U.S. Department of Labor

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

BRB No. 17-0348 BLA

BETTY G. POSENO (Widow of PAUL D. POSENO) Claimant-Respondent v. U.S. STEEL MINING COMPANY, LLC Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/17/2018 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William T. Barto, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05625) of Administrative Law Judge William T. Barto rendered on a survivor's claim filed on June

6, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Applying Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2012), the administrative law judge credited the miner with at least fifteen years of qualifying coal mine employment and found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). He further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's finding of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and thus his finding that claimant invoked the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's determination that employer failed to rebut the presumption. Alternatively, employer asserts that claimant is unable to establish the elements of entitlement without the benefit of the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[2]

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.[3] 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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[1] Relevant to this survivor's claim, under Section 411(c)(4), if a claimant establishes that 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 mine, and that he or she had a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had "at least fifteen years" of underground coal mine employment. Decision and Order at 4, 6; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 6; Hearing Transcript at 19.

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(iii). 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 and comparable and gainful work.[4] *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a claimant may establish total disability using any of four types of evidence: pulmonary function study evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinion evidence.[5] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider the evidence as a whole, as well as the evidence pertinent to the individual categories, weighing all the evidence supportive of a finding of total disability against all the contrary probative evidence to determine whether total disability has been established by a preponderance of the evidence. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 171, 21 BLR 2-34, 2-42 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the pulmonary function studies of September 8, 2005 and July 24, 2008, both of which produced qualifying[6] values. Decision and Order at 7; Director's Exhibit 15. However, the administrative law judge determined that the September 8, 2005 study was invalid based upon a note from Dr. Patel, the administering physician, stating "[p]oor effort, lot of coughing." Decision and Order at 7, *quoting* Director's Exhibit 15. In contrast, the administrative law judge found the July 24, 2008 pulmonary function study was valid as none of the physicians of record invalidated the study. Decision and Order at 8. Thus, weighing the pulmonary function studies together, the administrative law judge concluded that they provided "some evidence" of a totally disabling respiratory impairment. *Id*.

[4] The administrative law judge found that the miner's usual coal mine work as a roof bolter required "medium exertion." Decision and Order at 9.

[5] The administrative law judge found that because neither party submitted blood gas studies into evidence, and there was no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure, claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 7.

[6] 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).

Employer asserts that the administrative law judge erred in crediting the July 24, 2008 study because the identity of the doctor who administered the study is unknown, and it failed to conform to the quality standards at 20 C.F.R. §718.103 and in 20 C.F.R. Part 718, Appendix B. Employer's argument lacks merit.

Because the July 24, 2008 study was obtained in conjunction with the miner's treatment, it is not subject to the specific quality standards set forth at 20 C.F.R. §718.103 and Appendix B. *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008); 20 C.F.R. §718.101(b). The administrative law judge nevertheless considered whether the July 24, 2008 study was sufficiently reliable to support a finding of total disability, and accurately observed that "none of the consulting physicians opine that the July 24, 2008 [study] is invalid."[7] Decision and Order at 8. Moreover, there is no indication in the record that employer raised the reliability of the July 24, 2008 pulmonary function study when the case was before the administrative law judge. *See* Employer's October 13, 2016 Letter Brief. Assertions that objective studies do not meet the quality standards under the 20 C.F.R. Part 718 regulations must be raised below, and such challenges will not be considered for the first time on appeal to the Board. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987). Thus, we reject employer's assertion of error and affirm the administrative law judge's finding that the pulmonary function studies provided "some evidence" of a totally disabling respiratory impairment. Decision and Order at 8.

Employer next asserts that the administrative law judge erred in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinion of Dr. Perper, the only physician to directly opine

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[7] The Department of Labor's comments to the regulations explain that evidence not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] § 718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by [20 C.F.R.] [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

on the issue of total disability, as well as the opinions of Drs. Oesterling[8] and Caffrey.[9] Decision and Order at 8-9; Claimant's Exhibit 1; Employer's Exhibits 1-4. The administrative law judge found that Dr. Perper's opinion that the miner was totally disabled from a respiratory standpoint at the time of his death was "well-reasoned," "well-documented," and supported by the medical evidence which established "many years of severe respiratory impairment at the end of the [m]iner's life." Decision and Order at 9. In addition, he found that Dr. Perper's opinion was supported by claimant's hearing testimony regarding the history and severity of the miner's "trouble breathing" in the ten years prior to his death. *Id*. Further, the administrative law judge noted that Drs. Oesterling and Caffrey "agree that the [m]iner had a severe and extensive fungal infection in the lungs at the time of his death, resulting in widespread necrosis." *Id*. at 4, 9. According "significant weight" to Dr. Perper's opinion, the administrative law judge concluded that the medical opinion evidence supported a finding of total respiratory disability. *Id*. at 9.

Employer argues that administrative law judge erred in finding total disability established because Dr. Perper's opinion is "speculative, not documented and reasoned, invalid and contrary to the weight of the evidence," and because no physician offered a "contemporaneous" opinion of total disability during the miner's life. Employer's Brief at 15.

Contrary to employer's argument, the fact that no physician offered a contemporaneous opinion of total disability during the miner's life does not preclude a finding of total disability based on the medical opinion evidence. *See* 20 C.F.R. §718.204(b)(2)(iv). The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides that total disability may be found:

> if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his or her usual coal mine employment].

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[8] Dr. Oesterling opined that the miner died "a respiratory death" due to an "overwhelming pulmonary infection" in the form of "diffuse pneumonia with extensive changes due to Candida." Employer's Exhibits 2 at 3-4, 4 at 2.

[9] Dr. Caffrey opined that the miner died due to "overwhelming Aspergillosis infection in the lungs," noting that all of the miner's lung tissue was necrotic, and that his lungs were "three times normal weight . . . because of the severity and the diffuseness of the necrotic process." Employer's Exhibits 1 at 3, 3 at 5.

20 C.F.R. §718.204(b)(2)(iv). The administrative law judge correctly noted that Dr. Perper based his opinion that the miner was totally and permanently disabled due to a respiratory impairment on a review of the miner's work history, medical history and treatment records, death certificate, and autopsy report and slides. Decision and Order at 8, *citing* Claimant's Exhibit 1 at 27. Specifically, after reviewing treatment and medical records from 2005 until the miner's death in 2014, Dr. Perper concluded that the miner's "respiratory functions were severely abnormal," noting that he was "continuously" dependent on supplemental oxygen, and his oxygen saturation was reduced even with "a high dose of 3 liters per minute" of supplemental oxygen.[10] Claimant's Exhibit 1 at 27. In addition, Dr. Perper noted "markedly abnormal pulmonary function tests in 2008" and pathological findings of "significant and substantial" clinical coal workers' pneumoconiosis and "severe and extensively diffuse complicating pulmonary Aspergillosis," which "resulted in total and permanent respiratory disability." *Id*. at 24, 27. Thus, the administrative law judge permissibly concluded that Dr. Perper provided a "well-reasoned and well-documented" opinion based on a "thorough analysis of the records he consulted" and the autopsy evidence. Decision and Order at 9; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2- 323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Consequently, we affirm the administrative law judge's finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). We also affirm his finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2) overall.[11] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987);

[10] Dr. Perper noted that at a July 3, 2012 doctor's appointment the miner's "oxygen saturation while on 3 liters/min of supplemental oxygen was 88%," at a November 15, 2012 appointment the miner's "oxygen saturation while on 3 liters/min of supplemental oxygen was 90%," a February 25, 2013 note indicated the miner was "wearing oxygen all the time," on September 17, 2014 the miner's "[o]xygen saturation while on 3 liters/min of supplemental oxygen: 91%," on both October 28, 2013 and November 26, 2013 the miner's "[o]xygen saturation while on 3 liters/min of supplemental oxygen: 88%." Claimant's Exhibit 1 at 8, 9, 11, 12.

[11] We reject employer's assertion that the administrative law judge's finding of total disability was based solely on claimant's testimony. Employer's Brief at 15. The administrative law judge's analysis makes clear that he weighed all of the evidence relevant to total disability and relied on the medical opinion of Dr. Perper, as supported by the other evidence of record, to find that total disability was established. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986),

Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc). Furthermore, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

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

Employer initially contends that the administrative law judge erred in finding the Section 411(c)(4) presumption invoked, and therefore erred in failing to affirmatively place the burden on claimant to prove that the miner had pneumoconiosis and that his death was due to pneumoconiosis. Employer's Brief at 7-8, 12-13. We disagree. We have affirmed the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See supra* at 10. Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[12] or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii).

Employer additionally contends that "the better reasoned and documented medical opinion compels a finding that pneumoconiosis is **not** present," and that the "preponderance of the better reasoned and documented medical evidence does **not** establish that the miner's . . . pneumoconiosis, if it existed, was a 'substantially contributing' cause or factor in his death." Employer's Brief at 6-7. Employer, however, has not identified any specific error of law or fact in the administrative law judge's weighing of the evidence relevant to rebuttal. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Rather, employer seeks a reweighing of the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, and the Board may not reweigh the evidence or substitute its own inferences on appeal.

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aff'd on recon. 9 BLR 1-236 (1987) (en banc); Decision and Order at 9. We note that employer does not cite any contrary evidence in raising its objections.

[12] "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). "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).

See Grizzle v. Pickands Mather & Co., 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-589, 2-606 (4th Cir. 1999); *Anderson*, 12 BLR at 1-113. Therefore, we affirm the administrative law judge's determinations that employer failed to rebut the Section 411(c)(4) presumption and that claimant is entitled to benefits. *See* 20 C.F.R. §718.305(d)(2)(i), (ii); Decision and Order at 10-21.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge