U.S. Department of Labor

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

BRB No. 17-0446 BLA

JANALLE VANCE (Widow of MOSE VANCE) Claimant-Respondent v. U.S. STEEL MINING COMPANY ALABAMA, LLC Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/28/2018 DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2016-BLA-05582) of Administrative Law Judge Daniel F. Solomon granting modification[1] and awarding benefits on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that the miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. He therefore found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis and that employer did not rebut the presumption.[2] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Accordingly, the administrative law judge granted modification and awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting the miner with at least fifteen years of underground coal mine employment and in finding that the miner was totally disabled, and thus erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further challenges the administrative law judge's finding that it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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,

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[1] Claimant, the widow of the miner who died on January 20, 2012, filed this claim for survivor's benefits on July 9, 2012. Director's Exhibit 2; Employer's Exhibit 4. In a Proposed Decision and Order issued on March 27, 2013, the district director found that the miner's death was caused by a medical condition unrelated to pneumoconiosis, precluding an award of benefits. Director's Exhibit 29. Claimant filed additional requests for modification on September 5, 2014 and February 22, 2016, which the district director denied. Director's Exhibits 31, 33-35. After the denial of the second modification request, claimant asked for a hearing and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 36.

[2] Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. There is no indication in the record that the miner was awarded benefits on a federal black lung claim. Claimant is therefore not entitled to automatic survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

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).

The sole basis for modification in a survivor's claim is a mistake in a determination of fact in the prior decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).

I. Invocation of the Section 411(c)(4) Presumption

A. Length of Qualifying Coal Mine Employment

To invoke the presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i). The administrative law judge initially observed that twenty years of coal mine employment were alleged[4] and that the district director determined that the employment records established sixteen years of coal mine employment. Decision and Order at 3; Director's Exhibit 29. When questioned at the hearing about whether the miner worked for "about 16 years as a miner," claimant testified, without hesitation, "I know he worked a little bit longer than that." Hearing Transcript at 18. When asked again whether the miner "worked at least 16 years [as a miner]," claimant testified, without equivocation, "I know he did." *Id*. After reviewing

[3] Because the record reflects that the miner's last coal mine employment was in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11-12.

[4] The administrative law judge stated, "[t]he miner alleged that he worked at least twenty years in or around one of more coal mines." Decision and Order at 3. Because there is no indication in the record that the miner filed a claim for benefits, we surmise that the administrative law judge meant to refer to claimant. The record contains a questionnaire related to claimant's application for survivor's benefits on which she reported that the miner had twenty years of coal mine employment. Director's Exhibit 5. In addition, the administrative law judge noted at the hearing that "claimant is alleging twenty years." Hearing Transcript at 10.

the record, in conjunction with claimant's unrebutted and "credible" testimony, the administrative law judge concluded that the miner "worked more than fifteen years in underground mining." *Id*. at 4. Assessing the credibility of witness testimony is for the administrative law judge as fact-finder, and the Board will not disturb his findings unless they are inherently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Moreover, the administrative law judge acted within his discretion in crediting claimant's testimony regarding the miner's coal mine employment in the absence of a conflict with his Social Security Administration earnings records. *See Dawson v. Old Ben Coal Co*., 11 BLR 1-58, 1-60 (1988); *Brumley v Clay Coal Corp*., 6 BLR 1-956, 1-959 (1984).

Employer asserts, generally, that the evidence as to the length of the miner's coal mine employment "is far from clear and conclusive." Employer's Brief at 17. Employer, however, has failed to identify any specific error made by the administrative law judge in rendering his credibility determinations, or set forth any argument that would undermine the administrative law judge's factual determinations. *Id*. The Board must limit its review to contentions of error specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). As employer's brief raises no specific allegations of error regarding the administrative law judge's reliance on claimant's testimony, we affirm the administrative law judge's finding that claimant established that the miner had at least fifteen years of qualifying coal mine employment. *See Sarf*, 10 BLR at 1-120-21; *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

B. Total Disability

A miner is considered totally disabled if he had a respiratory or pulmonary impairment which, standing alone, prevented him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). Total disability is established by pulmonary function studies, blood gas studies, evidence of 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 consider all relevant evidence and weigh the evidence supporting a finding of total disability against the 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 this case, the administrative law judge found that claimant established total disability based on his crediting the medical opinion of Dr. Perper and the miner's treatment records over the opinions of Drs. Caffrey and Oesterling. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-12. The administrative law judge also found that claimant established total disability by demonstrating cor pulmonale with right-sided

congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 10-12. Weighing the evidence together, the administrative law judge determined that Dr. Perper's opinion, when considered with the miner's treatment and hospital records, was sufficient to establish total respiratory or pulmonary disability.[5] Decision and Order at 2.

Employer asserts that the administrative law judge erred in finding that claimant demonstrated cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii) which, according to employer, tainted the administrative law judge's weighing of the physicians' opinions at 20 C.F.R. §718.204(b)(2)(iv) and his weighing of the evidence as a whole. We disagree.[6]

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge reviewed treatment and hospital records, and the medical reports of Drs. Perper, Caffrey and Oesterling, all of whom are Board-certified pathologists. The miner's treatment and hospital records show that the miner had numerous medical conditions including congestive heart failure, coronary artery disease, cardiomyopathy, and chronic obstructive pulmonary disease. Director's Exhibits 13, 15-17; Claimant's Exhibits 1, 2, 4, 5. The miner was dependent on prescribed oxygen when he was admitted to the hospital on October 19, 2011. Director's Exhibit 28. During the course of his hospitalization, ending with his death on January 20, 2012, the miner suffered respiratory failure, underwent surgeries to insert and adjust a left ventricle-assist device, and was on a ventilator throughout his stay. *Id*.

[5] Regarding 20 C.F.R. §718.204(b)(2)(i), (ii), the administrative law judge stated, "[n]either party designated any pulmonary function studies or arterial blood gas studies. Decision and Order at 5, *citing* Hearing Transcript at 32. Nevertheless, the administrative law judge summarized pulmonary function study and blood gas study results appearing in the miner's treatment and hospital records, and determined that they provided some support for a finding of total respiratory or pulmonary disability because "the preponderance establishes a moderate exertional capacity." Decision and Order at 9.

[6] We need not address employer's assertion that the administrative law judge's erroneous conclusion that total disability was established at 20 C.F.R. §718.204(b)(2)(iii) tainted his weighing of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and his weighing of the evidence overall. As indicated, the medical evidence supporting the administrative law judge's finding of total respiratory or pulmonary disability is not premised on diagnoses of cor pulmonale with right-sided congestive heart failure. Thus, error, if any, in the administrative law judge's finding under 20 C.F.R. §718.204(b)(2)(iii) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Dr. Perper reviewed the miner's medical records, including the death certificate, the autopsy report and tissue slides, and prepared a report dated October 29, 2016.[7] Claimant's Exhibit 5. In response to a question as to whether the miner was totally disabled from a respiratory standpoint prior to his death, Dr. Perper stated:

> The answer is affirmative, prior to his death [the miner] was totally and permanently disabled both because of severe heart disease and congestive heart failure and from a respiratory stand point, because of his severe shortness of breath, cough, chest pain, abnormal breathing sounds (expiratory wheezing and rhonchi), was oxygen dependent and [on] breathing medications including bronchodilators.

Claimant's Exhibit 5.

Dr. Caffrey reviewed much of the same evidence, including the death certificate, autopsy report and tissue slides, and prepared a report dated November 23, 2016. Employer's Exhibit 1. He acknowledged that the miner was using supplemental oxygen prior to his admission to the hospital, experienced respiratory failure while in the hospital, and was continuously intubated from November 10, 2011 until his death. Employer's Exhibit 1. Dr. Caffrey diagnosed congestive heart failure, chronic obstructive pulmonary disease and emphysema, and attributed claimant's "pulmonary problems" to his congestive heart failure. *Id*.

Dr. Oesterling prepared a report dated January 16, 2017, after reviewing the death certificate, autopsy report and tissue slides, and the reports of Drs. Perper and Caffrey. Employer's Exhibit 2. Offering his opinion "concerning the role of this gentleman's limited coalworkers' disease," he concluded: "[T]here is no demonstrable structural change due to coal dust. Therefore the inhalation of coal dust was not a factor in altering his pulmonary function . . . Moreover, the limited change due to coal dust exposure would have produced no lifetime disability." *Id*.

[7] Dr. Birks, who completed the miner's death certificate, attributed the miner's death to "Multi-organ failure" due to "pump thrombosis." Director's Exhibit 13. Dr. Birks also identified chronic obstructive pulmonary disease as a "significant condition contributing to death." *Id.* The death certificate stated that the miner's autopsy results were available at the time that the death certificate was completed. *Id.* Dr. Tisone, the autopsy prosector, identified several severe cardiac conditions and their complications in his initial autopsy report, and subsequently prepared an addendum to the report wherein he identified findings consistent with pneumoconiosis. Director's Exhibits 16, 17.

Upon reviewing the evidence in detail, the administrative law judge accurately determined:

> The record shows that the [m]iner received medication and constant oxygen as a result of a breathing deficit . . . .
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> . . . .
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> [T]he records show that for the period between insertion of [the left ventricle-assist device on November 19, 2011] and the re-insertion [on] December 25, 2011 and death on January 12, 2012, the [m]iner was completely bedridden. He had a documented respiratory failure. He could not have performed any work[-]related activities at this time.
>
> ….
>
> The medical history establishes that [the m]iner had a longstanding history of respiratory impairments that required treatment including 24 hour oxygen.

Decision and Order at 9-11. The administrative law judge then permissibly accorded greatest weight to Dr. Perper's diagnosis of a totally disabling respiratory impairment, finding that it was better reasoned and better documented than the opinions of Drs. Caffrey and Oesterling. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-34 (4th Cir. 1998) (To resolve a conflict among medical opinions, an administrative law judge should consider, among other factors, the extent to which the underlying documentation supports each opinion); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997) (An administrative law judge must look beyond the surface of a medical opinion and assess the factors that affect its probative value, *i.e.*, the physician's qualifications, the documentation supporting the opinion, the extent to which the physician has explained his or her conclusions, and the sophistication of the physician's diagnoses); Decision and Order at 11.

As the administrative law judge explained, in contrast to Dr. Perper, "[employer's] experts fail to reconcile credible evidence showing that the [m]iner . . . was on oxygen and that his condition grew progressively worse to the point that he expired." Decision and Order at 11. Moreover, Drs. Caffrey and Oesterling did not dispute that the miner suffered from disabling respiratory and pulmonary impairments, but focused on whether they were attributable to coal dust exposure. Employer's Exhibits 1, 2. The administrative law judge correctly observed, however, that "total respiratory disability does not have to be from pneumoconiosis at this level of inquiry." Decision and Order at 9; 20 C.F.R. §718.204(b), (c); *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986).

Furthermore, the administrative law judge's disability finding is premised primarily on medical evidence establishing that the miner did not retain the respiratory capacity to perform his usual coal mine work, without identifying cor pulmonale as a causal factor. Thus, even if the administrative law judge erred in determining that the miner had cor pulmonale with right-sided congestive heart failure, employer has not explained how the administrative law judge's finding undermines the credited medical evidence or how remanding the case to the administrative law judge would alter his weighing of that evidence. As such, error, if any, is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference.").

Consequently, we affirm the administrative law judge's finding that the medical opinion evidence establishes total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), and his finding that the evidence establishes total respiratory disability at 20 C.F.R. §718.204(b)(2) overall. *See Rafferty*, 9 BLR at 1-232. We further affirm the administrative law judge's determinations that claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis and established a mistake in a determination of fact in the prior decision. 20 C.F.R. §§718.305(b), 725.310; *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Wojtowicz*, 12 BLR at 1-164.

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

In order to rebut the presumption of death due to pneumoconiosis under Section 411(c)(4), employer must establish that the miner had neither legal nor clinical pneumoconiosis, or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer does not dispute the administrative law judge's finding that it did not disprove legal pneumoconiosis[8] and alleges only that he erred in crediting Dr. Perper's opinion that pneumoconiosis hastened the miner's death, and in discrediting the contrary opinions of Drs. Caffrey and Oesterling. We reject employer's arguments. The administrative law judge permissibly determined that Dr. Caffrey's opinion was

[8] We thus affirm, as unchallenged, the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i) because it failed to establish that the miner did not have either legal or clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15.

insufficient to establish that pneumoconiosis played no part in the miner's death because Dr. Caffrey did not address whether pneumoconiosis hastened the miner's death.[9] 20 C.F.R. §718.305(d)(ii); *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000), *citing Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80 (4th Cir. 1992); Decision and Order at 17.

With respect to Dr. Oesterling's opinion, the administrative law judge correctly observed that the physician maintained that the miner's respiratory difficulties were caused entirely by severe cardiac disease but did not dispute that at the time of his death, the miner suffered from a total respiratory or pulmonary disability. Decision and Order at 9, 10; Employer's Exhibit 2. He also correctly noted Dr. Oesterling's conclusions that the cause of the miner's death was a thrombus in the right ventricle of his heart and that coal dust did not cause, contribute to, or hasten the miner's death. Decision and Order at 18-19; Employer's Exhibit 2. The administrative law judge permissibly discredited Dr. Oesterling's opinion, however, because he did not resolve the conflict between his assessment that the miner's death was cardiac in nature, and his statement that the miner had a hemorrhagic pulmonary infarction caused by thromboembolic disease that "would have been the primary factor in this gentleman's death in terms of pulmonary function." Decision and Order at 18-19, *quoting* Employer's Exhibit 2; *see Akers*, 131 F.3d at 441. The administrative law judge further reasonably determined that, in light of this unresolved conflict, Dr. Oesterling did not credibly address whether pneumoconiosis played a causal role in the pulmonary aspect of the miner's death. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 804-05 (4th Cir. 1998) (appropriate for an administrative law judge to discredit medical opinions on disability causation or death causation that do not adequately address evidence supporting a causal link between pneumoconiosis and death or total disability). We therefore affirm the administrative law judge's finding that Dr. Oesterling's opinion is insufficient to rebut the presumed fact that the miner's death was due to pneumoconiosis.

As employer raises no other arguments, we affirm the administrative law judge's weighing of the medical opinion evidence as rational, and affirm his determination that employer failed to establish that "no part" of the miner's death was caused by

[9] Dr. Caffrey noted his disagreement with Dr. Perper's conclusion that the miner's death was "in substantial part a direct result of" coal dust exposure, stating: "[The miner's] medical problems were severe cardiac conditions which led to his death, and these cardiac conditions were not caused by coal dust or his work in the mines for 16.6 years." Employer's Exhibit 1, *quoting* Claimant's Exhibit 5.

pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(2)(ii).[10] *See Copley*, 25 BLR at 1-89. Because employer failed to rebut the presumption that the miner's death was due to pneumoconiosis, we further affirm the award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[10] We decline to address employer's allegations of error regarding the administrative law judge's crediting of Dr. Perper's opinion that pneumoconiosis hastened the miner's death. Because the burden of proof shifted to employer upon invocation of the Section 411(c)(4) presumption, error, if any, in the administrative law judge's consideration of an opinion that does not support employer's burden to establish that pneumoconiosis played no part in the miner's death is harmless. *See Larioni*, 6 BLR at 1-1278.