

U.S. Department of Labor

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



BRB Nos. 16-0076 BLA
and 16-0077 BLA

FAY HALL)
(o/b/o and Widow of KENNETH HALL))
)
Claimant-Respondent)
)
v.)
)
THE PITTSTON COMPANY/)
CLINCHFIELD COAL COMPANY)
) DATE ISSUED: 08/17/2016
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (12-BLA-5264, 12-BLA-6239) of Administrative Law Judge Larry A. Temin awarding benefits on a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹ This case involves a miner's subsequent claim filed on November 10, 2003, and a survivor's claim filed on May 25, 2010. Director's Exhibits M-3, S-2.²

Background Information

In a Decision and Order dated January 18, 2007, Administrative Law Judge Pamela Lakes Wood initially considered the miner's 2003 subsequent claim.³ Judge Wood found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and, therefore, denied benefits. Director's Exhibit M-53.

Although the miner filed an appeal with the Board, the Board dismissed the appeal as abandoned on October 16, 2007. Director's Exhibits M-65, M-70. The miner subsequently filed a request for reconsideration. Director's Exhibit M-71. However, upon learning that the miner had filed a request for modification, the Board denied the miner's request for reconsideration. Director's Exhibit M-71.

On June 18, 2008, the district director acknowledged the miner's request for modification. Director's Exhibit M-73. After the district director denied the miner's request for modification, the miner requested a formal hearing. Director's Exhibit M-76. However, while the miner's request for modification was pending before the Office of Administrative Law Judges, the miner died on July 27, 2009. Director's Exhibits M-87, M-90. Consequently, the miner's claim was remanded to the district director for a determination of the appropriate party to pursue the miner's claim, as well as consolidation with any survivor's claim. Director's Exhibits M-87, M-88. Claimant, the

¹ Employer's appeal in the miner's claim was assigned BRB No. 16-0076 BLA, and its appeal in the survivor's claim was assigned BRB No. 16-0077 BLA. By Order dated February 25, 2016, the Board consolidated these appeals for purposes of decision only.

² The evidence in the miner's claim is identified with an "M" and the evidence in the survivor's claim is identified with an "S."

³ The miner's previous claim, filed on October 11, 1978, was finally denied by the United States Court of Appeals for the Fourth Circuit on November 3, 1992, because the miner failed to establish invocation of the interim presumption set forth at 20 C.F.R. §727.203(a) (1992). Director's Exhibit M-1; *Hall v. Clinchfield Coal Co.*, 978 F.2d 1254 (Table) (4th Cir. Nov. 3, 1992).

surviving spouse of the miner, filed a survivor's claim on May 25, 2010. Director's Exhibit S-2.

In a Proposed Decision and Order dated November 1, 2011, the district director awarded benefits in the miner's claim. Director's Exhibit M-97. On the same date, the district director issued a Proposed Decision and Order in the survivor's claim, finding that claimant was derivatively entitled to survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l).⁴ At employer's request, both claims were forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits M-99, S-28. The survivor's claim was consolidated with the miner's claim. Director's Exhibit S-29.

The Administrative Law Judge's Decision and Order

In a Decision and Order dated September 24, 2015, the administrative law judge credited the miner with eighteen years and three months of coal mine employment,⁵ and noted employer's stipulation that the miner suffered from clinical pneumoconiosis.⁶ The administrative law judge, therefore, found that the miner established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Next, the administrative law judge determined that the miner's clinical pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b), and that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). However, the administrative law judge found that the miner failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits in the miner's claim.

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).

⁵ The miner's most recent coal mine employment was in Virginia. Director's Exhibit M-1. Accordingly, the Board will apply the law of the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁶ "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).

The administrative law judge also adjudicated claimant's survivor's claim. After crediting the miner with at least eighteen years of qualifying coal mine employment, the administrative law judge found that the evidence established that the miner suffered from a totally disabling respiratory impairment. 20 C.F.R. §718.204(b). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at Section 411(c)(4) of the Act.⁷ 30 U.S.C. § 921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer's argues that the administrative law judge lacked jurisdiction to adjudicate the survivor's claim. Claimant responds in support of the administrative law judge's award of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁸

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. 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).

Employer contends on appeal that the administrative law judge lacked jurisdiction to adjudicate the survivor's claim, and that it was not given an opportunity to develop and submit evidence, or assert arguments and defenses, in the survivor's claim. Because the administrative law judge denied benefits in the miner's claim, employer notes that that claimant was no longer derivatively entitled to benefits under Section 932(l), the basis for the district director's award of benefits. Employer, therefore, contends that the administrative law judge, instead of adjudicating the survivor's claim, should have remanded the claim to the district director "for processing through the proper administrative procedure." Employer's Brief at 8. We disagree. Contrary to employer's

⁷ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

⁸ Because it is unchallenged on appeal, we affirm the administrative law judge's denial of benefits in the miner's claim. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

contention, the survivor's claim in this case was processed in accordance with the Act and regulations.⁹ 20 C.F.R. §§725.407, 725.408, 725.410, 725.412, 725.418.

A claimant can establish entitlement to survivor's benefits by several different means: (1) by establishing derivative entitlement pursuant to Section 932(l); (2) by establishing the elements of entitlement set forth at 20 C.F.R. Part 718; (3) by establishing entitlement to the Section 411(c)(3) irrebuttable presumption, 30 U.S.C. §921(c)(3); or (4) by establishing entitlement under Section 411(c)(4), as in this case. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. The record reveals that the district director assembled documentation regarding all methods of entitlement, including the miner's death certificate, autopsy report, and treatment records in the survivor's claim. Director's Exhibits S-7-13.

Further, employer was informed that claimant's possible entitlement to survivor's benefits was not limited to derivative entitlement. In a Schedule for the Submission of Additional Evidence dated April 19, 2011, the district director informed employer of his preliminary conclusions. Specifically, the district director advised employer that the evidence he had received so far established that: (1) the miner worked for sixteen years as a coal miner; (2) the miner had pneumoconiosis caused by his coal mine employment; and (3) the miner's pneumoconiosis contributed to his death. Director's Exhibit S-21. The district director further found that the evidence established that claimant would be entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at Section 411(c)(4), and that the presumption would not be

⁹ Claimant filed her survivor's claim on May 25, 2010. Director's Exhibit S-2. On May 26, 2010, the district director issued a Notice of Claim to The Pittston Company, to which it responded on June 3, 2010. Director's Exhibits S-16, S-17. On June 17, 2010, the district director also issued a Notice of Claim to Clinchfield Coal Company, which responded on June 28, 2010. Director's Exhibits S-18, S-19. The Pittston Company and Clinchfield Coal Company issued a combined response on August 23, 2010. Director's Exhibit S-20. The district director issued a Schedule for the Submission of Additional Evidence on April 19, 2011, to which The Pittston Company/Clinchfield Coal Company responded on May 6, 2011. Director's Exhibits S-21, S-22. Finally, the district director issued a Proposed Decision and Order on June 30, 2011, and, after determining that he had not considered some evidence submitted by The Pittston Company/Clinchfield Coal Company in the miner's claim, issued an Amended Proposed Decision and Order awarding benefits on November 1, 2011. Director's Exhibits S-23-25.

rebutted. *Id.* The district director also informed employer of the limitations on the quantity of evidence that it could submit in defense of the claim.¹⁰ *Id.*

When the survivor's claim was forwarded to the Office of Administrative Law Judges, employer listed the following as contested issues: (1) the existence of pneumoconiosis; (2) total disability; and (3) the cause of the miner's death. Director's Exhibit S-29. Thus, employer was aware that these issues remained relevant in determining claimant's entitlement to survivor's benefits.

Finally, we note that, where a formal hearing is requested after a district director's decision, an administrative law judge proceeds de novo and is not bound by the district director's findings. *See* 20 C.F.R. §725.455(a). Rather, an administrative law judge must adjudicate a claim based upon the record made before him. *See* 20 C.F.R. §725.477. As set forth above, the medical issues of entitlement in the survivor's claim were raised as hearing issues. The administrative law judge was required to address those issues, and he was required to apply the law in effect at the time of his decision. Therefore, we reject employer's contention that the administrative law judge lacked jurisdiction to adjudicate whether claimant was entitled to survivor's benefits on a basis different than that determined by the district director. We also reject employer's contention that it was denied an opportunity to develop and submit evidence, or assert arguments and defenses, in the survivor's claim.¹¹

Because employer does not challenge the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and that employer failed to rebut the presumption, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 51-56. We, therefore, affirm the administrative law judge's award of benefits in the survivor's claim.

¹⁰ At the hearing, employer was provided an opportunity to submit evidence in connection with the survivor's claim. Hearing Transcript at 16-17.

¹¹ We note that employer has not cited any evidence supporting its contention, and that the record contains evidence to the contrary, as noted above.

Accordingly, the administrative law judge's Decision and Order awarding benefits in the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge