U.S. Department of Labor

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

BRB No. 19-0064 BLA

DOROTHY E. NOVAK (Widow of CHARLES NOVAK) Claimant-Respondent v. HELEN MINING COMPANY and VALLEY CAMP COAL COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/17/2019 DECISION and ORDER

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

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Andrea Berg and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, 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.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05528) of Administrative Law Judge Drew A. Swank on a claim filed pursuant to 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 May 27, 2016.

After crediting the miner with 25.33 years of coal mine employment,[1] at least fifteen of which were underground, the administrative law judge found that he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the constitutionality of the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding total

[1] The record reflects the miner's last coal mine employment occurred in Pennsylvania. Director's Exhibit 2. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if claimant establishes the miner had at least fifteen years of underground coal mine employment or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(*l*) of the Act also provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his 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). We affirm the administrative law judge's finding that claimant cannot benefit from this provision, as there is no indication in the record that the miner was awarded benefits during his lifetime. Decision and Order at 9 n.11.

disability and that claimant invoked the Section 411(c)(4) presumption. Finally, it argues he erred in finding the presumption unrebutted.[3] Claimant[4] responds in support of the award of benefits. The Director, Office of Worker's Compensation Programs (the Director), has filed a limited response in support of the applicability of the Section 411(c)(4) presumption.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and 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, 362 (1965).

Constitutional Challenge

Citing *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), employer argues that the Affordable Care Act (ACA), which contains provisions reviving the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 26. The United States Supreme Court, however, has upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the District Court has stayed its order in *Texas* v. *United States*. Consequently, the Board declines to hold this case in abeyance pending resolution of the legal challenge to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of 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 consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least fifteen years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Claimant is the widow of the miner, who died on January 23, 2016. Director's Exhibit 7.

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).

The administrative law judge considered a pulmonary function study and a blood gas study, each conducted on May 22, 2015. Both produced non-qualifying values.[5] Decision and Order at 11-12; Employer's Exhibit 9. He therefore found that disability was not established at 20 C.F.R. §718.204(b)(2)(i), (ii). *Id.* Moreover, because there was no evidence of cor pulmonale with right-sided congestive heart failure, he found claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii). *Id.* at 12-13.

The administrative law judge next considered the medical opinions of Drs. Perper, Spagnolo, and Begley. 20 C.F.R. §718.204(b)(2)(iv). Although Dr. Perper did not address whether the miner had a totally disabling pulmonary impairment, Claimant's Exhibit 1, Drs. Begley and Spagnolo opined the miner was not totally disabled from a pulmonary standpoint. Employer's Exhibits 7, 10. The administrative law judge found the opinions of Drs. Begley and Spagnolo well-documented and well-reasoned. Decision and Order at 14-15. He therefore found the medical opinions did not establish total disability. *Id.*

Finally, the administrative law judge considered lay testimony.[6] Anthony Novak (Mr. Novak), the miner's son, testified the miner's breathing "got worse and worse" from the time he left coal mine employment in 1993 until his death in 2016. Hearing Transcript at 17-18, 21. Mr. Novak testified the miner's family physician, Dr. Barns, provided oxygen to the miner "toward the end of his life" and that "it got to the point that he was on it constantly." *Id.* at 21-22. Mr. Novak characterized the miner's breathing as "very labored" and indicated the miner had difficulty walking from one point to another. *Id.* at 21. The administrative law judge noted the miner's treatment notes from December 11, 2015 indicate that his condition "[was] improved by rest, [was] improved with oxygen, and [was] improved with sitting upright." Decision and Order at 16; Employer's Exhibit 3. Because he found the miner's treatment notes supported Mr. Novak's testimony, the administrative law judge found it credible. *Id.*

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are 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" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The administrative law judge erroneously considered 20 CFR 718.204(d)(2) which applies to cases "filed on or after January 1, 1982, *but prior to June 30, 1982*…." (emphasis added). This case was filed after June 30, 1982.

The administrative law judge found "Mr. Novak's lay testimony regarding the miner's respiratory condition and his use of supplemental oxygen . . . consistent with [the miner's] medical history" and supportive of a finding of total disability. Decision and Order at 16. Noting that pneumoconiosis is a latent and progressive disease, the administrative law judge accorded more weight to Mr. Novak's testimony and the miner's treatment records than to the earlier non-qualifying objective studies. *Id.* He therefore found the evidence established total disability at 20 C.F.R. §718.204(b)(2). *Id.*

Employer argues that because the record contains substantial medical evidence addressing the miner's pulmonary status, the administrative law judge erred in relying solely on Mr. Novak's lay testimony to support a finding of total disability. Employer's Brief at 9. The regulation at 20 C.F.R. 718.305(b)(4)[7] provides when lay testimony may be considered:

> 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 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 Third Circuit has held under an analogous provision 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

[7] We agree with employer that the administrative law judge improperly relied on 20 C.F.R. §718.204(d) when considering the lay testimony. Employer's Brief at 8; Decision and Order at 15. The regulations provide that Section 718.204(d) does not apply when considering the applicability of the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(iii). The Department of Labor explained it promulgated separate lay evidence rules for 20 C.F.R. §718.305 because the rules in 20 C.F.R. §718.204(d) were "incomplete for purposes of implementing the Section 411(c)(4) presumption" in survivors' claims. 77 Fed. Reg. 19,456, 19,461-62 (Mar. 30, 2012). Because we must remand this case for reconsideration of whether claimant can rely upon lay testimony to establish total disability, *see* discussion, *infra*, we instruct the administrative law judge to apply the lay evidence rules at 20 C.F.R. §718.305(b)(4).

or lack thereof." *Koppenhaver v. Director, OWCP*, 864 F.2d 287, 289 (3d Cir. 1988); *see also Cook v. Director, OWCP*, 901 F.2d 33, 36 (4th Cir. 1990) (consideration of lay evidence is available where the medical evidence of record is insufficient to establish total disability); *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). Thus, an administrative law judge can rely upon lay testimony in the case of a deceased miner if the medical evidence neither establishes nor refutes total disability.

Employer contends the administrative law judge erred in not addressing relevant evidence which it alleges refutes a finding of total disability. Employer's Brief at 13-14. We agree. The administrative law judge found the non-qualifying objective studies conducted on May 22, 2015, eight months before the miner's death, were less reliable than the miner's subsequent treatment records. Decision and Order at 16. However, employer accurately notes that Dr. Spagnolo reviewed the miner's more recent treatment records, as well as the autopsy evidence.[8] Employer's Exhibit 12 at 10. Although the administrative law judge noted Dr. Spagnolo testified during a June 5, 2018 deposition that the miner had normal lung function and did not demonstrate evidence of a totally disabling pulmonary or respiratory impairment, the administrative law judge did not address whether this evidence was sufficient to refute a finding of total disability.[9] Decision and Order at 14; Employer's Exhibit 12 at 29-32, 40-45. Because this evidence, if credited, could refute a finding of total disability, precluding reliance upon Mr. Novak's testimony to establish total disability, we vacate the administrative law judge's finding of total disability. 20 C.F.R. §718.204(b)(2).

On remand, if the administrative law judge again determines there is no medical or other relevant evidence which refutes a finding of total disability at the time of the miner's

[8] Dr. Spagnolo prepared an April 21, 2018 report, in which he reviewed the miner's treatment records from March 28, 2014 to December 30, 2015 (addressing the miner's treatment for metastatic prostate cancer). Employer's Exhibit 7. During his June 5, 2018 deposition, Dr. Spagnolo again indicated he reviewed records from the miner's last hospitalizations in December of 2015. Employer's Exhibit 12 at 16. Dr. Spagnolo also reviewed Dr. Zezulak's autopsy report, and the autopsy reports of Dr. Perper, Oesterling, and Swedarsky. *Id.* at 23. Although Dr. Spagnolo found the autopsy evidence revealed a "few changes," he opined they "were not disabling and did not contribute to [the miner's] death." *Id.* at 25.

[9] As previously noted, the administrative law judge found Dr. Spagnolo's opinion well-reasoned. Decision and Order at 14-15.

death, he may consider Mr. Novak's lay testimony.[10] However, he must consider Mr. Novak's testimony in light of the entirety of the miner's treatment records and the other evidence of record.[11] He must consider all relevant evidence and adequately explain his findings as required by the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 1-165 (1989).

Because we have vacated the administrative law judge's finding of total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption.[12] 30 U.S.C. §921(c)(4). If the administrative law judge finds the evidence does not establish total disability, he must consider whether the evidence establishes that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b).

[10] Employer argues that because Mr. Novak is claimant's son, the administrative law judge is prohibited from relying on his "self-serving testimony" to establish total disability. Employer's Brief at 11. We disagree. Because Mr. Novak is not eligible for benefits, including augmented benefits, the administrative law judge is not prohibited from basing a finding of total disability on his testimony. 20 C.F.R. §718.305(b)(4).

[11] The administrative law judge did not address the results of objective test results contained in the miner's treatment records, including a non-qualifying June 22, 2015 pulmonary function study and a qualifying March 22, 2014 blood gas study. Employer's Exhibit 3.

[12] We decline to address, at this time, employer's challenge to the administrative law judge's determination that it failed to rebut the Section 411(c)(4) presumption. On remand, should the administrative law judge again find that claimant has invoked the Section 411(c)(4) presumption, employer may challenge the administrative law judge's rebuttal findings.

Accordingly, the administrative law judge's Decision and Order Awarding 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge