vacate the administrative law judge's finding that Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits in the Miner's claim.

Existence of Pneumoconiosis

In the interest of judicial economy, we also address the administrative law judge's findings that Claimant did not establish the Miner had either clinical or legal

[8] In addition to alleging fifteen years of coal mine employment, the Miner asserted coal mine employment as a welder/repairmen subsequent to his work for Employer. Director's Exhibit 30. The Act's definition of a miner is comprised of a "situs" requirement (the miner must have worked in or around a coal mine or coal preparation facility) and a "function" requirement (the miner must have worked in the extraction or preparation of coal). 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202(a). Whether the Miner's employment as a welder/repairman constitutes work as a miner under the Act and can be counted as qualifying coal mine employment requires factual findings the administrative law judge must make. *See Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985).

Employer asserts that "if [the Miner's] employment after [it] constitutes coal mine employment, then [it] must be dismissed as a responsible party because it will not be the company that last employed [the Miner] most recently for one year." Employer's Brief at 14 n.2. Employer, however, conceded it was the responsible operator before the administrative law judge and, therefore, has waived its right to contest the issue. Employer's Post-Hearing Brief at 3; *see generally United States v. Olano*, 507 U.S. 725, 733 (1993); *Taylor v. 3D Coal Co.*, 3 BLR 1-350 (1981).

pneumoconiosis without benefit of the Section 411(c)(4) presumption.[9] 20 C.F.R. §718.202(a).

Clinical Pneumoconiosis

The administrative law judge considered eleven interpretations of five x-rays. Dr. Tarver, dually qualified as a B reader and Board-certified radiologist, and Dr. Forehand, a B reader, read the September 13, 2011 x-ray as negative, while Dr. Alexander, also dually qualified, read it as positive for pneumoconiosis. MC Director's Exhibit 18, 20, 48. Taking into consideration the readers' qualifications and the number of readings, the administrative law judge permissibly found the September 13, 2011 x-ray negative for pneumoconiosis.[10] Decision and Order at 33; *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016).

Dr. Alexander read the January 18, 2012 x-ray positive for pneumoconiosis while Dr. Myer, also a dually qualified radiologist, read it as negative. MC Director's Exhibit 60; Claimant's Exhibit 8. Similarly, Dr. Miller, a dually qualified radiologist read the February 29, 2012 x-ray positive while Dr. Adcock, also dually qualified, read it as negative. Claimant's Exhibit 10, Employer's Exhibit 2. Because the doctors are equally qualified, he permissibly found the readings of the January 18, 2012 and February 29, 2012 x-rays in equipoise as to the existence of clinical pneumoconiosis.[11] Decision and Order at 33; *Addison*, 831 F.3d 244, 256-57.

---

[9] 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).

[10] The administrative law judge gave greatest weight to Drs. Tarver's and Alexander's readings because they are dually qualified. Decision and Order at 32-33. Although Dr. Forehand is not dually-qualified, the administrative law judge nevertheless permissibly found his reading "still entitled to significant weight" due to his status as a B reader and his "extensive experience examining coal miners for the black lung program" and experience "present[ing] on the topic of coal workers' pneumoconiosis." *Id.*; s*ee Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

[11] The administrative law judge found Drs. Alexander and Meyer both lectured on the topic of coal workers' pneumoconiosis. Decision and Order at 33. He also found the careers of Drs. Adcock and Miller "quite similar" since they "hold similar academic titles"

Dr. Miller read the December 27, 2012 x-ray as positive for pneumoconiosis, while Dr. Kendall read it as negative. Claimant's Exhibit 11; Employer's Exhibit 4. The administrative law judge found both physicians are dually qualified but "Dr. Miller's curriculum vitae indicates he taught in the field of radiology," while "Dr. Kendall's curriculum vitae indicates he has teaching experience, but it was not clear what topics he taught." Decision and Order at 33. Based on Dr. Miller's "superior" radiological qualifications, the administrative law judge permissibly found the December 27, 2012 x-ray positive for pneumoconiosis. *Id.*; *see Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); 20 C.F.R. §718.202(a)(1) ("consideration must be given to the radiological qualifications of the physicians interpreting such x-rays").

Dr. Miller read the April 9, 2013 x-ray positive for pneumoconiosis while Dr. Meyer read it as negative. MC Director's Exhibit 61; Claimant's Exhibit 9. Although both physicians are dually qualified, the administrative law judge found Dr. Meyer possesses "superior credentials" as he "is a full Professor of Diagnostic Radiology, whereas Dr. Miller is an Assistant Clinical Professor of Radiology." Decision and Order at 33. The administrative law judge also noted "Dr. Meyer's curriculum vitae reflects he has substantial experience with coal workers' pneumoconiosis" as a member of the American College of Radiology Pneumoconiosis Certification Program Task Force and lecturer on the radiology of the disease. *Id.* Thus, the administrative law judge permissibly found the April 9, 2013 x-ray negative for pneumoconiosis. Decision and Order at 34; *see Worhach*, 17 BLR at 1-108.

After reaching his findings with regard to each x-ray, the administrative law judge summarily stated, "[c]onsidering all of the x-ray evidence together, I find that it is insufficient to establish the existence of pneumoconiosis by a preponderance of the evidence." Decision and Order at 34. Because the administrative law judge provided no rationale for how he resolved the overall conflict in the x-ray evidence as the APA requires, particularly having credited the two most recent x-rays as positive, we vacate his finding. 20 C.F.R. §718.202(a)(1); 30 U.SC. §932(a); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

---

and "[b]oth have authored or co-authored publish articles, however their publications do not specifically relate to the topic of coal workers' pneumoconiosis." *Id.* He therefore permissibly found "no meaningful way to distinguish" their credentials. *Id.*; *see Hicks*, 138 F.3d 524, 533.

The administrative law judge also found Claimant did not establish clinical pneumoconiosis based on the autopsy evidence[12] and medical opinions of Drs. Javed and Piriz. Although the administrative law judge summarized the Miner's treatment records and noted that they include diagnoses of pneumoconiosis and obstructive lung disease, he did not explain the weight he accorded those records. Decision and Order at 28-30; MC Director's Exhibit 22, 70; Survivor's Claim (SC) Director's Exhibit 11; Claimant's Exhibits 2-4. Further, while the administrative law judge found Dr. Javed's November 3, 2016 letter diagnosing "severe [c]oal [w]orkers' pneumoconiosis" inadequately explained, he did not address the weight he accorded Dr. Javed's July 13, 2015 letter accompanying the records of his treatment of the Miner. Claimant's Exhibit 12; Decision and Order at 35; SC Director's Exhibit 11. Thus, because the administrative law judge did not address all the relevant evidence, we vacate his determination that Claimant did not establish clinical pneumoconiosis based on the Miner's treatment records and the medical opinions. 20 C.F.R. §718.202(a)(4); *see* 30 U.S.C. §923(b); *See Wojtowicz*, 12 BLR at 1-165; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); Decision and Order at 36.

Legal Pneumoconiosis

To establish legal pneumoconiosis, claimant must prove he has 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). The administrative law judge accurately found that neither Dr. Javed nor Dr. Piriz specifically addressed whether the Miner had legal pneumoconiosis. Claimant's Exhibit 12, 13. However, he erred in finding Dr. Forehand "did not specifically offer an opinion" on legal pneumoconiosis. Decision and Order at 36. Dr. Forehand conducted the Miner's

[12] Dr. Grimes conducted an autopsy of the Miner's right lung and diagnosed simple coal workers' pneumoconiosis. Claimant's Exhibit 7. The administrative law judge noted Dr. Grimes did not include microscopic findings or "specify what macroscopic findings correlate to which slides." Decision and Order at 35. Thus, the administrative law judge permissibly found Dr. Grimes's autopsy report "poorly documented" and entitled to less weight than the better documented autopsy reports by Drs. Oesterling and Caffrey finding no evidence of clinical pneumoconiosis. *See Hicks*, 138 F.3d at 533; Decision and Order at 35; Claimant's Exhibit 7; Employer's Exhibits 1, 5. However, as the administrative law judge acknowledged "the lung tissue sample the pathologists reviewed was quite limited and was insufficient to establish a firm diagnosis," Decision and Order at 27, he must reconsider whether Claimant established clinical pneumoconiosis by x-ray and explain how he resolves any conflict between the x-ray and autopsy evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Department of Labor (DOL)-sponsored pulmonary evaluation and diagnosed obstructive lung disease. Director's Exhibit 18. When asked on the DOL form to address the cause of the Miner's respiratory impairment, he stated it was "contributed to by cigarette smoke and coal mine dust is the principal cause of [the Miner's] respiratory impairment." *Id.* Because the administrative law judge did not address the entirety of Dr. Forehand's opinion, we vacate his finding that Claimant did not establish the Miner had legal pneumoconiosis.[13] *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 37.

Remand Instructions for the Miner's Claim

On remand, the administrative law judge must reconsider whether Claimant invoked the Section 411(c)(4) presumption. He must address the Miner's deposition testimony along with all the relevant evidence and determine the length of the Miner's coal mine employment, using a reasonable method of calculation. *See Muncy*, 25 BLR at 1-27. If Claimant establishes the Miner had at least fifteen years of qualifying coal mine employment and total disability, she is entitled to the Section 411(c)(4) presumption. If the presumption is invoked, the administrative law judge must consider whether Employer rebutted it.[14] 20 C.F.R. §718.305(d)(1)(i), (ii). If Claimant establishes total disability but not fifteen years of qualifying coal mine employment, the administrative law judge must determine whether she established the existence of clinical pneumoconiosis arising out of coal mine employment, legal pneumoconiosis, and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203, 718.204(c).

Remand Instructions for the Survivor's Claim

The administrative law judge found that because Claimant did not establish the Miner had pneumoconiosis, she was unable to establish his death was due to pneumoconiosis. 20 C.F.R. §718.205(b); Decision and Order at 38. Because we have

---

[13] We decline to address, as premature, the administrative law judge's findings that Employer's physicians' opinions are more credible on the existence of legal pneumoconiosis than Dr. Forehand's opinion. The administrative law judge will have to reconsider their credibility in light of his consideration of all relevant evidence, including his reweighing of Dr. Forehand's opinion, when determining if Claimant can establish legal pneumoconiosis or, if Claimant invokes the Section 411(c)(4) presumption, when assessing whether Employer can disprove the existence of the disease.

[14] If the presumption is invoked, the administrative law judge must reweigh the evidence on clinical and legal pneumoconiosis with the burden of proof on Employer to affirmatively disprove the existence of both forms of the disease. 20 C.F.R. §718.305.

vacated the administrative law judge's denial of benefits in the Miner's claim, we also vacate his denial of benefits in the survivor's claim. If benefits are awarded in the Miner's claim, the administrative law judge must first determine if Claimant is entitled to automatic survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[15] If benefits are not awarded in the Miner's claim, the administrative law judge must then determine if Claimant has established in the survivor's claim that the Miner had pneumoconiosis and that his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

---

[15] Section 422(*l*) of the Act, 30 U.S.C. §932(l), provides that the survivor of a miner who was eligible to receive benefits at the time of the miner's 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*).