U.S. Department of Labor

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

BRB No. 18-0278 BLA

BERTHA L. COLVIN (Widow of FOSTER COLVIN) Claimant-Petitioner v. EASTOVER MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/15/2019 DECISION and ORDER

Appeal of the Decision and Order of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Bertha L. Colvin, Evarts, Kentucky.

William Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order (2016-BLA-05421) of Administrative Law Judge Theresa C. Timlin, denying benefits on a claim filed pursuant to 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 December 15, 2014.

After crediting the miner with at least fifteen years of qualifying coal mine employment,[2] the administrative law judge found that he had 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 Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer rebutted the presumption, however, by establishing that no part of the miner's death was due to pneumoconiosis.

Turning to whether claimant could establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge found the evidence did not establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b). Accordingly, she denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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[1] Claimant is the surviving spouse of the miner, who died on March 13, 2006. Director's Exhibit 9.

[2] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. 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).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if 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 a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(*l*) of the Act also provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his 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*) (2012). Claimant cannot benefit from Section 422(*l*), however, as the miner's lifetime claim for benefits was denied. Director's Exhibit 17.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether substantial evidence supports the Decision and Order below. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We initially address employer's contention that the administrative law judge erred in finding the evidence established the miner was totally disabled due to a pulmonary impairment, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption.[4] Employer's Brief at 8-9. 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, 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).

In considering whether the evidence established the existence of a totally disabling respiratory impairment, the administrative law judge accurately found that the only pulmonary function study, conducted on December 19, 1992, produced non-qualifying results.[5] Decision and Order at 7; Employer's Exhibits 1, 2. We therefore affirm the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law

[4] Employer's argument in its response brief is in support of another method by which the administrative law judge may reach the same result and deny benefits. Employer's Response Brief at 8-9. Therefore, those arguments are properly before the Board, no cross-appeal is required. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

judge also accurately found that the record contains no arterial blood gas study evidence or evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 7-8. We therefore affirm her finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii).*Id.*

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Rosenberg and Vuskovich. Dr. Rosenberg opined that prior to the acute events surrounding the miner's death,[6] he was not disabled from a pulmonary perspective. Employer's Exhibit 1 at 3. Dr. Rosenberg indicated that after the miner underwent coronary bypass surgery and developed sepsis, he had marked hypoxemia and respiratory failure. *Id.* Dr. Rosenberg opined that "at that point in time, [the miner] obviously was disabled." *Id.* Dr. Vuskovich opined that the miner did not have a disabling pulmonary impairment that arose in whole or in part from his coal mine dust exposure. Employer's Exhibit 2 at 8.

The administrative law judge found that Dr. Vuskovich did not specifically address whether the miner had a totally disabling respiratory impairment at the time of his death. Decision and Order at 11. However, the administrative law judge found Dr. Rosenberg's opinion that the miner was "obviously disabled," with marked hypoxemia and respiratory failure, supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 12. She therefore found the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer contends that the administrative law judge erred in finding total disability established by Dr. Rosenberg's opinion because the doctor opined that the miner was totally disabled based only upon acute conditions. We agree.

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[6] The miner was seen in the Harlan-Appalachian Regional Hospital (ARH) emergency room on February 6, 2006 for symptoms suggestive of unstable angina and a myocardial infarction. Director's Exhibit 16. After the miner was transferred to Hazard-ARH, he underwent coronary artery bypass surgery. *Id.* The miner suffered post-surgical complications, including pleural effusions and pneumonia. *Id.* When he was taken off his ventilator on February 15, 2006, he experienced weakness on the right side of his body consistent with a cerebrovascular accident. *Id.* On February 23, 2006, the miner went into cardiac arrest due to septic shock. *Id.* After he was successfully resuscitated, he was transferred to the intensive care unit, where he went into renal failure. *Id.* The miner was dialyzed and then developed anoxic encephalopathy and hypotension. *Id.* Because the miner showed no signs of recovery from a neurological standpoint, his ventilatory support was discontinued on March 12, 2006, and he died on March 13, 2006. *Id.*

The regulations provide that "a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from engaging" in his or her usual coal mine employment or comparable and gainful employment. 20 C.F.R. §718.204(b)(1). A non-respiratory or non-pulmonary condition shall only be considered in determining whether a miner was totally disabled if, in turn, it "causes a *chronic* respiratory or pulmonary impairment." 20 C.F.R. §718.204(a) (emphasis added).

Here, Dr. Rosenberg opined that, "[p]rior to his acute events, [the miner] was *not* disabled from a pulmonary perspective." Employer's Exhibit 1 at 3 (emphasis added). Further, while Dr. Rosenberg acknowledged that the miner's sepsis caused "marked hypoxemia and respiratory failure" during the miner's final hospitalization, he did not opine that this condition, or any other condition, caused a "chronic" respiratory or pulmonary impairment. *Id.* We therefore agree with employer that Dr. Rosenberg's opinion does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7] *See* 20 C.F.R. §718.204(a); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). Moreover, because there is no other evidence supporting total disability,[8] we must reverse the administrative law judge's finding at 20 C.F.R. §718.204(b)(2), and her finding that claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4).

Where the Section 411(c)(3) and 411(c)(4) presumptions do not apply, *see* 30 U.S.C. §921(c)(3), (4), claimant must establish that pneumoconiosis was a substantially contributing cause of the miner's death. *See* 20 C.F.R. §§718.1, 718.205(b)(1), (2). The

[7] This conclusion is consistent with several other regulatory provisions that make clear that an administrative law judge must consider whether objective evidence obtained during a period of acute illness reliably establishes total respiratory disability. Appendix B to Part 718 provides that pulmonary function studies should "not be performed during or soon after an acute respiratory illness;" Appendix C to Part 718 provides that arterial blood gas studies should "not be performed during or soon after an acute respiratory or cardiac illness;" and 20 C.F.R. §718.105(d) provides that arterial blood gas studies performed during a hospitalization that ended in the miner's death must be "accompanied by a physician's report that the test results were produced by a chronic respiratory or pulmonary condition."

[8] The administrative law judge accurately found that Dr. Vuskovich did not specifically address whether the miner had a totally disabling pulmonary impairment. Decision and Order at 11; Employer's Exhibit 2.

administrative law judge accurately found that there is no evidence supportive of a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).[9] Decision and Order at 21. We therefore affirm the administrative law judge's finding that the medical evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Consequently, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[10]

[9] Neither Dr. Rosenberg nor Dr. Vuskovich attributed the miner's death to pneumoconiosis. Employer's Exhibits 1, 2. Moreover, the miner's death certificate does not attribute the miner's death to pneumoconiosis. Director's Exhibit 9. The death certificate attributes the miner's death to hypoxic brain injury due to sepsis and pneumonia. *Id.*

[10] Because we affirm the administrative law judge's denial of benefits, we need not address employer's contention that it was improperly designated the responsible operator. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge