U.S. Department of Labor

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

BRB No. 17-0159 BLA

BRENDA KAY COOK (Widow of EARL COOK)	)	
Claimant-Petitioner	)	
v.	)	
BUCKHORN COAL INCORPORATED	)	
and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 12/13/2017
Employer/Carrier-Respondents	)	
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 Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Brenda Kay Cook, Minnie, Kentucky.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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 (13-BLA-05273) of District Chief Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on January 30, 2012.

Based on his determination that the miner had 12.38 years of coal mine employment,[3] the administrative law judge found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4).[4] 30 U.S.C. §921(c)(4) (2012). Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(4) presumption, the administrative law judge found that claimant did not establish the existence of either clinical or legal

[1] Claimant is the widow of the miner, who died on August 1, 2011. Director's Exhibit 14. Through her lay representative before the administrative law judge, claimant requested a decision on the record, to which employer agreed. Decision and Order at 2. By Order dated May 6, 2016, the administrative law judge granted claimant's request, and canceled the hearing. *Id*.

[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. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] 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); *see* 20 C.F.R. §718.305.

pneumoconiosis[5] pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer/carrier (employer) responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 Section 411(c)(4) Presumption—Length of Coal Mine Employment

Claimant bears the burden of proof to establish the length of the miner's coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's finding if it is based on a reasonable method of computation and is supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge noted that the miner's coal mine employment was intermittent, and found that the evidence did not establish the beginning and ending dates of the miner's coal mine employment. The administrative law judge therefore relied on the miner's Social Security Administration (SSA) earnings records as the most accurate evidence of the number of years the miner worked in coal mine employment. Decision and Order at 10.

[5] "Clinical pneumoconiosis" consists of "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 lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

The SSA earnings records document that the miner worked in coal mine employment from 1983 until 1995. Decision and Order at 10; Director's Exhibit 10. The administrative law judge correctly noted that where the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, it is permissible to use the formula provided at Section 725.101(a)(32)(iii).[6] Decision and Order at 10; *see* 20 C.F.R. §725.101(a)(32)(iii); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-203 (2016). Thus, using the miner's reported earnings, the administrative law judge calculated the length of the miner's coal mine employment for each year from 1983 through 1995, and credited the miner with 12.38 years of coal mine employment.[7] Decision and Order at 10-11.

Substantial evidence supports the administrative law judge's finding of 12.38 years of coal mine employment. *See Muncy*, 25 BLR at 1-27; Director's Exhibit 10. Moreover, the finding is consistent with the allegations of both claimant and the miner that he worked in coal mine employment for at most thirteen years.[8] Therefore, we

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[6] Section 725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

[7] In this case, with the exception of the year 1983, the administrative law judge calculated the miner's length of employment using the average *annual* earnings by year for miners who spent 125 days at a mine site, rather than the *daily* average earnings by year, as specified at 20 C.F.R. §725.101(a)(32)(iii). Decision and Order at 10-11. We note, however, that the evidence of record is insufficient to establish the requisite fifteen years of qualifying coal mine employment using either method of calculation. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] Specifically, claimant alleged that the miner worked in coal mine employment from 1983 to 1995. Director's Exhibit 8. The miner alleged thirteen years of coal mine employment in his first and second lifetime claims, Director's Exhibits 1 at 67; 2 at 105, and completed employment history forms in his second claim alleging coal mine employment from January 1982 to September 1995. Director's Exhibit 2 at 99, 103-04.

affirm the administrative law judge's finding of 12.38 years of coal mine employment, and the administrative law judge's determination that claimant did not establish the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Entitlement Under 20 C.F.R. Part 718

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where the Section 411(c)(4) statutory presumption does not apply, claimant must affirmatively establish that the miner's death was due to pneumoconiosis.[9] *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

Existence of Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered seven readings of five x-rays. Decision and Order at 4, 11-12. One x-ray reading was positive for pneumoconiosis. Dr. Hussain, whose radiological qualifications are not of record, read an August 7, 2002 x-ray as "2/1" for simple pneumoconiosis. Director's Exhibit 2 at 70. The administrative law judge accurately noted that Dr. Wheeler, a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis. *Id*. at 57. Taking into account Dr. Wheeler's superior radiological qualifications, the administrative law judge permissibly found that the August 7, 2002 x-ray was negative for pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)*; Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-86 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 12. As the

[9] Section 422(*l*) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*)(2012). Claimant cannot benefit from this provision, as both of the miner's lifetime claims for benefits were denied. Director's Exhibits 1, 2. Additionally, because the record contains no evidence of complicated pneumoconiosis, the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), does not apply in this case.

remaining x-ray readings were negative for pneumoconiosis,[10] the administrative law judge found that the x-ray evidence did not establish the existence of pneumoconiosis. Because substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), the finding is affirmed.[11]

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge considered the report of a lung biopsy dated November 18, 2010.[12] Decision and Order at 7-8, 12. The administrative law judge accurately found that the biopsy report did not contain a diagnosis of pneumoconiosis.[13] Decision and Order at 12; Employer's Exhibit 13. We therefore affirm the administrative law judge's finding that the biopsy evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

None of the presumptions listed at 20 C.F.R. §718.202(a)(3) is applicable in this survivor's claim filed on January 30, 2012. As the administrative law judge properly found, the record contains no evidence of complicated pneumoconiosis necessary to invoke the irrebuttable presumption of death due to pneumoconiosis pursuant to 20

[10] As was summarized by the administrative law judge, Dr. Sargent, a Board-certified radiologist and B reader, and Dr. Wicker, a B reader, read the November 3, 1997 x-ray as negative for pneumoconiosis. Director's Exhibit 1 at 27-29. Drs. Dineen and Jarboe, both B readers, read the October 7 and 9, 1993 x-rays, respectively, as negative, Employer's Exhibits 5 at 3-4, 6 at 3-4, and Dr. Wright, an "A" reader, read the November 6, 1993 x-ray as negative. Director's Exhibit 1 at 22.

[11] The administrative law judge considered x-ray readings and medical opinions contained in the records of the miner's denied claims, most of which were not designated as evidence in the survivor's claim pursuant to 20 C.F.R. §725.414. Decision and Order at 4-7, 11-12; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007)(en banc)(holding that the "medical evidence from the prior living miner's claims must be designated as medical evidence by one of the parties" in order to be included in the record of the survivor's claim). Any error was harmless, as the administrative law judge's consideration provided claimant with all the evidence available to support her survivor's claim, when she appears to have submitted none. *See Larioni*, 6 BLR at 1-1278.

[12] The record contains no autopsy evidence. The miner's death certificate indicates that no autopsy was performed. Director's Exhibit 14.

[13] As summarized by the administrative law judge, the lung biopsy conducted at King's Daughters Medical Center yielded a diagnosis of "undifferentiated carcinoma." Employer's Exhibit 13 at 6.

C.F.R. §718.304, and claimant did not establish enough coal mine employment to invoke the rebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.305. *See* 20 C.F.R. §718.202(a)(3); Decision and Order at 12. Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Hussain, Broudy, and Fino. Decision and Order at 6-7, 12. Dr. Hussain diagnosed the miner with pneumoconiosis, based on Dr. Hussain's positive reading of the August 7, 2002 x-ray. Director's Exhibit 2 at 84-85. Because the administrative law judge found that a better qualified physician reread the August 7, 2002 x-ray as negative for pneumoconiosis, he permissibly discounted Dr. Hussain's opinion. *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-217-18 (6th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000). Drs. Broudy and Fino opined that the miner did not have pneumoconiosis, but suffered from metastatic lung cancer that was due to solely to smoking. Employer's Exhibits 9-12. Thus, substantial evidence supports the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis.

The administrative law judge also considered the miner's hospitalization and treatment records, and summarized them as reflecting treatment for diabetes, hypertension, hyperlipidemia, neuropathy, mild sclerosis, mild left ventricular hypertrophy, kidney cancer, and metastatic lung cancer to the liver. Decision and Order at 8, 12. The administrative law judge found that there was no evidence in the treatment records that the miner had any pulmonary impairment related to coal mine dust exposure. *Id*. at 12.

A review of the record reflects that the hospitalization and treatment records contain diagnoses of chronic obstructive pulmonary disease (COPD), but the records do not address whether the COPD was related to coal mine dust exposure. *See* 20 C.F.R. §718.201(b); Director's Exhibit 15 at 1, 3, 7, 9, 23; Employer's Exhibit 25 at 18, 20, 24-28, 39, 42. The treatment records, however, also contain diagnoses of "[c]oal workers' lung," which the administrative law judge did not address.[14] 20 C.F.R. §718.201(a)(1); Employer's Exhibit 25 at 39, 42. We find this error to be harmless, however. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985). As we will set forth, the

[14] Dr. Moammar, of the Ashland Medical Group, diagnosed the miner with "[c]oal workers' lung," following examinations of the miner on November 9, 2010, and November 15, 2010. Employer's Exhibit 25 at 39, 42.

record contains no evidence that the miner's death was due to pneumoconiosis. Thus, a finding of entitlement to survivor's benefits is precluded as a matter of law.

Death Due to Pneumoconiosis

To establish that the miner's death was due to pneumoconiosis, claimant must establish that pneumoconiosis was the cause of the miner's death, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that the miner's death was caused by complications of pneumoconiosis. 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).

The record contains the miner's death certificate, the records of the miner's final hospitalization, and the reports of Drs. Broudy and Fino. The miner's death certificate identified "[r]espiratory [f]ailure [s]econd[ary] to [m]etastatic lung cancer" as the immediate cause of the miner's death, and listed "[m]etastatic lung and renal cancer" as factors leading to the immediate cause of the death. Director's Exhibit 14. No other causes or conditions were listed. The records of the miner's final hospitalization listed sepsis, acute renal failure, and "[history of] metastatic lung and renal ca to liver," as "[d]iagnos[e]s at time of [d]eath." Employer's Exhibit 25 at 27. Those records made no mention of whether pneumoconiosis caused or contributed to the miners' death. *Id*. at 24-28. Drs. Fino and Broudy reviewed the miner's medical records, and attributed the miner's death to lung cancer due to smoking. Employer's Exhibits 9-12.

A review of the record reveals no evidence that pneumoconiosis caused or hastened the miner's death. *See* 20 C.F.R. §718.205(b)(1),(2). Consequently, claimant cannot establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in her survivor's claim. *See* 20 C.F.R. §718.205(a)(3). Thus, a finding of entitlement is precluded. *See Trumbo*, 17 BLR at 1-87-88.

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