U.S. Department of Labor

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

BRB No. 16-0161 BLA

FELICIA A. MUNCY (Daughter of ANDREW J. SHULOCK) Claimant-Petitioner v. U.S. STEEL MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/19/2016 DECISION and ORDER

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

Felicia A. Muncy, Philippi, West Virginia, *pro se*.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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 (2013-BLA-5874) of Administrative Law Judge Drew A. Swank, rendered on a survivor's claim filed on March 4, 2013, 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 first determined that claimant is an eligible disabled survivor of the miner, pursuant to 20 C.F.R. §§725.218(a) and 725.221. Specifically, the administrative law judge determined that the evidence was sufficient to establish that claimant became disabled, as defined by the Social Security Act, prior to age twenty-two.[3] *See* 20 C.F.R. §§725.218, 725.221. The administrative law judge found that the miner worked thirty-two years in underground coal mine employment, or in conditions substantially similar to those in underground mines. However, because the administrative law judge determined that the evidence was insufficient to establish total disability, he concluded that claimant was unable to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis set forth in Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. The administrative law judge further determined that claimant was unable to establish her entitlement under

[1] Claimant is the adult daughter of the miner, Andrew J. Shulock, who died on January 24, 2013. Director's Exhibit 11.

[2] Andrea L. Kelley, claimant's sister and lay representative, requested that the Board review the administrative law judge's decision, but Ms. Kelley is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co*., 19 BLR 1-88 (1995) (Order).

[3] Employer and the Director, Office of Worker's Compensation Programs (the Director), contested the issue of whether claimant is an eligible survivor of the miner. Decision and Order at 5. In reaching his determination that claimant is an eligible survivor of the miner, the administrative law judge referenced the regulatory framework used by the Social Security Administration for making a disability determination. *See* 42 U.S.C. §423(d); 20 C.F.R. §404.1520(a)(4)(i)-(iv); Decision and Order at 9.

[4] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or 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), as implemented by 20 C.F.R. §718.305.

20 C.F.R. Part 718, as the evidence did not establish that the miner had pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits.[5] Employer responds, urging affirmance of the denial of benefits, based on the administrative law judge's determination that the miner was not totally disabled. Employer also asserts, however, that the denial of benefits may be affirmed on the alternate ground that claimant is not an eligible survivor of the miner. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge erred in weighing the evidence regarding total disability for purposes of invocation of the Section 411(c)(4) presumption of death due to pneumoconiosis.

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 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[6] 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. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTION - TOTAL DISABILITY

The regulations provide that a miner shall be considered 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). In the absence of contrary probative evidence, a miner's disability shall be established by pulmonary function studies showing values equal to, or less than, those in Appendix B; blood gas tests showing values equal to, or less than, those set forth in Appendix C; evidence establishing cor pulmonale with right-sided congestive heart failure; or if a

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had thirty-two years of employment in underground coal mines, or in conditions substantially similar to underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

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

physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv). If total disability has been established under one or more subsections, the administrative law judge must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record to determine whether total disability has been established by a preponderance of the evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that there are no pulmonary function studies in evidence. Decision and Order at 17. The administrative law judge also found that claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(ii), as "neither party has provided any blood gas tests." *Id*. In addition, the administrative law judge noted that because there was no evidence to establish that the miner suffered from cor pulmonale with right-sided congestive heart failure, claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). *Id*. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge further determined that there was no medical opinion evidence indicating that the miner was totally disabled from a respiratory or pulmonary standpoint.[7] *Id*. at 19.

The Director argues on appeal that the Board must vacate the administrative law judge's finding that claimant failed to establish total disability because he misstated that there are no blood gas tests in the record. The Director notes correctly that the miner's treatment records from the Bluefield Regional Medical Center contain two arterial blood gas tests, dated December 15, 2008 and January 14, 2013,[8] which were not considered by the administrative law judge. Director's Letter Brief at 1-2; Employer's Exhibit 6 at 8 and 43. The December 15, 2008 test yielded qualifying results, while the January 14,

[7] The medical treatment records from the Bluefield Regional Medical Center and the Princeton Community Hospital include diagnoses of pneumoconiosis, emphysema, and chronic obstructive pulmonary disease but they do not indicate whether the miner suffered from a totally disabling respiratory or pulmonary impairment. Employer's Exhibits 6, 7.

[8] The Director references the date of the second arterial blood gas test as "December 26, 2012," but our review of the Bluefield Regional Medical Center records indicates that the miner was admitted to the medical center on December 26, 2012, and the arterial blood gas test was obtained on January 14, 2013. Employer's Exhibit 6 at 43.

2013 test yielded non-qualifying results.[9] Employer's Exhibit 6 at 8 and 43. Because the administrative law judge did not consider evidence relevant to whether the miner was totally disabled, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(ii), and his finding that claimant could not invoke the Section 411(c)(4) presumption.[10] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998).

On remand, the administrative law judge must reconsider whether claimant established invocation of the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). The administrative law judge must determine whether the arterial blood gas tests are sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[11] If so, the administrative law judge must then determine whether claimant established that the miner had a totally disabling respiratory or pulmonary impairment, after consideration of any contrary probative evidence pursuant to 20 C.F.R. §718.204(b)(2). *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). If the administrative law judge concludes that the miner was totally disabled, claimant has established invocation of the Section 411(c)(4) presumption, and the administrative law judge must then consider whether employer has established rebuttal of that presumption. 20 C.F.R. §718.305(d)(2)(i), (ii). In rendering his credibility determinations on remand, the administrative law judge must explain the

[9] A "qualifying" blood gas test yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" test yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[10] Because the administrative law judge correctly stated that the record does not contain the results of any pulmonary function studies, any evidence that the miner suffered from cor pulmonale, or any medical opinion evidence indicating that the miner had a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's findings that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), (iv). Decision and Order at 17, 19-20.

[11] In weighing the arterial blood gas tests on remand, the administrative law judge should address the reliability of the tests in light of the regulatory instruction at Appendix C to Part 718 that "[t]ests must not be performed during or soon after an acute respiratory or cardiac illness." 20 C.F.R. Part 718, Appendix C; *see* Director's Letter Brief at 2; Employer's Brief at 8 n.3, 10 n.4, 12 n.5.

basis for all of his findings of fact and conclusions of law in accordance with the Administrative Procedure Act (APA).[12]

II. DEPENDENCY

As an additional matter, in light of our decision to vacate the denial of benefits, we will address employer's assertion that the administrative law judge erred in finding that claimant is an eligible survivor of the miner. The regulations provide that a child of a deceased miner is entitled to benefits if the requisite standards of relationship and dependency are met. 20 C.F.R. §725.218(a). An unmarried adult child satisfies the dependency requirement if such child is eighteen years of age or older and is under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), provided that the disability began before the child attained age twenty-two.[13] 20 C.F.R. §§725.209(a)(2)(ii), 725.221. The Social Security Act defines "disability" as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d)(1)(A); *Tackett v. Director, OWCP*, 10 BLR 1-117, 1-118 (1987). Benefits commence with the first month in which all of the conditions of entitlement are met, and continue until the month before the month in which such child dies or marries, or the disability ceases. 20 C.F.R. §725.219.

The administrative law judge observed correctly that the record establishes that the Social Security Administration began providing disability payments to claimant in April 1986, after she had attained the age of twenty-two. The administrative law judge also noted however, that the beginning date for receipt of Social Security benefits, while relevant, is not necessarily the determinative factor in considering whether a claimant is an eligible survivor. Decision and Order at 10, *citing Adler v. Peabody Coal Co.*, 22 BLR 1-44 (2000).

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[12] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[13] Employer does not dispute that claimant is the miner's child, pursuant to 20 C.F.R. §725.208, and that claimant is currently unmarried, pursuant to 20 C.F.R. §725.209(a)(1).

To establish her dependency, claimant submitted an April 26, 2013 letter from Dr. Biola, her primary care physician, which states only, "this is to confirm that she [claimant] is mentally and physically disabled and has been since birth." Director's Exhibit 20. Claimant also provided a letter dated May 16, 2014, from Dr. Mac Ewen, indicating that he treated claimant as child during "the 1960's and 1970's" when he was the Medical Director of the Alfred I. DuPont Institute for Children. Dr. Mac Ewen wrote that claimant "has a diagnosis of congenital dislocation of the left hip and subluxation of the right hip" and "was born disabled." Claimant's Exhibit 1. He described that "[claimant's] parents . . . first brought her to the Institute in March, 1963 for orthopedic evaluation. In April, 1963, the first operation on [claimant's] left hip was carried out; an open reduction of dislocation of the left hip with Salter osteotomy of the left ilium. The second operation on [claimant's] left hip was carried out in May, 1965; arthroplasty, left hip joint, with anterior acetabuloplasty . . . ." *Id.*

The administrative law judge stated that he "gave significant weight to the opinions of Drs. Biola and Mac Ewen because they have treated claimant, understand her medical history, and thus can provide more persuasive opinions regarding her disabilities." Decision and Order at 10. Although the administrative law judge concluded that claimant established that she has "a disability" as defined by Section 223(d) of the Social Security Act, the administrative law judge erred in failing to specify the exact nature of the disability that claimant proved prior to the age of twenty-two. 22. 42 U.S.C. §423(d)(1)(A); *see Tackett*, 10 BLR at 1-118.

We also agree with employer that the administrative law judge erred in failing to consider whether there was a factual basis for Dr. Biola's statement that claimant has been disabled "since birth" other than what the physician was told by claimant or claimant's sister. Director's Exhibit 20. Employer notes that Dr. Biola first saw claimant for a "Pt. [patient] establishment" visit on March 6, 2012, at which time Dr. Biola wrote under the "Muscoskeletal" portion of her examination records that claimant had "[n]ormal range of motion, muscle strength, and stability in all extremities with no pain on inspection." *Id.* The administrative law judge should consider on remand employer's assertion that there is no information in the record explaining the basis for Dr. Biola's statement that claimant was disabled "since birth" or "any real information as to what mental and/or physical disability was present at the time of her contact with [claimant]." Employer's Brief at 19 *quoting* Director's Exhibit 20.

Furthermore, we conclude that the administrative law judge did not properly address employer's assertions that the record contains no information pertaining to claimant's hip condition following the surgeries performed by Dr. Mac Ewen and, therefore, there is insufficient evidence in the record to establish that claimant suffered

from a disability as defined in Section 223(d) of the Social Security Act.[14] Thus, because the administrative law judge's findings on the dependency issue are not adequately explained under the APA, we vacate his finding under 20 C.F.R. §§725.218(a) and 725.221 and instruct the administrative law judge to reconsider on remand whether claimant has established that she is an eligible survivor of the deceased miner. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[14] Medical records from the Alfred I. DuPont Institute for Children are dated from March 1963 to July 21, 1975. Director's Exhibit 18; Claimant's Exhibit 1. There are no medical treatment records pertaining to claimant's congenital hip disorder subsequent to 1975.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge