U.S. Department of Labor

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

BRB No. 18-0226 BLA

DOROTHY ANN SALMONS (Widow of ROBERT LEE SALMONS) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 04/24/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office, PLLC), South Williamson, Kentucky, for claimant.

William M. Bush (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-BLA-5768) of Administrative Law Judge Steven D. Bell, rendered on a survivor's claim[1] filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with eighteen years of underground coal mine employment, but determined he was not totally disabled pursuant 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge found claimant did not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He further found claimant did not establish pneumoconiosis at 20 C.F.R. §718.202(a), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and denied benefits.[3]

On appeal, claimant contends the administrative law judge erred in finding the miner was not totally disabled because he did not consider all of the blood gas studies and relevant treatment records, and therefore erred in finding the Section 411(c)(4) presumption not invoked. Claimant also contends the administrative law judge erred in finding the miner did not have pneumoconiosis and that his death was not due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the case should be remanded because the administrative law judge did not adequately consider the blood gas studies or treatment records in finding that the miner was not totally disabled.[4] We agree that this claim must be remanded.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

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[1] Claimant is the surviving spouse of the miner, who died on July 31, 2013. Director's Exhibit 10.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis if he had fifteen years of underground coal mine employment, or employment in conditions substantially similarly to those in underground mines, and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] The administrative law judge also found there is no evidence of complicated pneumoconiosis to invoke the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[4] We affirm the administrative law judge's finding that the miner had eighteen years of underground coal mine employment, as it is supported by substantial evidence. *See* Decision and Order at 3; Hearing Transcript at 14.

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).

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

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). Total disability may be established by qualifying pulmonary function studies or arterial blood gas studies,[6] evidence 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 all relevant supporting evidence against all relevant 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 initially found that there are no pulmonary function studies or medical opinions.[7] He next considered sixteen blood gas studies performed at Williamson Appalachian Regional Hospital between June 23 and June 26, 2013.[8] Decision

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[5] Because the miner's coal mine employment was in Kentucky, this case arises within the jurisdiction 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); Director's Exhibits 5, 6.

[6] A "qualifying" pulmonary function or arterial blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] We affirm, as unchallenged, the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] The records from Williamson Appalachian Regional Hospital indicate the miner was admitted on June 23, 2013 in "acute respiratory failure" and was diagnosed with "exacerbation of chronic obstructive pulmonary disease," pneumonia, emphysema, congestive heart failure, and skin wounds from a prior staph infection. Director's Exhibit

and Order at 4; Director's Exhibit 12 at 32-47. He noted that the studies were obtained to monitor the miner's oxygen levels while on a respirator. Decision and Order at 4. He also considered blood gas studies from the Huntington Veterans' Administration Medical Center, dating from May 18, 2012 to May 27, 2012, and April 2, 2013 to June 4, 2013. *Id*.; Director's Exhibit 11 at 52-81.

The administrative law judge found that "while many of the [studies] were not literally performed 'during a hospitalization which end[ed] in the miner's death,' they all were performed during hospitalizations occurring within a few months of [his death]" on July 31, 2013. Decision and Order at 4, *quoting* 20 C.F.R. §718.105(d). He had "reservations about accepting the [blood gas] results at face value," particularly those obtained while the miner was on a ventilator, and therefore concluded that "the limitations contained in 20 C.F.R. § 718.105(d) are more relevant than not." Decision and Order at 4. The administrative law judge found that because the studies "do not meet the quality standards found in 20 C.F.R. § 718.105(b) and (c)," he needed "assurance (in the form of a medical opinion)" that the results were reliable for determining whether the miner was totally disabled. *Id*. He further stated, "I find the quality standards necessary to assure a decision-maker that the [blood gas studies] might be accepted as valid." *Id*. In the absence of such a medical opinion, he concluded that the studies are not admissible and that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[9] *Id*.

We agree with the parties that the administrative law judge's weighing of the blood gas studies is not rationally explained. He made multiple references to the quality standards, and concluded that they "are necessary to assure a decision-maker that the [blood gas studies] might be accepted as valid." Decision and Order at 4. Contrary to this analysis, because all of the blood gas studies in this case are contained in the miner's treatment records, the quality standards set forth at Appendix C and 20 C.F.R. §718.105

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12. He was placed on a respirator until his condition stabilized and was discharged on June 26, 2013.

[9] The administrative law judge indicated he would give the blood gas studies little weight "even if they met the minimum standards for admissibility," but he gave no explanation for his finding. Decision and Order at 3. He also alternatively found that even accepting the "face value of the results" of the studies, a majority of the [studies] contain results contradicting a finding of disability." *Id*. Again, the administrative law judge did not identify which studies in the record are qualifying or non-qualifying to allow the Board to review his rationale.

do not strictly apply.[10] *See* 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Rather, the administrative law judge is required to determine if the blood gas study results are sufficiently reliable to support a finding of total disability. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). We are unable to discern from his decision if he properly considered whether the results are sufficiently reliable to establish total disability.[11] *Id*.

Furthermore, the administrative law judge discredited the entirety of the blood gas studies because that they were conducted shortly before the miner's death in July 2013 or while the miner was on a ventilator. Decision and Order at 4. The Director correctly notes, however, that this rationale does not apply to the three studies performed in May 2012, which predate the miner's death by over a year and were not conducted while the miner was on a respirator.[12] Director's Brief at 3, *citing* Director's Exhibits 11 at 801-81. Because the administrative law judge has not adequately explained the weight he accorded the blood gas studies, his Decision and Order is not in accordance with the Administrative Procedure Act.[13] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune*

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[10] As the Director, Office of Workers' Compensation Programs (the Director), notes, even non-treatment record blood gas studies are not subject to strict compliance with the quality standards and, "in the case of a deceased miner where no other [studies] are available," noncomplying studies may support of finding of total disability "as long as the adjudicator is convinced that the tests are 'technically valid.'" Director's Brief at 4; *see* 20 C.F.R. § 718.105(e).

[11] The administrative law judge also failed to explain why the fact that several of the tests were performed "within a few months" of the miner's death undermines their probative value. Decision and Order at 4. As the administrative law judge acknowledged, the requirement for a "physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition," applies only to studies conducted "during a hospitalization which ends in the miner's death." *See* 20 C.F.R. §718.105(d).

[12] Two of the three studies performed in May 2012 are qualifying for total disability. Director's Brief at 3 n.3.

[13] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

v. Cent. Appalachian Coal Co., 6 BLR 1-996, 1-998 (1984). We must therefore vacate his finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

We also agree with claimant and the Director that the administrative law judge failed to properly consider the miner's hospital records on the issue of total disability. Claimant's Brief at 4; Director's Brief at 4-5. The administrative law judge correctly noted there are no medical opinions in the treatment records diagnosing total respiratory disability. Decision and Order at 3. An administrative law judge may nevertheless infer that a miner was totally disabled if the treatment records provide sufficient information from which to conclude that he was unable from a respiratory standpoint to perform his usual coal mine employment.[14] *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Poole v. Freeman Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). Because the administrative law judge did not fully discuss the hospital records relevant to the issue of total disability, we vacate his finding at 20 C.F.R. §718.204(b)(2)(iv). *McCune*, 6 BLR at 1-998. Further, as the administrative law judge erred in finding that the miner was not totally disabled, we vacate his determination that claimant did not invoke the Section 411(c)(4) presumption, and further vacate the denial of benefits. 30 U.S.C. §921(c)(4).

Entitlement under Part 718 – Existence of Pneumoconiosis

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, without aid of the Section 411(c)(3) or Section 411(c)(4) presumption, claimant must demonstrate, 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. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

[14] Claimant asserts the miner's admission to the hospital for "respiratory failure and the administration of a mechanical vent to support this respiratory failure is prima facie evidence of a totally disabling respiratory impairment." Claimant's Brief at 4. The Director states the hospital records, along with the pulmonary functions studies "lend support to the idea that the miner suffered from a chronic pulmonary condition and . . . could inform the [administrative law judge's] consideration" of whether the blood gas studies are reliable to establish that the miner was totally disabled. Director's Brief at 4.

Claimant asserts the administrative law judge did not adequately consider the miner's hospital records prior to finding that he did not have legal pneumoconiosis.[15] Claimant's Brief at 4-5. We disagree. The administrative law judge found that while the hospital records indicate that the miner had chronic obstructive pulmonary disease (COPD), no physician attributed the miner's COPD to coal mine dust exposure. Decision and Order at 7. Claimant does not specifically challenge this finding or identify any specific evidence to satisfy the regulatory requirement that she prove that the miner's COPD was significantly related to, or substantially aggravated by, coal mine dust exposure. 20 C.F.R. §718.202(a)(2); *see* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986). Thus, in the absence of a physician's opinion addressing the etiology of the miner's COPD, we affirm the administrative law judge's finding that claimant did not establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 7. Because claimant did not establish that the miner had clinical or legal pneumoconiosis,[16] she is unable to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *Trumbo*, 17 BLR at 1-87-88. Thus, the only avenue for claimant to establish entitlement to survivor's benefits is the Section 411(c)(4) presumption.

Remand Instructions

The administrative law judge must reconsider whether the blood gas studies are sufficiently reliable to establish total disability at 20 C.F.R. §718.204(b)(2)(i). He must also reconsider whether the treatment records are sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). If claimant establishes total

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[15] 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).

[16] We affirm, as unchallenged by claimant, the administrative law judge's findings that she did not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) or clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Skrack*, 6 BLR at 1-711; Decision and Order at 5-7.

disability under either or both subsections, the administrative law judge must weigh the supporting and contrary evidence together and determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2). If claimant establishes total disability, she will have invoked the Section 411(c)(4) presumption, in which case the administrative law judge must determine whether the Director rebutted the presumption. *See* 20 C.F.R. §718.305(d)(2)(i), (ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). If the administrative law judge finds that the evidence does not establish total disability, however, he must reinstate the denial of benefits. In rendering his findings of fact and conclusions of law, the administrative law judge must set forth the reasons for his findings consistent with the APA. *See Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge