U.S. Department of Labor

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

BRB Nos. 19-0193 BLA
and 18-0396 BLA

BONNIE LOU COLLINS (Widow of and o/b/o JAMES ROBERT COLLINS)	)	
Claimant-Respondent	)	
v.	)	
SHAMROCK PROCESSING COMPANY, INCORPORATED	)	
and	)	
INSURANCE OF WAUSAU c/o LIBERTY MUTUAL INSURANCE GROUP	)	DATE ISSUED: 12/19/2019
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Tracy A. Daly and the Decision and Order Awarding Continuing Benefits of Larry A. Temin, Administrative Law Judges, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Edward Waldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05078) of Administrative Law Judge Tracy A. Daly rendered on a miner's claim filed on August 8, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Employer also appeals the Decision and Order Awarding Continuing Benefits (2018-BLA-05408) of Administrative Law Judge Larry A. Temin rendered on a survivor's claim filed on October 10, 2017. The Board consolidated the appeals for purposes of decision only.

Finding that the miner was totally disabled under 20 C.F.R. §718.204(b)(2) and had at least twenty-four years of qualifying coal mine employment, Judge Daly found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He further found employer did not rebut the presumption and awarded benefits in the miner's claim.

Judge Temin found claimant satisfied the eligibility criteria for automatic entitlement to survivor's benefits under Section 422(*l*) of the Act and awarded benefits in the survivor's claim.[3] 30 U.S.C. §932(*l*) (2012).

On appeal, employer summarily objects to the application of amended Sections 411(c)(4) and 422(*l*), contending that Section 1556 of the Patient Protection and Affordable

[1] Claimant is the widow of the miner, who died on September 23, 2017. Survivor's Claim Director's Exhibits 2, 6, 8, 10, 18. Claimant is pursuing the miner's claim on behalf of his estate. *Id.*

[2] Under Section 411(c)(4) of the Act, a miner is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Section 422(*l*) of the Act 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 the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

Care Act, Public Law No. 111-148, which revives "these provisions, violates Article II of the United States Constitution." Employer's Brief at 4. On the merits, employer asserts Judge Daly erred in finding total disability under 20 C.F.R. §718.204(b)(2)(i), (iv). Regarding the survivor's claim, employer contends the award must be reversed as premature. In response, claimant urges affirmance of the miner's and survivor's awards of benefits as supported by substantial evidence and in accordance with law. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, urges the Board to decline to entertain employer's unidentified constitutional objections and to reject employer's contention that the award of survivor's benefits is premature.

The Board's scope of review is defined by statute. The administrative law judges' decisions must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As a threshold matter, we agree with the Director that employer failed to provide any specific argument for its constitutional objection to Sections 411(c)(4) and 422(*l*). Thus, we decline to address it. *See* 20 C.F.R. §802.211(b).

The Miner's Claim - Invocation of the 411(c)(4) Presumption

Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish the miner had at least fifteen years of qualifying coal mine employment[5] and "had at the time of his death, a totally disabling respiratory or pulmonary impairment . . . ." 20 C.F.R. §718.305(b)(1)(iii). A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by qualifying pulmonary function studies, qualifying arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R.

[4] These cases arise within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky and Ohio. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

[5] We affirm, as unchallenged on appeal, Judge Daly's finding that the miner had at least twenty–four years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

§718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant 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).

Judge Daly found the pre-bronchodilator FEV1 and FVC results from Dr. Forehand's January 29, 2015 pulmonary function study yielded qualifying values.[6] Decision and Order at 8-9, 21; 20 C.F.R. §718.204(b)(2)(i); 20 C.F.R. Part 718, App. B. He further found Drs. Gaziano, Forehand, and Go validated this pulmonary function study. Decision and Order at 21. Judge Daly also found that employer's expert, Dr. Rosenberg, did not review the January 29, 2015 study or the reports of Drs. Go and Forehand that validated the study. *Id.* at 23. In addition, the miner was unable to complete a pulmonary function study when Dr. Rosenberg examined him. *Id.* at 11-12; Employer's Exhibits 1, 5. Therefore, as there is no contrary probative pulmonary function study evidence, Judge Daly found the pulmonary function study evidence established total disability under 20 C.F.R. §718.204(b)(2)(i).

Employer contends the January 29, 2015 pulmonary function study is not valid because it was not reproducible. Employer's Brief at 5. It asserts Dr. Forehand noted the miner had difficulty performing the maneuvers, indicated the results should be regarded as his "best effort," and admitted the test did not meet the American Thoracic Society validity criteria. Employer also argues that because Dr. Go opined that the pre-bronchodilator FEV1 values were not reproducible, the qualifying results are not valid. *Id.* at 4-5.

We initially affirm, as unchallenged on appeal, Judge Daly's finding that Dr. Gaziano validated the January 29, 2015 pulmonary function study.[7] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9, 21. Addressing the arguments employer now raises on appeal, Judge Daly concluded the qualifying pre-bronchodilator results were valid. Decision and Order at 21. He found that, despite Dr. Forehand's acknowledgement the miner had some difficulty doing the FVC maneuver on the January 29, 2015 pulmonary function study, Dr. Forehand stated "[t]he results were tighter in the

[6] The results of an October 30, 2014 pulmonary function study were invalidated. Director's Exhibit 16. Repeat studies were performed on January 29, 2015. At his deposition, Dr. Forehand agreed that the reported results of the later test were varied from the computer printout, but the pre-bronchodilator results were qualifying in any event. Claimant's Exhibit 4 at 16-17.

[7] Dr. Gaziano's report checked the box that states "Vents are acceptable." He also wrote, "The T.V. and F.V. curves appear valid." Director's Exhibit 10 at 3.

second study [January 29, 2015]" than in the October 2014 test.[8] Decision and Order at 21; Claimant's Exhibit 4 at 14. Moreover, Judge Daly correctly found Dr. Forehand specifically testified at his deposition that the January 29, 2015 pulmonary function study generated reproducible tracings that were valid for the interpretation of whether the miner had a respiratory impairment. Decision and Order at 21; Claimant's Exhibit 4 at 10.

Regarding Dr. Go's opinion, Judge Daly found he concluded the FVC values obtained on the January 29, 2015 study were reproducible and that the post-bronchodilator FEV1 value was reproducible. Decision and Order at 21; Claimant's Exhibit 5 at 3. Contrary to employer's contention, Dr. Go did not specifically state that the January 29, 2015 pre-bronchodilator FEV1 was not reproducible. Claimant's Exhibit 5 at 3. In this respect, Judge Daly correctly noted that Dr. Go opined the miner "had pulmonary function tests that, although they were not optimally performed, sufficiently and *reproducibly* demonstrated that [the miner] had a moderately severe reduction of the FEV1 in the setting of an obstructive ventilatory defect." *Id.* at 5 (emphasis added); Decision and Order at 14.

Based on the undisputed validation report of Dr. Gaziano, and the opinions of Drs. Forehand and Go, Judge Daly permissibly found the January 29, 2015 pulmonary function study valid and adequately addressed employer's challenge to the validity of the pulmonary function study. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). Dr. Forehand explained the miner's difficulty in performing the test, *see* 20 C.F.R. §718.103(b)(5), and Drs. Forehand, Go, and Gaziano found the results reproducible. *See* 20 C.F.R. Part 718, App. B at (2)(ii)(G); *see also Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). Employer has failed to establish that Judge Daly erred in finding the

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[8] In his January 29, 2015 report, Dr. Forehand explained:

> Mr. Collins is an elderly man with advanced Alzheimer's Disease. He is a cooperative individual with limited understanding of how to perform a forced vital capacity maneuver according to American Thoracic Society standards. He has difficulty keeping the mouthpiece secured in his mouth for at least six seconds during each expiratory maneuver.
>
> On the other hand, a look at his flow volume loops tells you that Mr. Collins does have a moderately severe obstructive ventilator pattern, indicative of obstructive lung disease. . . . I do not believe that Mr. Collins' efforts can improve over the current results. Please accept this study as his best effort.

Director's Exhibit 10-1; Decision and Order at 10. Dr. Forehand further testified that even if a study does not meet the acceptability criteria of the American Thoracic Society, that does not mean important information cannot be derived from it. Claimant's Exhibit 4 at 14-15; Decision and Order at 11.

pulmonary function study adequate to support a finding of total disability. *See generally Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41 (6th Cir. 2014); 20 C.F.R. §718.101(b) (requiring that a test substantially comply with applicable standards). Thus, we affirm his finding that claimant established the miner was totally disabled under 20 C.F.R. §718.204(b)(2)(i) as it is supported by substantial evidence.[9] *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

Regarding 20 C.F.R. §718.204(b)(2)(iv), employer's sole contention is that Judge Daly erred in crediting the medical opinions of Drs. Forehand and Go because they relied on the allegedly invalid pulmonary function study results. Employer's Brief at 5-6. The determination of whether a medical opinion is adequately reasoned and documented is for the administrative law judge to decide and the Board is not empowered to reweigh the evidence. *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). Because we have affirmed Judge Daly's finding that the miner was totally disabled under 20 C.F.R. §718.204(b)(2)(i), we reject employer's argument and affirm Judge Daly's finding that the medical opinion evidence established total disability under 20 C.F.R. §718.204(b)(2)(iv).[10] Decision and Order at 23.

We also affirm Judge Daly's findings that claimant established total disability under 20 C.F.R. §718.204(b)(2) overall and invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198 (1986); Decision and Order at 23. Moreover, we affirm his finding that employer failed to rebut the presumption as it is unchallenged on appeal. *Skrack*, 6 BLR at 1-711. We therefore affirm the award of benefits in the miner's claim.

[9] We also affirm, as unchallenged on appeal, Judge Daly's findings that claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii) because the blood gas study evidence did not produce qualifying values and there is no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure. *Skrack*, 6 BLR at 1-711; Decision and Order at 21.

[10] Dr. Forehand opined that, based on the pulmonary function test results, the miner would not have been able to perform the duties of a dump operator, which was his last coal mine employment. Claimant's Exhibit 4 at 9, 11. Dr. Go opined that, given the severity of the miner's FEV1 reduction, the miner would not have been able to perform his last job as a dump operator. Claimant's Exhibits 5 at 5; 12 at 5.

The Survivor's Claim

Judge Temin found claimant satisfied her burden to establish each element necessary to demonstrate entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order Awarding Continuing Benefits at 3.

We reject employer's contention that claimant did not satisfy the eligibility criteria under Section 422(*l*) because the award of benefits in the miner's claim was not yet final when Judge Temin awarded benefits in the survivor's claim. An award of benefits in a miner's claim need not be final for a claimant to receive survivor's benefits under Section 422(*l*). *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-46 (2014). Because we have affirmed the award of benefits in the miner's claim, we affirm Judge Temin's determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, we affirm the Decision and Order Awarding Benefits in the miner's claim and the Decision and Order Awarding Continuing Benefits in the survivor's claim.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge