U.S. Department of Labor

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

BRB Nos. 16-0063 BLA
and 16-0065 BLA

VERLIN SULLIVAN (Adult Child of VERLIN McCOY)	)	
and	)	
BETTY JANE McCOY (Widow of VERLIN McCOY)	)	
Claimants-Petitioners	)	
v.	)	
D M & L COAL COMPANY, INCORPORATED	)	DATE ISSUED: 08/16/2016
and	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decisions and Orders Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Dennis Keenan (Hinkle & Keenan), South Williamson, Kentucky, for claimants.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimants[1] appeal the Decision and Order Denying Benefits (2011-BLA-5632) of Administrative Law Judge Alice M. Craft, rendered with respect to a survivor's claim filed by the miner's adult son on June 16, 2010, and the Decision and Order Denying Benefits (2011-BLA-5810) of Judge Craft, rendered with respect to a survivor's claim filed by the miner's widow on July 8, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In each of her Decisions and Orders, which are almost identical, the administrative law judge credited the miner with nineteen years of underground coal mine employment and accepted the parties' stipulation that the miner had pneumoconiosis arising out of coal mine employment. However, because the evidence was insufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimants were unable to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that the evidence did not establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits in each claim.

[1] Claimants are the adult son and widow of the miner, who died on March 5, 2010. Son's Claim (SC) Director's Exhibit 2; Widow's Claim (WC) Director's Exhibit 2. The miner filed two claims for benefits during his lifetime, each of which was finally denied. SC Decision and Order at 2; WC Decision and Order at 2.

[2] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimants establish 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 also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

On appeal, claimants argue that the medical report by Dr. DeGuzman is sufficient to establish that the miner was totally disabled, and that the administrative law judge erred in finding that they were not entitled to the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), responds and notes that claimants challenge only the administrative law judge's finding that the miner was not totally disabled by a respiratory or pulmonary impairment. The Director urges affirmance of this finding and the denial of benefits.[3]

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.[4] 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).

The regulations provide that a miner shall be considered totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; 3) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv). If total disability has been established under one or more subsections, the administrative law judge must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record to determine whether total disability has been established by a preponderance of the evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987).

[3] The administrative law judge noted that "[t]he [c]arrier for the [e]mployer is now defunct; no one participated on behalf of the [e]mployer." SC Decision and Order at 2; WC Decision and Order at 2. The record reflects that the Director, Office of Workers' Compensation Programs, is defending the claim on behalf of the Black Lung Disability Trust Fund.

[4] The record indicates that the miner's last coal mine employment was in Kentucky. SC Director's Exhibit 3; WC 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).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that there are no pulmonary function studies in evidence. Son's Claim (SC) Decision and Order at 13; Widow's Claim (WC) Decision and Order at 13. The administrative law judge also found that claimants were unable to establish total disability under 20 C.F.R. §718.204(b)(2)(ii), as the two arterial blood gas studies, dated January 26, 2010 and March 4, 2010, were non-qualifying.[5] SC Decision and Order at 13; WC Decision and Order at 13; SC Director's Exhibits 18-63, 19-8; WC Director's Exhibits 17-63, 18-8. In addition, because there is no evidence indicating that the miner suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge determined that claimants are unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). SC Decision and Order at 13; WC Decision and Order at 13.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), administrative law judge found that neither Dr. DeGuzman nor Dr. Vuskovich specifically addressed whether the miner had been totally disabled by a respiratory or pulmonary impairment and, thus, he found that their opinions were insufficient to satisfy claimants' burden of proof. SC Decision and Order at 13; WC Decision and Order at 13; Claimant's Exhibit 3; Employer's Exhibit 1.[6] The administrative law judge concluded that claimants failed to establish total disability, based on the medical opinion evidence, and were unable to invoke the presumption at Section 411(c)(4) that the miner's death was due to pneumoconiosis. SC Decision and Order at 13; WC Decision and Order at 13.

Claimants contend in this appeal that the administrative law judge erred in her treatment of Dr. DeGuzman's opinion. We disagree. In a report dated May 27, 1997, Dr. DeGuzman indicated that he had been treating the miner since June 24, 1990. Claimant's Exhibit 3. He noted that the miner was involved in a mining accident on November 11, 1986, in which the miner fell from a scaffold and sustained multiple injuries to his neck, right shoulder, dorsolumbosacral area, and left knee. *Id.* Dr. DeGuzman also noted that the miner had a history of chronic obstructive pulmonary disease (COPD) and "coal miners' pneumoconiosis . . . related to [the miner's] former job as a coal miner." *Id.* The final diagnoses were listed as: chronic degenerative cervical disease and arthritis; chronic traumatic arthritis of the right shoulder; chronic degenerative dorsolumbosacral disk

[5] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[6] Dr. DeGuzman's May 27, 1997 report was designated as Claimant's Exhibit 3 in both of the claims. Dr. Vuskovich's February 26, 2012 report was designated as Employer's Exhibit 1 in both claims. SC Decision and Order at 2; WC Decision and Order at 2.

disease and arthritis; chronic traumatic arthritis of the left knee; COPD; "coal miners' pneumoconiosis with recurring chronic bronchitis;" history of hypertensions; and history of angina pain. *Id*. Dr. DeGuzman opined at the time of his report that the miner was "totally and permanently 100% disabled, and therefore, he cannot go back to work that requires physical and mental [sic], for his living and for his family." *Id*.

Claimants state that the administrative law judge erred in concluding that Dr. DeGuzman's report "was mainly dealing with [the miner's] physical problems" as Dr. DeGuzman indicated that he treated the miner for chronic obstructive pulmonary disease and coal workers' pneumoconiosis, and prescribed medication for the miner's "smothering." Claimants' Brief in Support of Petition for Review (unpaginated) at [2]. Claimants point out that Dr. DeGuzman reported that the miner could not return to work and "Dr. DeGuzman didn't say that the COPD and/or coal miners' pneumoconiosis were not the cause of the miner's disability but rather included those diagnoses in his report." *Id*.

Contrary to claimants' contention, although Dr. Guzman indicated that the miner was totally disabled by orthopedic injuries, the administrative law judge noted correctly that Dr. DeGuzman "did not specifically state the basis for his determination of total disability, nor did he specifically state that the [m]iner was disabled from a pulmonary or respiratory impairment." SC Decision and Order at 13; WC Decision and Order at 13; *see* Claimant's Exhibit 3. Therefore, the administrative law judge rationally found that Dr. DeGuzman's opinion was "not sufficient for a finding that the [m]iner was totally disabled by a pulmonary or respiratory impairment." SC Decision and Order at 13; WC Decision and Order at 13; *see 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).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish that the miner was totally disabled pursuant

to 20 C.F.R. §718.204(b)(2)(iv).[7] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). As claimants failed to establish that the miner had a totally disabling respiratory or impairment, we affirm the administrative law judge's finding that they are not entitled to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. Furthermore, we affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); SC Decision and Order at 14; WC Decision and Order 14.

[7] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimants did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), and that Dr. Vuskovich's opinion is insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); SC Decision and Order at 13; WC Decision and Order at 13.

Accordingly, the administrative law judge's Decision and Order Denying Benefits (2011-BLA-5632) in the claim of the miner's adult son and the Decision and Order Denying Benefits (2011-BLA-5810) in the claim of the miner's widow are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge