U.S. Department of Labor

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

BRB Nos. 17-0547 BLA
and 17-0548 BLA

SOPHIA TURNER (Widow of and o/b/o RALPH E. TURNER) Claimant-Petitioner v. BIG ELK CREEK COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/14/2018 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in Miner's Claim; and Denying Benefits in Claimant's Survivor's Claim of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Dan F. Partin, Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits in Miner's Claim; and Denying Benefits in Claimant's Survivor's Claim (2015-BLA-05460 and 2015-BLA-05448) of Administrative Law Judge Adele Higgins Odegard, issued pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In considering the miner's subsequent claim,[2] the administrative law judge credited the miner with twenty-six years of coal mine employment but determined that the evidence did not establish a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant was unable to invoke the rebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[3] She also found that claimant could not invoke the irrebuttable presumption at Section 411(c)(3) of the Act because the evidence did not establish complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Because claimant failed to establish total disability, the element of entitlement that was previously denied in the miner's prior claim, the administrative law judge determined that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and denied benefits accordingly.

[1] Claimant is the widow of the deceased miner, who died on February 3, 2014. Director's Exhibit 38.

[2] The miner's first claim was denied by the district director on December 20, 2006, because the evidence failed to establish that the miner was totally disabled. Director's Exhibit 1. The miner's second claim, filed on January 29, 2008, was denied by Administrative Law Judge Paul C. Johnson on December 8, 2009, for failure to establish total disability. Director's Exhibit 2. The miner took no action on the denial of the 2008 claim, until he filed the current subsequent claim on July 21, 2013. Director's Exhibit 3. Following the miner's death, claimant filed her survivor's claim on February 28, 2014. Director's Exhibit 29.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground coal mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

With regard to the survivor's claim, the administrative law judge found that claimant was not entitled to derivative benefits pursuant to Section 932(*l*),[4] and that claimant was unable to invoke the Section 411(c)(4) rebuttable presumption of death due to pneumoconiosis, as the miner was not totally disabled. The administrative law judge further determined that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and therefore benefits were denied in the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding that the miner was not totally disabled, that the biopsy evidence did not establish complicated pneumoconiosis, and that the miner's death was not due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in either claim.

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.[5] 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).

I. THE MINER'S CLAIM

To establish entitlement to benefits on the miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[4] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

When a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because the miner's prior claim was denied for failure to establish total disability, claimant had to submit new evidence to establish this element in order to obtain a review of the miner's claim on the merits. 20 C.F.R. §725.309(c).

A. Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge concluded that claimant failed to establish complicated pneumoconiosis under any of these methods or in consideration of the record as a whole.

Claimant contends that the administrative law judge erred in his treatment of the biopsy evidence. Pursuant to 20 C.F.R. §718.304(b),[6] the administrative law judge noted that a biopsy was taken from a post-mortem resection of the miner's right lung. Director's Exhibit 40. The biopsy report was prepared by Dr. Colquitt and included a gross description of multiple gray-black macular lesions ranging from 0.3 to 1.1 centimeters in greatest dimension. *Id*. There was no microscopic description. The final diagnosis was as follows: "bronchopneumonia; changes compatible with simple coal workers' pneumoconiosis; focal, small organizing thrombus; emphysematous change." *Id*.

[6] We affirm the administrative law judge's findings that claimant did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) or (c), as those findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22-23.

The administrative law judge considered the biopsy report to be insufficient to satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.304(b). Claimant maintains, however, that Dr. Colquitt's notation of lesions in excess of one centimeter is sufficient to establish complicated pneumoconiosis. We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has specifically held that the greater-than-one-centimeter standard applicable to x-ray evidence under 20 C.F.R. §718.304(a) is not applicable to autopsy or biopsy evidence at 20 C.F.R. §718.304(b). *See Gray v. SLC Coal Co.*, 176 F.3d 382, 390 (6th Cir. 1999). Because the biopsy report does not include a finding of "massive lesions" or a specific diagnosis of complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish complicated pneumoconiosis based on the biopsy evidence pursuant to 20 C.F.R. §718.304(b).[7] As claimant raises no specific allegation of error with regard to the administrative law judge's finding that the evidence, as a whole, does not establish the existence of complicated pneumoconiosis, we affirm the administrative law judge's conclusion that claimant is not entitled to the invocation of the irrebuttable presumption under Section 411(c)(3) of the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

B. Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work. 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 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 of the 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). Claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish total disability. We disagree.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[8] the administrative law judge considered the newly submitted medical opinions of Drs. Forehand, Vuskovich, and Rosenberg, along

[7] We note that Dr. Colquitt specifically described his findings as "simple pneumoconiosis." Director's Exhibit 40.

[8] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish total respiratory or pulmonary disability pursuant to 20 C.F.R.

with a questionnaire completed by Dr. Dye, the miner's treating physician,[9] and various hospital records. Decision and Order at 16-20. The administrative law judge correctly noted that Drs. Forehand, Vuskovich, and Rosenberg each opined that the miner was not totally disabled. *Id*. at 19-20; Director's Exhibits 12, 42; Employer's Exhibit 2. The administrative law judge further found that while the miner's treatment records document that the miner was "hospitalized multiple times for pneumonia[,]" . . . [they] do not establish what the [m]iner's overall respiratory condition was like, when he was not acutely ill" and "do not provide sufficient information" from which to "infer" that the miner had a totally disabling respiratory or pulmonary impairment. Decision and Order at 21; *see* Director's Exhibit 42. Thus, the administrative law judge concluded that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant asserts that "Dr. Forehand diagnosed a mild respiratory impairment, which indicates a significantly reduced breathing capacity and should be considered severe and disabling." Claimant's Brief at 4. Claimant also notes that Dr. Dye treated the miner for pulmonary emphysema and coal workers' pneumoconiosis, and that the treatment records establish that the miner had a respiratory disease that was caused by his coal dust exposure. *Id.* Claimant further states:

> The exertional requirements of [the miner's] usual coal mine employment must be compared with a physician's assessment of [the miner's] respiratory impairment. . . . The [miner's] usual coal mine work included being a dozer operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the [miner's] condition against such duties, as well as the medical opinions of Drs. Forehand and Dye, it is rational to conclude that the [miner's] condition prevented him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Judge Odegard made no mention of [the miner's] usual coal mine work in conjunction with Drs. Forehand and Dye's opinions of disability.

Id. at 5 (citations omitted). Claimant's assertions of error are without merit.

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§718.204(b)(2)(i)-(iii), based on the newly submitted evidence. *See Skrack*, 6 BLR at 1-711; Decision and Order at 13-16.

[9] Dr. Dye did not address the issue of total disability in his treatment notes or on the questionnaire he completed. Director's Exhibits 39, 41.

Contrary to claimant's contention, although Dr. Forehand identified "a mild respiratory impairment," he specifically opined that the miner was not totally disabled. Director's Exhibit 12. Moreover, while Dr. Dye treated the miner for black lung, he did not state that the miner had a totally disabling respiratory or pulmonary impairment. Director's Exhibits 39, 42.

The administrative law judge also specifically discussed the exertional requirements of the miner's usual coal mine work in weighing the relevant medical opinions. Decision and Order at 12, 19. She determined that the miner's usual coal mine work as a dozer operator required a medium level of physical exertion, insofar as the miner occasionally had to lift approximately seventy pounds. Decision and Order at 12, *citing* 42 C.F.R. § 404.1567(c) (Social Security classifications of work); Director's Exhibit 6. She rationally credited the opinions of Drs. Forehand and Rosenberg that the miner was not totally disabled because they each possessed "some" understanding of the exertional requirements of the miner's usual coal mine job to the extent that they knew that miner worked as a dozer operator.[10] Decision and Order at 19; *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge further found, however, that Dr. Vuskovich specifically understood that the miner had to "sit for ten hours per day, stand for two hours per day and lift fifty to seventy pounds once or twice per week." Director's Exhibit 42. She permissibly gave "greater weight" to Dr. Vuskovich's opinion[11] that the miner was not totally disabled for this reason, and because the physician explained his conclusions based on the objective evidence of record.[12] *Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155.

[10] Dr. Forehand performed the Department of Labor examination and reviewed the miner's employment history Form CM-911(a) in preparing his report. Director's Exhibit 12. Dr. Rosenberg noted that the miner operated a dozer and stated that the miner "was not considered disabled from performing his previous coal mine job or other similarly arduous types of labor." Employer's Exhibit 2.

[11] We reject claimant's contention that the administrative law judge erred in relying on the opinions of Drs. Rosenberg and Vuskovich because they were non-examining physicians. *See Sterling Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

[12] The administrative law judge permissibly relied on Dr. Vuskovich's opinion that the miner was not totally disabled because the physician understood the exertional requirements of the miner's usual coal mine employment, reviewed the objective evidence and "summarized approximately 1000 pages of medical records." Decision and Order at 17; *see Jericol Mining, Inc*. v. Napier, 301 F.3d 703, 713-714 (6th Cir. 2002).

Furthermore, the administrative law judge rationally explained why she found the treatment records insufficient to satisfy claimant's burden of proof. *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). Although claimant asserts that the blood gas studies contained in the treatment record show "acute hypoxemia," the administrative law judge observed correctly that the studies have no probative value in determining whether the miner had a permanent respiratory disability since the studies were obtained while the miner was acutely ill. Decision and Order at 15 n.27, *citing* 20 C.F.R. §718.105(d) (test results from hospitalizations that end in miner's death are not to be considered, except if accompanied by physician's report indicating that test results were produced by chronic respiratory or pulmonary condition). She also correctly found that Dr. Dye's treatment records do not mention whether the miner had a totally disabling respiratory impairment and that there was no physician's opinion diagnosing total disability in the hospitalization records. Director's Exhibit 42.

Because the administrative law judge considered the exertional requirements of the miner's usual coal mine employment and rationally credited the uncontradicted medical opinion evidence[13] in finding that the miner was not totally disabled, we affirm her finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).[14] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, (6th Cir. 2002); *Stephens*, 298 F.3d at 522. We therefore affirm the administrative law judge's findings that claimant failed to invoke the Section 411(c) presumption and failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Thus, we affirm the denial of benefits in the miner's claim.

[13] We reject claimant's contention that the administrative law judge erred in not relying on claimant's testimony regarding the miner's physical condition to find that the miner was totally disabled. The Sixth Circuit has held that lay testimony cannot be considered when the record contains "medical evidence on the issue of disability due to a respiratory or pulmonary impairment." *Coleman v. Director, OWCP*, 829 F.2d 3, 5 (6th Cir. 1987).

[14] There is no merit to claimant's contention that total disability is established because "it can be reasonably concluded" that the miner's regular coal mining duties "involved [the miner] being exposed to heavy concentrations of dust on a daily basis." Claimant's Brief at 5. Even if one of the physicians had recommended against further coal mine dust exposure, such a recommendation is insufficient to establish total respiratory or pulmonary disability. *See Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989).

I. The Survivor's Claim – 20 C.F.R. §718.205(b)

For survivor's claims where the Section 411(c)(3) and 411(c)(4) presumptions are not invoked,[15] 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). Death is considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused or was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-304 (6th Cir. 2010).

The administrative law judge determined that the evidence failed to establish that the miner's death was due to pneumoconiosis. She noted that the miner's treating physician, Dr. Dye, "ascribed the [m]iner's death to coronary artery disease in the [m]iner's death certificate . . . [and] did not cite any contributing factors in that document." Decision and Order at 31; Director's Exhibit 38. The administrative law judge also noted that Dr. Dye completed a questionnaire in March 2014, indicating that he had treated the miner multiple times over several years" and stating that the miner had "black lung," based on the x-ray and post-mortem biopsy evidence. Director's Exhibit 39. In response to the question, "Did the miner's pulmonary disease play any part in either causing the miner's death or hastening the miner's death," Dr. Dye stated "yes." *Id*. When asked to provide his rationale, Dr. Dye responded "worsen cardiac disease." *Id.*

The administrative law judge rejected Dr. Dye's opinion on the grounds that it was "baldly conclusory and is not supported by any citation to objective medical evidence (such as medical test results) or any facts relating to the [m]iner's final illness and death." Decision and Order at 31. Claimant's sole argument on appeal is that the administrative law judge was required to credit Dr. Dye's opinion since he treated the miner. Contrary to claimant's assertion, an administrative law judge is not required to give greater weight to the opinion of a treating physician, based on that status alone. 20 C.F.R. §718.104(d)(5). Rather, "the opinions of treating physicians get the deference they deserve based on their

[15] Based on our affirmance of the administrative law judge's denial of benefits in the miner's claim, claimant is not entitled to derivative survivor's benefits pursuant to Section 932(*l*). Because claimant did not introduce any additional medical evidence in the survivor's claim to establish that the miner was totally disabled or that he suffered from complicated pneumoconiosis, she is not entitled to invocation of the Sections 411(c)(3) or 411(c)(4) presumptions.

power to persuade." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002). In this case, the administrative law judge rationally found that Dr. Dye's cursory opinion that pneumoconiosis hastened the miner's death was not sufficiently reasoned. *See Odom*, 342 F.3d at 492. As there is no other medical evidence to support claimant's burden of proof,[16] we affirm the administrative law judge's determination that claimant failed to establish the miner's death was due to pneumoconiosis pursuant to 20 C.F.R §718.205(b). *Conley*, 595 F.3d at 303-304.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in Miner's Claim; and Denying Benefits in Claimant's 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

[16] The administrative law judge observed correctly that Drs. Rosenberg and Vuskovich opined that pneumoconiosis played no role in the miner's death. Decision and Order at 31; Director's Exhibit 42; Employer's Exhibit 2.