U.S. Department of Labor

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

BRB No. 19-0023 BLA

KATHERINE BAKER (Widow of RICHARD BAKER) Claimant-Petitioner v. PERRY COUNTY COAL CORPORATION and GATLIFF COAL COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/16/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Katherine Baker, Wooten, Kentucky.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2016-BLA-05074) of Administrative Law Judge Christopher Larsen 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).[1] This case involves a survivor's claim filed on April 28, 2014.

In a Proposed Decision and Order dated October 29, 2014, the district director denied benefits because claimant did not establish any element of entitlement. Director's Exhibit 17 at 6-7. Claimant filed a request for modification on December 26, 2014 and submitted additional evidence. Director's Exhibit 27. The district director denied benefits on August 20, 2015, finding claimant established the existence of pneumoconiosis, but did not establish total disability or death due to pneumoconiosis. Claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges.

Diane Jenkins, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, subsequently requested that the case be decided on the record. The administrative law judge granted the request and issued a Decision and Order Denying Benefits on September 18, 2018. He found the miner worked for more than fifteen years in underground coal mine employment or in conditions substantially similar to those in an underground mine. He further determined, however, because claimant failed to establish the miner had a totally disabling respiratory or pulmonary impairment, she was unable to invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that even

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[1] Claimant is the survivor of the miner, who died on February 6, 2014. Director's Exhibit 8. There is no indication in the record the miner was awarded federal black lung benefits. *See* Director's Exhibit 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 in this appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes 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); *see* 20 C.F.R. §718.305.

assuming claimant had invoked the presumption, employer had rebutted it by proving no part of the miner's death was due to pneumoconiosis. After considering whether claimant could establish entitlement under 20 C.F.R. Part 718 without the presumption, the administrative law judge determined claimant established the miner had pneumoconiosis arising out of coal mine employment, but did not establish the miner's death was due to pneumoconiosis. He therefore denied benefits.[3]

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order Denying Benefits below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order Denying Benefits if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

I. Invocation of the Section 411(c)(4) Presumption - Total Disability

A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1).[5] In the absence of contrary probative evidence, claimant

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[3] The administrative law judge did not render a specific finding as to whether claimant established a basis for modification of the district director's initial denial of benefits under 20 C.F.R. §725.310. This omission does not constitute error, as the Board has held that in cases involving a request for modification of a district director's decision, the administrative law judge proceeds de novo and "the modification finding is subsumed in the administrative law judge's findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] The administrative law judge accurately found there is no evidence of complicated pneumoconiosis. Therefore, claimant is not entitled to the irrebuttable presumption of

may establish the miner was totally disabled at the time of his death based on pulmonary function tests, 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). If total disability is established under one or more subsections, the evidence supportive of a finding of total disability must be weighed against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988). In this case, the administrative law judge determined claimant did not establish total disability, as the sole qualifying[6] blood gas study was outweighed by the contrary probative evidence of record. Decision and Order at 13.

Relevant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered five pulmonary function studies contained in the treatment records, dated August 16, 2006, December 9, 2009, April 21, 2010, January 4, 2012,[7] and September 20, 2012. Decision and Order at 6-7. The studies performed on August 16, 2006, December 9, 2009, April 21, 2010, and September 20, 2012 yielded non-qualifying values. Director's Exhibit 27 at 2, 185; Director's Exhibit 31 at 5-7. In contrast, the January 4, 2012 study that the St. Charles Respiratory Clinic administered yielded qualifying values. Director's Exhibit 31 at 5. The administrative law judge accorded diminished weight to the qualifying study, because Dr. Vuskovich called into question its validity, commenting that the miner's "initial efforts were not maximum efforts which artificially lowered his FEV1 result" and the miner "prematurely terminated his expiratory efforts which artificially lowered his FVC result." Director's Exhibit 31 at 5; *see* Decision and Order at 8.

The quality standards used to determine the validity of a pulmonary function study are inapplicable to studies performed in the course of treatment. 20 C.F.R. §718.101(b); *see J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008).

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death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

[6] A "qualifying" pulmonary function study or blood gas study yields values equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" pulmonary function study or blood gas study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The administrative law judge incorrectly stated the date of this pulmonary function test was January 24, 2012, when it is dated January 4, 2012. Decision and Order at 8; Director's Exhibit 31 at 5. We deem this clerical error harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Nevertheless, the administrative law judge must still be persuaded a pulmonary function study appearing in a treatment record is "reliable" for "it to form a basis for a finding of fact on an entitlement issue." 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). In this case, the administrative law judge permissibly credited as "probative and persuasive" Dr. Vuskovich's uncontradicted opinion that the January 4, 2012 treatment pulmonary function study was not reliable because the miner had exerted less than maximum effort. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 8. Having found the sole qualifying pulmonary function study to be unreliable, the administrative law judge rationally found the weight of the pulmonary function study evidence was not supportive of a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 8. As this determination is rational and supported by substantial evidence, it is affirmed. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the only fully reported blood gas study results, which Dr. Alam administered at rest on September 21, 2011. Decision and Order at 9; Director's Exhibit 27 at 7. Because the administrative law judge correctly determined this study produced qualifying values, we affirm his finding that it was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id*.

Next, the administrative law judge accurately found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 9. We therefore affirm his finding claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iii).

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the miner's treatment records and Dr. Vuskovich's medical opinion. Decision and Order at 11-13. The treatment records cover the period between 2009 and 2013, and document Dr. Chaney's treatment of the miner for cerebrovascular disease and chronic pain in the back, neck, and shoulders. Director's Exhibit 27. Dr. Chaney indicated that in addition to these conditions, the miner had been diagnosed with coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD). *Id*. at 9-107. The records also reflect Dr. Chaney's prescription for supplemental oxygen on October 19, 2011 and Dr. Alam's signature on a second order for supplemental oxygen on November 3, 2011. *Id*. at 5. Dr. Vuskovich reviewed treatment records dated between 1987 and 2014, including x-rays and medical reports associated with the miner's hospitalizations on January 30, 2014 and February 6, 2014 for treatment of a ruptured spleen and broken ribs suffered in a car

accident.[8] Director's Exhibit 27 at 198-204. Dr. Vuskovich opined these records do not contain data sufficient to support the diagnosis of a totally disabling impairment.[9] Director's Exhibit 31.

The administrative law judge accurately noted the treatment records appearing in Director's Exhibit 27 "document[ed] treatment for some pulmonary problems," but lacked a definitive diagnosis of a totally disabling respiratory or pulmonary impairment. Decision and Order at 13. He rationally concluded that when considered in conjunction with Dr. Vuskovich's opinion that the miner had no pulmonary impairment, this evidence was insufficient to establish total respiratory or pulmonary disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d

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[8] Dr. Vuskovich summarized the records he reviewed in detail, stating that they reflected: a 1987 admission to Mary Breckinridge Hospital for treatment of injuries suffered in a car accident; a 2006 admission to ARH-Hazard Hospital for treatment of stroke symptoms; an x-ray dated August 17, 2006 that was read as negative for disease; a 2009 hospitalization for treatment of injuries secondary to a car accident; an x-ray dated September 9, 2009 read as positive for simple pneumoconiosis; an invalid pulmonary function study dated September 9, 2009; a cardiac assessment by Dr. Rukavina on January 13, 2010; a physical examination by Dr. Ajjarapu on April 29, 2011; an x-ray dated April 29, 2011 read as positive for simple pneumoconiosis; an x-ray dated September 21, 2011 read as positive for simple pneumoconiosis; an invalid pulmonary function study dated September 20, 2012; a physical examination at Grace Community Health on October 21, 2013; a January 4, 2012 pulmonary function study that did not produce valid results; a physical examination at Grace Community Health Center on January 30, 2014 reflecting normal cardiopulmonary findings; a hospitalization later the same day at the University of Kentucky Medical Center after the miner's car left the road and went down a 150-foot embankment; and a final hospitalization at ARH-Hazard Hospital on February 6, 2014. Director's Exhibit 31 at 2-9. The treatment records Dr. Vuskovich reviewed were not subject to the evidentiary limitations and were not made part of the record. 20 C.F.R. §725.414(a)(4).

[9] In a report dated May 22, 2015, Dr. Vuskovich stated the miner's pulmonary function studies would have been normal if he had exerted better effort, and the study reflecting his best effort performed on April 21, 2010, produced "near normal" results. Director's Exhibit 31 at 12. He further indicated the miner's arterial blood oxygen saturation, as Dr. Ajjarapu measured on April 29, 2011, was normal. *Id*. He concluded "[i]nformation from [the miner's] medical records showed that within a reasonable degree of medical certainty, [the miner] did not have [a] disabling pulmonary impairment." *Id*.

829, 846 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order at 13. We therefore affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the September 21, 2011 qualifying blood gas study was outweighed by Dr. Vuskovich's "specific discussion of the medical records and his subsequent clear conclusions regarding the [m]iner's pulmonary status."[10] Decision and Order at 13; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Consequently, we affirm the administrative law judge's determination claimant did not establish total disability at 20 C.F.R. §718.204(b)(2). *Id*. We therefore further affirm the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. *See* 20 C.F.R. §718.305(b)(1)(iii), (c)(2); Decision and Order at 14.

II. Death Due to Pneumoconiosis

In a survivor's claim where no statutory presumptions are invoked, claimant must establish the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(b)(1), (2). Death is considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of the miner's death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003) (pneumoconiosis hastens the miner's death if it does so "through a specifically defined process that reduces the miner's life by an estimable time."). In this case, the administrative law judge determined claimant established the miner had pneumoconiosis arising out of coal mine employment but did not establish pneumoconiosis was a substantially contributing cause of the miner's death. Decision and Order at 14-15.

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[10] Dr. Vuskovich did not review the qualifying blood gas study dated September 21, 2011. Director's Exhibits 27 at 7, 31 at 2-3. He observed, however, that the blood gas study Dr. Ajjarapu administered on April 29, 2011 showed normal oxygen saturation and that the findings on examination of the miner's cardiopulmonary system at Grace Community Health Center on January 30, 2014 were normal. Director's Exhibit 31 at 12.

Relevant to 20 C.F.R. §718.205(b), the administrative law judge considered the death certificate and Dr. Vuskovich's medical opinion. Decision and Order at 15. The death certificate Dr. Ratliff signed listed "accidental death" as the cause of the miner's death. Director's Exhibit 8. Dr. Vuskovich stated the miner's death was caused by bleeding from his ruptured spleen, which deprived his organs of the oxygen necessary to sustain life.[11] Director's Exhibit 31 at 10-12.

The administrative law judge acted within his discretion in finding the miner's death certificate was insufficient, in and of itself, to establish pneumoconiosis was a substantially contributing cause of the miner's death because Dr. Ratliff did not identify any contributing causes of death. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 (4th Cir. 2000); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order at 15; Director's Exhibit 8. The administrative law judge also rationally found the opinion of Dr. Vuskovich that pneumoconiosis played no role in the miner's death was well-reasoned and well-documented, as he conducted a full review of the medical evidence of record and thoroughly explained his finding that the miner "bled to death." Director's Exhibit 31 at 12; *see Martin*, 400 F.3d at 306; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 15. Because the administrative law judge reasonably determined there is no evidence that pneumoconiosis was a substantially contributing cause of the miner's death, we affirm his determination claimant did not establish the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. *See Williams*, 338 F.3d at 518; Decision and Order at 15. As claimant failed to invoke the Section 411(c)(4) presumption and did not establish the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trumbo v. Director, OWCP*, 17 BLR 1-85, 1-87-88 (1993).

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[11] Dr. Vuskovich reviewed the records of both of the miner's hospitalizations and reported the following: the attending physician initially diagnosed heavy contusions on the miner's face, a spleen laceration, and a fractured rib; the miner was discharged on February 3, 2014, with notes indicating his ruptured spleen would be managed non-operatively and the miner was given a prescription for anti-coagulation medications. Director's Exhibit 31-8. At a deposition taken on October 6, 2014, claimant testified the miner collapsed on February 5, 2014, and was taken by ambulance to ARH-Hazard Hospital. Director's Exhibit 13 at 4-5. Dr. Vuskovich observed that the attending surgeon noted the miner's spleen was actively bleeding, with two liters of free blood in his abdominal cavity and, therefore, he removed it on February 6, 2014. Director's Exhibit 31 at 9. Dr. Vuskovich concluded the miner "bled to death" as a result of the hemorrhagic shock his ruptured spleen caused. *Id.* at 12.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge