U.S. Department of Labor

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

BRB No. 18-0424 BLA

DORIS G. BIAS (Widow of JAMES B. BIAS, JR.)	)	
Claimant-Petitioner	)	
v.	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 08/28/2019
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office PLLC), South Williamson, Kentucky, for claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-05929) of Administrative Law Judge Richard A. Morgan, rendered on a survivor's claim filed on July

14, 2010,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with 31.46 years of coal mine employment, with at least fifteen years spent working in an underground mine. He found claimant did not establish the miner was totally disabled and thus could not invoke the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] He further found the evidence insufficient to establish the miner's death was due to pneumoconiosis and denied benefits. 20 C.F.R. §718.205(b).

On appeal, claimant argues the administrative law judge erred by not considering lay testimony relevant to whether the miner was totally disabled. She also contends he erred in finding the miner's death was not due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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).

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[1] The miner filed two claims during his lifetime, each one denied. Decision and Order at 2 n.3. Because the miner was not determined to be eligible to receive benefits at the time of his death, claimant is not entitled to derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption the miner's death was due to pneumoconiosis if she establishes he had at least fifteen years of underground or comparable coal mine employment, and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner did not have complicated pneumoconiosis and thus claimant is not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's most recent coal mine employment was in West Virginia. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6, 7.

Invocation of the Section 411(c)(4) presumption – Total Disability

In order to invoke the Section 411(c)(4) presumption, claimant must establish the miner worked at least fifteen years in qualifying coal mine employment and "*had at the time of his death* a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §725.305(b)(1)(iii) (emphasis added).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). Total disability can be established by pulmonary function or arterial blood gas studies, evidence of pneumoconiosis and 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 weigh the evidence supporting total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988).

We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner did not have cor pulmonale and claimant did not establish total disability based on the pulmonary function studies, blood gas studies, and medical opinions. 20 C.F.R §718.204(b)(2)(i)-(iv); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order 30-32. Claimant argues, however, that the administrative law judge erred in not considering whether she established total disability based on lay testimony.[5] 20 C.F.R. §718.305(b)(4); Claimant's Brief at 4-5. We agree.

The regulation at 20 C.F.R. §718.305(b)(4) states:

> In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or

[5] The administrative law judge summarized the lay testimony, as follows:

> [The miner's daughter] testified that the miner had breathing problems and could not walk far without stopping and resting. She noted that he also had coughs and congestion. She said he was unable to do simple yard work due to shortness of breath, and he could only walk as far as from the back of the house to the porch, roughly 60-70 feet. She stated that he also had trouble going up and down the stairs and would be short of breath whenever he came to the top, which was roughly 12 steps.

Decision and Order at 18.

> pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

20 C.F.R. §718.305(b)(4). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held under an analogous provision set forth at 20 C.F.R. §727.203(a)(5) that consideration of lay evidence is available where the medical evidence of record is insufficient to establish total disability. *Cook v. Director, OWCP*, 901 F.2d 33, 36 (4th Cir. 1990); *see also Koppenhaver v. Director, OWCP*, 864 F.2d 287, 289 (3d Cir. 1988) ("[W]here the available medical evidence is insufficient to establish total disability or lack thereof" a survivor "may establish entitlement to the presumption of total disability on the basis of lay testimony and affidavits."); *Pekala v. Director, OWCP*, 13 BLR 1-1, 1-5 (1989) (use of lay testimony by itself to establish total disability is permissible when the available medical evidence is insufficient to affirmatively prove that no disease or disability was present).

The administrative law judge stated he could only consider lay testimony in a survivor's claim "in the absence of medical or other relevant evidence" and thus did not discuss the lay testimony in his analysis of whether the miner was totally disabled. Decision and Order at 30. Contrary to the administrative law judge's finding, the medical evidence he relied upon to find the miner was not totally disabled does not address the miner's respiratory condition at the time of death.[6]

The miner died on February 14, 2010. Director's Exhibit 13. The record contains two non-qualifying[7] pulmonary function studies, dated October 2, 1985 and March 2, 1987,

[6] The facts of this case are distinguishable from those in *Sword v. G & E Coal Co.*, 25 BLR 1-127 (2014) (Hall, J., dissenting), a case arising within the jurisdiction of the Sixth Circuit, where the administrative law judge relied solely on lay testimony to find total disability established. Because the record in *Sword* contained extensive medical evidence addressing the miner's pulmonary status at the time of death, including multiple pulmonary function studies, arterial blood gas studies, medical reports and treatment notes, the Board agreed with employer's argument that, under the Sixth Circuit's holding in *Coleman v. Director, OWCP*, 829 F.3d 3 (6th Cir. 1987), it was not appropriate to rely solely on the lay testimony to find total disability established. *Sword*, 25 BLR at 1-131.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20

and a non-qualifying blood gas study, dated October 2, 1985, which predate the miner's death by over twenty years. Director's Exhibit 2. The miner's autopsy was performed by Dr. Racadag, who described simple coal worker's pneumoconiosis. Director's Exhibit 15. Dr. Oesterling reviewed the autopsy slides and described a minimal amount of coal macules consistent with simple coal worker's pneumoconiosis, emphysema, and bronchopneumonia. Director's Exhibit 15. Dr. Bush also reviewed the autopsy slides and described a mild degree of simple coal workers' pneumoconiosis – only about one percent of the lung tissue was affected. Employer's Exhibit 5. Drs. Oesterling and Bush opined that the amount of coal mine dust in the lung tissue sample would not have caused a respiratory impairment or disability. Neither physician addressed, however, whether the miner had a totally disabling respiratory or pulmonary impairment related to other causes.[8] Dr. Castle specifically opined it was not possible to accurately determine whether the miner had a respiratory impairment at the time of death or what the severity of that impairment was from the record evidence.[9] Employer's Exhibit 6. Dr. Zaldivar also reported he was unable to determine whether the miner had a respiratory or pulmonary impairment at the time of his death.[10] Employer's Exhibit 2.

C.F.R. Part 718, respectively. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] Dr. Zaldivar noted the miner had pathological findings of emphysema that "must have caused some degree of obstruction, but the degree of obstruction is unknown." Employer's Exhibit 2.

[9] Dr. Castle noted that the most recent objective test was a January 2010 blood gas study obtained while the miner was in the hospital on oxygen. Although the study was normal he noted it "was useless in terms of establishing impairment or disability." Employer's Exhibit 6 at 17. Appendix C to Part 718 provides that arterial blood gas studies should "not be performed during or soon after an acute respiratory or cardiac illness," and 20 C.F.R. §718.105(d) provides that arterial blood gas studies performed during a hospitalization that ended in the miner's death must be "accompanied by a physician's report that the test results were produced by a chronic respiratory or pulmonary condition."

[10] The administrative law judge stated that he credited the reasoned opinions of Drs. Castle and Zaldivar that the miner was not totally disabled. Decision and Order at 32. The administrative law judge mischaracterized their opinions since neither physician was able to determine if the miner had a respiratory or pulmonary impairment at the time of death, based on what they described as a lack of available information. Employer's Exhibits 3, 7.

Because the miner was diagnosed with two respiratory diseases – clinical coal worker's pneumoconiosis and COPD/emphysema – and the medical evidence is insufficient to either establish or refute that the miner was totally disabled at the time of his death, the administrative law judge erred by not considering the lay testimony relevant to the miner's respiratory condition. *See* 20 C.F.R. §718.305(b)(4); *Cook*, 901 F.2d at 36; *Pekala*, 13 BLR at 1-5. We therefore vacate the administrative law judge's determination the miner was not totally disabled and that claimant did not invoke the Section 411(c)(4) presumption. On remand, the administrative law judge must consider all relevant evidence,[11] including lay testimony, and determine whether the miner was totally disabled at the time of his death. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995).

Part 718 Entitlement – Death Due to Pneumoconiosis

If claimant is unable to invoke the Section 411(c)(4) presumption she must establish by a preponderance of the evidence 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 was a substantially contributing cause of 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 Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-980 (4th Cir. 1992). Failure to establish any one of the elements of entitlement precludes an award of benefits in the survivor's claim. *See Trumbo*, 17 BLR at 1-87-88.

Claimant contends the administrative law judge erred in finding the death certificate and Dr. Chaffin's report were not credible to establish the miner's death was due to pneumoconiosis. Claimant's Brief at 5-6; *see* Director's Exhibit 13; Claimant's Exhibit 3. Because Dr. Chattin was the miner's family physician and provided the miner's hospice treatment, she maintains his opinion is sufficient to satisfy her burden of proof. Claimant's Brief at 6. Claimant's argument is without merit.

[11] Medical records in the month preceding the miner's death indicate he had a terminal diagnosis of chronic obstructive pulmonary disease (COPD) and was confined to a bed and oxygen-dependent. Claimant's Exhibit 5. The administrative law judge summarized these records but did not consider them in his analysis of the medical evidence on total disability, except to note Dr. Zaldivar's statement that it was not clear why the miner was on oxygen. Decision and Order at 31-32.

The death certificate listed the cause of the miner's death as "cardiopulmonary arrest due to hypoxia, COPD, and tobacco abuse."[12] Director's Exhibit 13. The administrative law judge rationally found no explanation in the hospital records for the findings listed on the death certificate by Dr. Chattin. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 (4th Cir. 2000) (reference on a death certificate to pneumoconiosis as a condition contributing to death, without further explanation, does not constitute a reasoned opinion). In an undated report, Dr. Chattin described the miner as a long term patient who was treated for "significant arthritis as well as breathing problems." Claimant's Exhibit 3. He noted the autopsy showed pneumoconiosis and summarily stated "the black lung complicated [the miner's] life with his breathing which directly contributed to his death." *Id*. The administrative law judge permissibly found Dr. Chaffin's statements were unexplained and his opinion not adequately reasoned to establish that the miner's death was due to pneumoconiosis.[13] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 (4th Cir. 1997); Decision and Order at 35.

As claimant raises no additional allegations of error with regard to the weight accorded the evidence,[14] we affirm the administrative law judge's finding that she did not satisfy her burden to prove the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b). *See Shuff*, 967 F.2d at 979-80; *Trumbo*, 17 BLR at 1-87-88.

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[12] In his discussion of legal pneumoconiosis, the administrative law judge determined that there was no evidence in the record indicating the basis for the miner's diagnosis of chronic obstructive pulmonary disease (COPD). He also found claimant did not establish the miner's COPD was legal pneumoconiosis under 20 C.F.R. §718.201. Claimant does not challenge these determinations. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[13] Because the administrative law judge determined that Dr. Chattin's opinion was not reasoned, it was not entitled to any additional weight as a treating physician. 20 C.F.R. §718.104(d).

[14] The administrative law judge credited the opinions of Drs. Zaldivar and Castle that the miner's death was unrelated to pneumoconiosis, over the contrary opinion of Dr. Gaziano. Decision and Order at 35-37; Claimant's Exhibits 1, 4; Employer's Exhibits 2, 3, 6-8. We affirm the administrative law judge's credibility findings as they are unchallenged. *See Skrack*, 6 BLR at 1-711.

Remand Instructions

Because benefits are precluded under 20 C.F.R. §718.205(b), the issue on remand is whether claimant is entitled benefits under Section 411(c)(4). The administrative law judge must address whether the lay testimony considered in conjunction with any other relevant evidence and the exertional requirements of the miner's usual coal mine work[15] establishes that he was totally disabled at the time of his death. If claimant establishes the miner's total disability and invokes the Section 411(c)(4) presumption, the administrative law judge must then consider whether employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). In determining the issues on remand, the administrative law judge must explain the bases for all of his findings of fact and conclusions of law in accordance with the Administrative Procedure Act.[16] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[15] The administrative law judge found the miner's last coal mine employment was as "an equipment operator in the supply yard" and it required "moderate labor." Decision and Order at 6. He specifically noted the miner "did less lifting over time due to his heath conditions." *Id*.

[16] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge