U.S. Department of Labor

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

BRB No. 17-0539 BLA

BARBARA ANN SAMMONS (Widow of CHESTER SAMMONS) Claimant-Petitioner v. CELTIC PROCESSING, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents 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 Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Barbara Ann Sammons, Wittensville, Kentucky.

Karin L. Weingart (Spilman, Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel,[2] the Decision and Order Denying Benefits (2012-BLA-05367) of Administrative Law Judge Clement J. Kennington, rendered on a survivor's claim filed on October 26, 2010,[3] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2102) (the Act). Based on employer's concessions that the miner had at least fifteen years of underground or substantially similar coal mine employment and was totally disabled, the administrative law judge found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4) of the Act.[4] The administrative law judge further determined, however, that employer established rebuttal of the presumption. The administrative law judge also found that claimant failed to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304,[5] or that the

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[1] Claimant is the widow of the miner, Chester Sammons, who died on October 13, 2009. Director's Exhibit 19.

[2] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Section 422(*l*) of the Act, 30 U.S.C. §932 (*l*) (2012), provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. In this case, the miner filed for benefits on October 23, 1980, but he withdrew his claim. Director's Exhibit 1. As the miner was not determined to be eligible to receive benefits at the time of his death, claimant is not eligible for benefits pursuant to 30 U.S.C. §932(*l*).

[4] Under Section 411(c)(4), there is a rebuttable presumption that a miner's death was due to pneumoconiosis if the evidence 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[5] The administrative law judge correctly found that the record does not contain any evidence to establish that the miner had complicated pneumoconiosis, and thus claimant is unable to invoke the irrebuttable presumption that the miner's death was due to

miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and denied benefits accordingly.

On appeal, claimant generally challenges the denial of her claim. Employer responds, urging affirmance of the administrative law judge's findings and the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[6]

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

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

Once claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[8] or that

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pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Decision and Order at 13.

[6] We affirm, as unchallenged, the administrative law judge's finding that claimant invoked the rebuttable presumption of death due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), *See Skrack v. Director, OWCP*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14; Employer's Response Brief at 11.

[7] Because the record indicates that the miner's last coal mine employment was in Virginia and West Virginia, the Board 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); Director's Exhibits 5, 17.

[8] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis is defined as "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

"no part of the miner's death was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer established both methods of rebuttal. Based on our review of the evidence and the administrative law judge's Decision and Order, we conclude that substantial evidence supports the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i).

A. Legal Pneumoconiosis

To establish that the miner did not legal pneumoconiosis, employer must demonstrate that he did not have a chronic dust disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the miner's treatment records, and the medical opinions of Drs. Bellotte and Majmundar, relevant to whether employer disproved the existence of legal pneumoconiosis. Decision and Order at 18-20. The administrative law judge found that the miner's treatment records and hospital records included references to "COPD/black lung," but that they are "devoid of any physician's explanation of how this diagnosis was determined." Decision and Order at 19; *see* Director's Exhibit 34; Employer's Exhibits 4, 6, 7.

The administrative law judge noted that Dr. Bellotte, who reviewed the miner's treatment and hospital records on behalf of employer, opined that the miner did not have legal pneumoconiosis. Decision and Order at 18; Employer's Exhibit 3. Dr. Bellotte explained that the miner's respiratory symptoms of cough and sputum production were a manifestation of amyotrophic lateral sclerosis (ALS). Employer's Exhibit 3. He also explained why the miner's x-ray and objective test results were not consistent with chronic obstructive pulmonary disease (COPD) but were characteristic of patients with ALS. *Id.* He further noted that the miner's respiratory impairment was attributed throughout his treatment records as being due to ALS, and he explained how the progressive weakness caused by that condition exclusively caused the miner's impairment, which he treated in similar patients in his own practice.[9] Dr. Bellotte concluded that the miner did not have

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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).

[9] Dr. Bellotte explained:

COPD/legal pneumoconiosis, noting specifically that the miner "did not have a chronic dust disease of the lungs or the sequelae that was caused by, contributed to, or substantially aggravated by coal mine dust exposure." *Id.; see* 20 C.F.R. §718.201(a)(2). Notably, there is no evidence in the record that addresses Dr. Bellotte's report, nor that specifically disputes any of his conclusions.

Dr. Majmundar, the miner's treating physician, prepared a single page letter, which stated the following: [The miner] did have pneumoconiosis as a result of his coal mine employment; 2) [the miner] had very severe respiratory impairments that would have precluded work activity on a sustained basis: and 3) [the miner's] pneumoconiosis, respiratory and pulmonary impairments, [are] due to his employment in the coal mines, [and they] exacerbated his death process. Director's Exhibit 31, September 26, 2011 letter. Dr. Majmundar did not provide any information, however, to support any of these statements.

The administrative law judge credited Dr. Bellotte's opinion as well-reasoned and we see no error in that finding. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 18. In contrast, the administrative law judge rationally determined that Dr. Majmundar's opinion was not well-reasoned because Dr. Majmundar did not provide any documentation regarding the frequency of his treatment of the miner, made only conclusory statements, did not discuss any objective evidence, and did not address the effects of ALS on the miner's respiratory condition. Decision and Order at 18; Director's Exhibit 31; s*ee* 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492 (6th Cir. 2003); Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the employer disproved the existence of legal pneumoconiosis, based on Dr. Bellotte's opinion, pursuant to 20 C.F.R. §718.305(d)(2)(i)(A). *See Universal*

> Having taken care of patients with this disease in my practice, I have seen *everything* in these charts in my own patients. The progressive weakness leads to muscle wasting (atrophy), weakness of respirations. The respiratory muscle [sic] are impaired. Cough, which is the main defense system of the lungs, becomes ineffective. Secretions are aspirated, atelectasis develops, and recurrent infections with pneumonia occur. . . [that] require extensive treatment with wide spectrum antibiotics. Multi System Organ Failure (MSOF) then ensues.

Employer's Exhibit 3 at 5.

Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (holding that substantial evidence is such evidence "that a reasonable mind would accept to support a conclusion.").

B. Clinical Pneumoconiosis

In considering whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge found that the record contained one x-ray, dated October 29, 2008, that was interpreted in accordance with the ILO classification system. Decision and Order at 16. Drs. Shipley and Meyer, dually qualified as Board-certified radiologists and B readers, read that x-ray as negative for pneumoconiosis. Employer's Exhibit s 1-2. Although the treatment and hospital records also contained x-rays, dating from October 1999 through September 2009, the administrative law judge correctly found that they did not include diagnoses of pneumoconiosis. Decision and Order at 17; Director's Exhibits 28, 29, 34; Employer's Exhibits 4-8.

With respect to the medical opinion evidence, the administrative law judge permissibly found that Dr. Bellotte provided a well-reasoned opinion that the miner did not have clinical pneumoconiosis, supported by Dr. Bellotte's review of Dr. Shipley's and Dr. Meyer's x-ray reports, along with the treatment and hospital records and the x-ray reports contained in those records. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 18; Employer's Exhibit 3. The administrative law judge also permissibly rejected Dr. Majmunder's diagnosis of clinical pneumoconiosis because it was "conclusive" and not adequately explained. Decision and Order at 16; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013); *Clark,* 12 BLR at 1-155; Director's Exhibit 31. In addition, the administrative law judge observed that Dr. Bellotte is Board-certified in Internal Medicine and Pulmonary Diseases, while there is no information in the record regarding Dr. Majmundar's qualifications. Decision and Order at 7, 11 n.10, 17.

Substantial evidence supports the administrative law judge's credibility findings and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's determination that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(B). We further affirm the administrative law judge's finding that employer established rebuttal of the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(2).

Because we affirm the administrative law judge's determinations that the miner did not have clinical or legal pneumoconiosis, we also affirm his finding that claimant is unable

to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).[10] Decision and Order at 21.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[10] For survivor's claims where the Section 411(c)(3) and 411(c)(4) presumptions are not invoked, claimant must establish by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements of entitlement precludes an award of benefits in the survivor's claim. *See Trumbo*, 17 BLR at 1-87-88.