U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0410 BLA

PAMELA A. LAYNE (Widow of PAUL E. LAYNE) Claimant-Petitioner v. McNAMEE RESOURCES INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/25/2017 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2014-BLA-5248) of Administrative Law Judge Drew A. Swank rendered on a claim filed pursuant to provisions of 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 September 17, 2012.

Based on his determination that the miner worked eleven years in coal mine employment, the administrative law judge found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(4) presumption, the administrative law judge found that claimant did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[3] Accordingly, the administrative law judge denied benefits.[4]

[1] Claimant is the widow of the miner, who died on March 6, 2012. Director's Exhibit 8.

[2] Relevant to this claim, Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] "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 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).

[4] Section 422(*l*) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Claimant cannot benefit from this provision, as

On appeal, claimant contends that the administrative law judge erred in crediting the miner with less than fifteen years of coal mine employment. Claimant also argues that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis. Employer/carrier responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order 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).

Length of Coal Mine Employment

Claimant bears the burden of proof in establishing the length of the miner's coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the administrative law judge's finding will be upheld if it is based on a reasonable method of computation and is supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985).

The administrative law judge considered the miner's employment history summary, his Social Security Administration (SSA) earnings record, and claimant's testimony. Decision and Order at 4; Director's Exhibits 2-5, 17; Hearing Tr. at 13-15. On her claim form, claimant stated that the miner worked in coal mine employment for ten to eleven years. Decision and Order at 4; Director's Exhibit 3. On the employment history form, claimant indicated that the miner worked in "coal mining" from January 1975 through May 1987 for various employers. *Id.* Claimant also indicated that from August 1966 to May 1968 the miner worked as a "truck driver" for Island Creek Stores

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there is no evidence that the miner filed a lifetime claim for benefits. Director's Exhibit 2.

[5] The record indicates that the miner was last employed in the coal mining industry in Kentucky. Director's Exhibit 3, 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

#17, and she described this employment as "company store, delivered goods, worked on appliances [for] homes that used coal for heat." *Id.* Claimant listed no other employment for the miner. The administrative law judge found that the miner was engaged in coal mine employment for about eleven years, from January 1975 through May 1987. Decision and Order at 4.

Claimant concedes that from August 1966 to May 1968 the miner was not engaged in coal mine employment. Claimant's Brief at 4. Claimant asserts, however, that the administrative law judge unreasonably excluded the miner's remaining years of employment with Island Creek Coal Company (Island Creek), from 1969 through 1974, from his total years of coal mine employment. *Id.* Claimant asserts that counting this additional time, the miner had more than the fifteen years of coal mine employment required to invoke the Section 411(c)(4) presumption. *Id.* Claimant's argument lacks merit.

The administrative law judge acknowledged that the miner's SSA earnings record indicates that the miner worked for Island Creek from 1966 through 1974. Decision and Order at 4; Director's Exhibit 4. He further noted that while the district director credited claimant with 17.09 years of coal mine employment, this apparently included the miner's employment at Island Creek when he was not engaged in coal mine employment. Decision and Order at 4. Contrary to claimant's contention, in excluding all of the miner's employment with Island Creek from his calculations, the administrative law judge permissibly accorded greater probative value to the more "detailed information" provided by claimant on the employment history form, which did not list any employment for Island Creek, except as a truck driver for the company store. *See Muncy*, 25 BLR at 1-27; Decision and Order at 4. Moreover, claimant provided no testimonial or documentary evidence contradicting this finding, or otherwise establishing that the miner was engaged in coal mine employment during any of his time with Island Creek.[6] We

[6] At her November 26, 2012 deposition, claimant asserted that the miner had more than twenty years of coal mine employment. Director's Exhibit 17 at 9. Claimant stated that she completed the miner's employment history form based on the information he provided on his UMWA pension application, and that she had forgotten about some of his employers until she started "digging for pay stubs." *Id.* at 4. Claimant did not submit any pay stubs into the record, however, and her testimony did not reference any periods of coal mine employment not listed on the employment history form. *Id.* at 3-10. Further, claimant confirmed that the miner's first employer was Slater Mining, where he worked from January 1975 to November of 1976. *Id.* at 10. Claimant stated that the miner was working for Slater Mining when they married in 1976. *Id.* This employment is corroborated by both the information claimant provided on the employment history form and by the miner's Social Security Administration earnings record. Director's

therefore affirm the administrative law judge's determination that claimant failed to meet her burden to establish the fifteen years of coal mine employment necessary to invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4).[7] *See* 20 C.F.R. §718.305; *Mills*, 348 F.3d at 136, 23 BLR at 2-16; *Kephart*, 8 BLR at 1-186.

The Existence of Pneumoconiosis

In a survivor's claim, where no statutory presumption applies, claimant must establish, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87

Exhibits 3, 4, 17 at 10. At the December 7, 2015 hearing, claimant alleged that the miner had at least seventeen years of coal mine employment, and again stated that he was already working as a miner in 1976, when they married. Hearing Tr. at 13, 15. Neither claimant's deposition testimony nor her hearing testimony provides any additional information regarding the nature of the miner's employment with Island Creek Coal Company, or describes any periods of employment prior to 1975.

[7] We further note that the record contains no medical evidence that could establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(1)-(iv), a second necessary fact to establish invocation of the Section 411(c)(4) presumption. There are no pulmonary function studies in the record pursuant to 20 C.F.R. §718.204(b)(2)(i). The only blood gas study of record was obtained during a hospitalization that ended in the miner's death, and there is no physician's report establishing that the test results "were produced by a chronic respiratory or pulmonary condition," as required by 20 C.F.R. §718.105(d). Employer's Exhibit 6 at 14. Rather, both Drs. Castle and Spagnolo opined that the blood gas studies reflected the miner's terminal cardiogenic shock, and could not be used to assess the presence of a disabling respiratory impairment. Employer's Exhibits 9, 11 at 29, 12 at 23. Therefore the blood gas study evidence is legally insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). There is also no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure, and no medical opinion of record diagnosing a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(iii), (iv); Director's Exhibits 8, 9; Employer's Exhibits 1, 3, 4, 6, 7, 9, 11, 12. Finally, under the facts of this case, claimant cannot establish total disability through lay evidence. *See* 718.305(b)(4). Therefore, any error in the administrative law judge's length of coal mine employment determination would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

(1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6). Failure to establish any one of the requisite elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

Claimant asserts that the administrative law judge erred in his consideration of the autopsy and medical opinion evidence in finding that claimant failed to establish the existence of pneumoconiosis.[8] The autopsy evidence consists of the opinion of the autopsy prosector, Dr. Dennis, and the reviewing opinions of Drs. Oesterling and Caffrey. Dr. Dennis performed the miner's autopsy on March 7, 2012. Director's Exhibit 9. Although both Dr. Dennis's gross and microscopic examinations revealed "no fibrosis," "minimal pigment deposition" and "no macular development," Dr. Dennis diagnosed the miner with simple coal workers' pneumoconiosis. *Id.*

Drs. Oesterling and Caffrey, who are both Board-certified pathologists, reviewed Dr. Dennis's report and the miner's autopsy slides. Dr. Oesterling noted that anthracotic pigmentation was present in the miner's lung tissue, but opined that there was no evidence of coal workers' pneumoconiosis. Decision and Order at 10; Employer's Exhibit 4. Dr. Caffrey similarly opined that while the miner's lungs contained anthracotic pigment, there were no lesions of coal workers' pneumoconiosis. Decision and Order at 9-10; Employer's Exhibit 1.

The administrative law judge permissibly found the opinions of Drs. Oesterling and Caffrey to be "well-documented and persuasive." *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 10. In contrast, correctly noting that anthracotic pigmentation alone is insufficient to establish pneumoconiosis, the administrative law judge permissibly discounted Dr. Dennis's opinion because he failed to identify any other gross or microscopic examination findings to support his diagnosis of pneumoconiosis. 20 C.F.R. §§718.202(a)(2), 718.201(a); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19

[8] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish the existence of simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (3); 718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

BLR 2-111, 2-117 (6th Cir. 1995); *see Groves*, 277 F.3d at 836, 22 BLR at 2-330*; Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 10.

Contrary to claimant's argument, the administrative law judge was not required to accord controlling weight to Dr. Dennis's opinion because Dr. Dennis performed the autopsy. *See Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-23 (1992); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178 (1984); Claimant's Brief at 3-4. Rather, the administrative law judge properly considered the credibility of Dr. Dennis's opinion, along with the other medical experts, and permissibly concluded that the preponderance of the autopsy evidence does not establish the existence of pneumoconiosis. *See Urgolites*, 17 BLR at 1-23; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order at 10. We affirm this finding as it is supported by substantial evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 10.

The administrative law judge also considered Dr. Dennis's opinion together with the medical reports of Drs. Spagnolo and Caffrey, and the miner's death certificate, and medical treatment records pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 13-15. The administrative law judge noted that, in contrast to Dr. Dennis, Drs. Spagnolo and Caffrey opined that the miner did not suffer from clinical or legal pneumoconiosis, and neither the miner's death certificate[9] nor his treatment records contain any mention of pneumoconiosis or any coal mine dust-related disease or impairment. *Id*; Director's Exhibit 8; Employer's Exhibits 3, 6, 7, 9, 11, 12.

The administrative law judge reiterated that while Dr. Dennis diagnosed coal workers' pneumoconiosis, he acknowledged that there was no macular development and he provided neither the location nor measurements of any nodules of pneumoconiosis. Decision and Order at 15. In comparison, the administrative law judge found the opinions of Drs. Spagnolo and Castle to be "much better documented and persuasive." *Id.* Thus, the administrative law judge permissibly found that Dr. Dennis's opinion did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 15. Finally, weighing all of the evidence together, the administrative law judge rationally found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Dixie*

[9] The miner's death certificate listed only acute myocardial infarction as the cause of death, with no other conditions noted. Director's Exhibit 8.

Fuel Co. v. Director, OWCP [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012); Decision and Order at 15.

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's determination that an award of benefits in this survivor's claim is precluded. *See* 20 C.F.R. §718.202(a); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge