U.S. Department of Labor

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

BRB No. 15-0201 BLA

SHARON L. FLEMING (Widow of PAUL FLEMING) Claimant-Respondent v. CLINCHFIELD COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/26/2016 DECISION and ORDER

Appeal of the Decision and Order – Award of Survivor Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Survivor Benefits (2011-BLA-5491) of Administrative Law Judge Richard T. Stansell-Gamm, rendered on a claim filed on March 30, 2010, pursuant to provisions of the Black Lung Benefits Act, 30

U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge acknowledged the parties' stipulation to thirty-seven years of coal mine employment, considered the relevant evidence, and found that the miner worked for thirty-nine years underground, or in conditions substantially similar to those in an underground mine. The administrative law judge also determined that claimant established that the miner was totally disabled at 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4).[2] 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

On rebuttal, the administrative law judge determined that, because employer stipulated that the miner had clinical pneumoconiosis, it was unable to affirmatively disprove the presumed existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(2)(i). The administrative law judge further concluded that employer was unable to rebut the presumption that "no part of the miner's death was caused by pneumoconiosis" pursuant to 20 C.F.R. §718.305(d)(2)(ii). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in determining that claimant established that the miner was totally disabled at 20 C.F.R. §718.204(b)(2)(iv) and, consequently, erred in finding that claimant invoked the rebuttable presumption at Section 411(c)(4). Employer further asserts that the administrative law judge erred in determining that it did not rebut the presumption that the miner's death was due to pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, have not filed substantive response briefs in this appeal.[3]

[1] The miner filed a claim seeking black lung benefits on November 14, 1997. This claim was finally denied by Administrative Law Judge Michael P. Lesniak on August 16, 1999. Claimant is the widow of the miner, who died on January 17, 2010. Director's Exhibit 12.

[2] 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 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), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established that the miner had thirty-nine years of qualifying coal mine

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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 Presumption – Total Disability at 20 C.F.R. §718.204(b)(2)

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents 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 disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; 3) the presence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling, notwithstanding the failure to establish total disability under 20 C.F.R. §718.204(b)(2)(i), (ii) or (iii). 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 Lane v. Union Carbide Corp.*, 105 F.3d 166, 171, 21 BLR 2-34, 2-42 (4th Cir. 1997); *Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85, 1-87 (1987).

The administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), because the pulmonary function studies and blood gas studies produced non-qualifying values. Decision and Order at 7-8. The administrative law judge also determined that claimant could not establish total disability

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employment and that the miner had clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

under 20 C.F.R. §718.204(b)(2)(iii) due to the absence of evidence of cor pulmonale with right-sided congestive heart failure. *Id*. at 7.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the medical opinion of Dr. Bailey, who concluded that the miner had a totally disabling respiratory impairment at the time of his death, and the contrary opinions of Drs. Bush and Fino. The administrative law judge initially indicated that he would determine the probative value of each opinion by examining the underlying documentation, the physician's reasoning, and the nature of the relationship between the physician and the miner. Decision and Order at 30-31. The administrative law judge determined that Dr. Bailey "reached a documented, reasoned, and exceptionally probative determination that prior to his death [the miner] was totally disabled by a pulmonary disease," based on the physician's "extensive familiarity with [the miner's] clinical presentation over the course of years and his status as a treating physician [from May 2006] through January 17, 2010." *Id*. at 31. The administrative law judge gave less weight to Dr. Bush's opinion, that the miner was not totally disabled from a respiratory impairment prior to his death, finding that Dr. Bush's conclusions were speculative and not well-supported by the evidence of record. *Id*. at 32-33. The administrative law judge gave less weight to Dr. Fino's opinion, that the miner did not have a totally disabling respiratory impairment, for the same reasons. *Id*.

Based on these findings, the administrative law judge concluded that Dr. Bailey's medical opinion outweighed the opinions of Drs. Bush and Fino, and was sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 34. After weighing Dr. Bailey's opinion in conjunction with the contrary probative evidence, the administrative law judge determined that claimant satisfied her burden to establish total disability under 20 C.F.R. §718.204(b)(2) by a preponderance of the evidence. *Id*.

Employer argues that the administrative law judge erred in giving dispositive weight to Dr. Bailey's opinion, based on his status as the miner's treating physician, because Dr. Bailey merely recited the miner's health problems, and his diagnosis of a totally disabling respiratory impairment is not supported by the evidence.[5] In addition,

[5] Employer also argues that Dr. Bailey's reliance on evidence of pneumoconiosis on CT scans dated December 31, 2009 and January 12, 2010, diminished the probative weight of his opinion in light of the fact that Dr. Humphreys, the radiologist who interpreted the scans, did not diagnose pneumoconiosis. We reject this allegation because, as employer acknowledges, "since a CT scan is a radiographic study, it[,] like a chest x-ray[,] is not relevant to finding respiratory or pulmonary impairment or disability." Employer's Brief at 6.

employer contends that the administrative law judge erred in discrediting Dr. Fino's opinion because he relied on outdated objective studies.

Contrary to employer's assertions, the administrative law judge's decision to accord greatest weight to Dr. Bailey's diagnosis of a totally disabling respiratory impairment, based on his status as a treating physician, was rational and supported by substantial evidence. The regulation at 20 C.F.R. §718.104(d) provides, in relevant part:

> In weighing the medical evidence of record relevant to whether the miner... is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician: (1) nature of relationship…; (2) duration of relationship...; (3) frequency of treatment…; and (4) extent of treatment…."

20 C.F.R. §718.104(d)(1)-(4). In this case, the administrative law judge addressed these factors and correctly determined that Dr. Bailey, a Board-certified family physician, had treated the miner from May 2006 until his death on January 17, 2010. Decision and Order at 22; Director's Exhibits 13-16. The administrative law judge also accurately observed that the miner visited Dr. Bailey on a regular basis and that the physician consistently diagnosed shortness of breath or diminished breath sounds or wheezing from 2007 through the miner's death in January 2010. *Id*. In addition, the administrative law judge noted that Dr. Bailey reported that the miner was a nonsmoker who suffered from chronic obstructive pulmonary disease/emphysema, and that he prescribed supplemental oxygen for the miner beginning on December 29, 2009, following a hospitalization for treatment of shortness of breath and chest pain. *Id*. The administrative law judge further observed that, in a report prepared after the miner's death, Dr. Bailey concluded that the miner had a totally disabling respiratory impairment. Decision and Order at 23; Director's Exhibit 16. Based on the administrative law judge's consideration of the factors set forth in 20 C.F.R. §718.104(d), he acted within his discretion in finding that Dr. Bailey provided a reasoned and documented opinion on the issue of total disability that was entitled to great probative weight.[6] *See Harman Mining Co. v. Director, OWCP*

[6] Contrary to employer's contention, a physician's opinion need not be based on qualifying objective studies in order to be credited as reasoned. If adequately explained, a physician may reasonably conclude that a miner's respiratory condition prevented him from performing his previous coal mine employment, whether the results of the objective studies are qualifying or non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000).

[*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Consolidation Coal Co. v. Held*, 314 F.3d 184, 188, 22 BLR 2-564, 2-571-72 (4th Cir. 2002); 20 C.F.R. §718.104(d).

The administrative law judge's discrediting of Dr. Fino's contrary opinion is also rational and supported by substantial evidence. In his report, Dr. Fino, relying on objective testing conducted in 1996, 1998, 2001, and 2002, determined that there was no evidence that the miner had a respiratory impairment because "his lung functions were all normal, his blood gases with exertion were normal, and his lung volumes and diffusing capacities were normal." Employer's Exhibit 4. At his deposition, Dr. Fino agreed that the miner "had respiratory failure secondary to pneumonia" but indicated that it was not progressive and "was actually improving." Employer's Exhibit 5 at 16. The administrative law judge permissibly found that Dr. Fino's opinion was entitled to less weight because it was based on pulmonary function studies, blood gas studies, and diffusion capacity evaluations that were performed at least seven years prior to the miner's death, which would not have reflected an accurate portrayal of the miner's lung function in the last months of his life, and was speculative concerning whether the miner had a totally disabling respiratory impairment at the time of his death.[7] *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); Decision and Order at 33. Consequently, we affirm the administrative law judge's finding that claimant established that the miner was totally disabled at 20 C.F.R. §718.204(b)(2).[8] Therefore, we also affirm the administrative law judge's conclusion that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. 921(c)(4), as implemented by 20 C.F.R 718.305(b).

[7] Because the administrative law judge provided a valid reason for giving less weight to Dr. Fino's opinion, we need not address employer's additional arguments concerning the administrative law judge's weighing of this opinion, including employer's contention that the administrative law judge erroneously relied on his own expertise to find that the December 29, 2009 ventilation perfusion lung scan established that the miner had an obstructive impairment, contrary to Dr. Fino's diagnoses. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

[8] We affirm, as unchallenged on appeal, the administrative law judge's determination that Dr. Bush's opinion was entitled to little weight on the issue of total disability. *Skrack*, 6 BLR at 1-711.

II. Rebuttal of the Presumption – 20 C.F.R. §718.305(d)(2)(ii)

In order to rebut the presumption that the miner's death was due to pneumoconiosis, employer must affirmatively prove that the miner did not have legal pneumoconiosis[9] and clinical pneumoconiosis,[10] or establish that "no part of the miner's death was caused by pneumoconiosis, as defined in § 718.201."[11] 20 C.F.R. §718.305(d)(2); *see Copley v. Buffalo Mining Co*., 25 BLR 1-81, 1-89 (2012). In evaluating whether employer rebutted the presumption, the administrative law judge weighed the death certificate and the medical opinions of Drs. Bailey, Bush and Fino. The administrative law judge gave less weight to Dr. Porter's statement on the death certificate that "coal workers' pneumoconiosis" contributed to his death, as he did not provide any support for this conclusion.[12] Director's Exhibit 12; *see* Decision and Order

[9] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[10] Clinical pneumoconiosis is defined as:

> [T]hose 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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[11] The administrative law judge found that, because the parties stipulated at the hearing that the miner had clinical pneumoconiosis, employer is unable to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i). Decision and Order at 34. Employer has not challenged this determination and it is, therefore, affirmed. *See Skrack*, 6 BLR at 1-711.

[12] On the death certificate, Dr. Porter identified the immediate cause of death as "right frontotemporoparietal subdural hematoma," and indicated that coal workers' pneumoconiosis was a significant condition contributing to death. Director's Exhibit 12. In Dr. Bailey's summary of the miner's final hospitalization, he reported that the miner's

at 35. The administrative law judge also gave less weight to Dr. Bailey's opinion, that pneumoconiosis was a contributing cause of death, finding that it was based on radiological evidence that was either negative or inconclusive for the presence of pneumoconiosis. Decision and Order at 35. Further, the administrative law judge gave less weight to the contrary opinions of Drs. Bush and Fino, that the miner's death was not due to pneumoconiosis, because they relied on a pathology finding of mild pneumoconiosis to exclude death causation, which is in contrast to the administrative law judge's determination that the pathology evidence was inconclusive as to whether there was mild or moderate pneumoconiosis.[13] *Id*. at 36-37.

Employer argues that the administrative law judge did not adequately explain why he gave less weight to the opinions of Drs. Bush and Fino. Employer states that "[e]ven if the degree of pneumoconiosis is inconclusive between mild and moderate, Dr. Bush's assumption the miner had mild pneumoconiosis, is irrelevant in this case, because the degree of pneumoconiosis had nothing to do with the miner's subdural hematoma." Employer's Brief at 9-10. Similarly, employer contends that the administrative law judge erred in discrediting Dr. Fino's opinion, "as the Act and regulations draw no distinctions between levels of simple pneumoconiosis." Employer's Brief at 10. Employer also alleges that the administrative law judge ignored Dr. Fino's testimony that the miner would have died from his head injury whether he had any type of lung disease, including "pathological simple coal workers' pneumoconiosis." Employer's Exhibit 4.

Contrary to employer's contention, the administrative law judge's finding that employer did not rebut the presumption that the miner's death was due to pneumoconiosis, is supported by substantial evidence. The administrative law judge acted within his discretion in according little weight to Dr. Bush's opinion on death causation because he relied on his conclusion that the miner had simple pneumoconiosis that was too mild to have affected his death in any way, which was contrary to the administrative law judge's finding that the pathology evidence is inconclusive as to whether the miner's pneumoconiosis was mild or moderate. *See Looney*, 678 F.3d at

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subdural hematoma resulted from the severe head injury that he suffered in a fall during this hospitalization. Director's Exhibit 13.

[13] The administrative law judge noted that when Dr. Bechtel, a Board-certified pathologist who performed an autopsy of the miner's chest, reviewed the same tissue slides, he found moderate anthracosis. Decision and Order at 32. The administrative law judge indicated that, because Drs. Bechtel and Bush are both well-qualified as Board-certified pathologists, their assessments are equally probative. *Id*. He determined, therefore, that the evidence is inconclusive concerning the amount of the miner's lung tissue that was destroyed by coal workers' pneumoconiosis. *Id*.

316-17, 25 BLR at 2-133; Decision and Order at 36. Further, the administrative law judge rationally determined that Dr. Fino did not adequately explain why any presumed respiratory impairment could not have been a contributing factor to the miner's death, when he did not die immediately after suffering the severe brain injury, but rather "continued to breath[e] after extubation which raises the issue of whether the presence of simple clinical pneumoconiosis in his lungs shorten[ed] the duration his life once he was removed from the ventilator."[14] Decision and Order at 37; *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). Therefore, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(ii), and further affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order – Award of Survivor Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[14] As the administrative law judge provided a valid reason for giving less weight to the opinions of Drs. Fino and Bush, we need not address employer's additional arguments concerning the administrative law judge's weighing of their opinions on the issue of death causation. *See Kozele*, 6 BLR at 1-382-3 n.4.