U.S. Department of Labor

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

BRB No. 16-0222 BLA

DOROTHY L. MATNEY (Widow of LEONARD F. MATNEY) Claimant-Respondent v. MAVERICK MINING CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/23/2017 DECISION and ORDER

Appeal of the Decision and Order of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (11-BLA-5834) of Administrative Law Judge Paul R. Almanza awarding benefits 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 April 7, 2010.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[1] the administrative law judge credited the miner with 27.2 years of qualifying coal mine employment,[2] and found that the evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant[3] invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in crediting the miner with at least fifteen years of qualifying coal mine employment. Employer also argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer, therefore, argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding

[1] If a claimant establishes that a miner had fifteen or more years of underground or substantially similar coal mine employment and establishes that he had a totally disabling respiratory or pulmonary impairment, Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), also provides that a survivor is automatically entitled to benefits if the miner was determined to be eligible to receive benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's lifetime claim for benefits was denied. Director's Exhibit 2.

[2] The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibit 4. Accordingly, the Board will apply the law 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).

[3] Claimant is the surviving spouse of the miner, who died on February 2, 2007. Director's Exhibit 7.

that employer did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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. 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).

Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in crediting the miner with at least fifteen years of qualifying coal mine employment. Employer also contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer, therefore, argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

Length of Coal Mine Employment

Employer initially contends that the administrative law judge erred in crediting the miner with at least fifteen years of coal mine employment. Claimant bears the burden of proof to establish the number of years the miner actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (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 determination if it is based on a reasonable method and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

The administrative law judge found that the miner's Social Security records were the most credible evidence regarding the length of his coal mine employment.[4] Decision and Order at 4. Based upon his review of those records, the administrative law judge

[4] The administrative law judge found that claimant's testimony and the miner's employment history that was submitted by claimant were not as detailed as the miner's Social Security records. Decision and Order at 4.

credited the miner with 27.2 years of coal mine employment from 1948 to 1983.[5] *Id.* at 4-7.

Employer argues that the administrative law judge erred in crediting the miner with 22.5 years of coal mine employment from 1948 to 1977. For the years 1948 through 1977, relying on the miner's Social Security records, the administrative law judge identified the number of quarters in each year in which the miner earned at least $50.00 from coal mine employment, and credited the miner with a total of ninety quarters, or 22.5 years of employment, for this period. Decision and Order at 5-6. The Board has held that this is a reasonable method of computation for coal mine employment prior to 1978. *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984). Although employer points out that the miner's income from coal mine employment varied from quarter to quarter, Employer's Brief at 11, employer does not challenge the administrative law judge's determination that the miner earned at least $50.00 for each quarter that he credited.[6] We, therefore, affirm the administrative law judge's finding that claimant established that the miner had 22.5 years of qualifying coal mine employment from 1948 to 1977.

In light of our affirmance of the administrative law judge's finding that the miner established at least fifteen years of qualifying coal mine employment from 1948 to 1977, we need not address employer's challenges to the administrative law judge's determination that the miner was entitled to an additional 4.72 years of qualifying coal

[5] The administrative law judge found that the miner "had 27.2 years of underground coal mine or its equivalent." Decision and Order at 9. Although employer challenges the length of the miner's coal mine employment, employer does not challenge the administrative law judge's determination that all of the miner's coal mine employment constituted "qualifying" coal mine employment for the purpose of invoking the Section 411(c)(4) presumption. This aspect of the administrative law judge's finding is, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Employer also contends that the administrative law judge erred in not taking into account the fact that the miner engaged in other employment during the time that he was credited with coal mine employment from 1948 to 1977. Employer's Brief at 11. Employer, however, cites only one instance where this occurred, the last quarter of 1961. *Id.* The administrative law judge's error, if any, in crediting the miner with 0.25 year of coal mine employment in 1961 is harmless, as it would not affect his determination that the miner had at least fifteen years of qualifying coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

mine employment after 1977. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Total Disability

Employer next contends that the administrative law judge erred in finding that claimant established that the miner had a totally disabling respiratory or pulmonary impairment. Employer specifically argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7]

The administrative law judge considered the medical opinions of Drs. Sutherland and Tuteur. Dr. Sutherland, the miner's treating physician from 1982 to 2007, noted that he treated the miner for recurrent lung difficulties with infections, and shortness of breath with dyspnea. Director's Exhibit 8. After noting that the miner suffered from restrictive and obstructive lung disease for multiple years, Dr. Sutherland observed that the miner's "condition continued to deteriorate with shortness of breath and dyspnea even on simple conversation." Director's Exhibit 9. Dr. Sutherland also noted that the miner could not perform even simple activities around the house without severe shortness of breath. *Id.* Dr. Sutherland, therefore, opined that the miner was totally and permanently disabled due to pneumoconiosis. *Id.*

Dr. Tuteur noted that the miner "continued to hunt and walk regularly." Employer's Exhibit 4. However, in the absence of any pulmonary function data, Dr. Tuteur acknowledged that "comment regarding the presence or absence of impairment of pulmonary function cannot be made." *Id.* Dr. Tuteur, however, opined that "[c]ertainly there was no disability secondary to any pulmonary condition during life." *Id.*

In addressing the conflicting medical evidence, the administrative law judge explained why he found Dr. Sutherland's opinion more persuasive than that of Dr. Tuteur:

> First, while I acknowledge that Dr. Tuteur has superior credentials as a board-certified pulmonologist while Dr. Sutherland is a family practitioner,

[7] The administrative law judge found that the record does not contain any pulmonary function studies or arterial blood gas studies. Decision and Order at 10. The administrative law judge further found that there is no evidence of cor pulmonale with right-sided congestive heart failure. *Id.* at 11. The administrative law judge, therefore, found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

> Dr. Sutherland had significant personal knowledge and experience with the [m]iner during his lifetime as his treating physician over twenty-five years. This personal knowledge is especially valuable where, as here, the record lacks objective testing such as PFTs or ABGs but contains significant evidence of observable symptoms such as the [m]iner's shortness of breath or his inability to carry on conversation or perform simple tasks around the house. Second, Dr. Sutherland's opinion is more well documented, in that it more closely tracks the medical records in this case. Dr. Tuteur's opinion that the [m]iner continued to hunt and walk regularly prior to his death is not well documented. Although medical records dating to 2002 indicated that the [m]iner was "very physically active," "hunt[ed] all the time," and "d[id] a whole lot of walking," these records were generated almost five years before the [m]iner's death and before the [m]iner's gradual decline in his condition. (EX 3).

Decision and Order at 16-17.

The administrative law judge noted that Dr. Sutherland's opinion was "based on his personal experience and coincides with the lay testimony in this case and the [m]iner's documented history of breathing problems." Decision and Order at 17. The administrative law judge, therefore, found that the medical opinion evidence established that, prior to his death, the miner suffered from a pulmonary impairment that would have prevented him from performing his usual coal mine work as a motorman. *Id.*

Employer contends that the administrative law judge erred in crediting Dr. Sutherland's opinion that the miner suffered from a totally disabling pulmonary impairment. Employer's Brief at 15-17. Specifically, employer argues that the administrative law judge erred in relying upon Dr. Sutherland's status as the miner's treating physician. Employer also contends that Dr. Sutherland's assessment was improperly based upon his consideration of the miner's symptoms only. We disagree.

Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998). In this instance, the administrative law judge did not mechanically credit Dr. Sutherland's opinion over that of Dr. Tuteur because Dr. Sutherland was the miner's treating physician. Rather, the administrative law judge accepted Dr. Sutherland's opinion because, in the absence of any objective testing available for review, the administrative law judge determined that Dr. Sutherland was in the best position to assess the extent of the miner's pulmonary impairment. The

administrative law judge noted that, unlike Dr. Tuteur, Dr. Sutherland was able to observe the gradual, progressive deterioration of the miner's pulmonary function, to the point that the physician observed that the miner became short of breath and dyspneic "even on simple conversation."[8] Decision and Order at 16; Director's Exhibit 9. Moreover, the administrative law judge determined that Dr. Sutherland went beyond a mere notation of the miner's shortness of breath, and opined that the miner's respiratory impairment impacted his ability to speak, and to perform simple tasks around the house.[9] Thus, contrary to employer's contention, Dr. Sutherland's opinion was not founded upon a mere symptom.

The administrative law judge accorded less weight to Dr. Tuteur's opinion because he found that the doctor's reliance on the fact that the miner continued to hunt and walk regularly prior to his death was not well documented. Decision and Order at 16. Because employer does not challenge this determination, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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[8] The administrative law judge inferred that Dr. Sutherland actually observed the miner becoming short of breath when engaging in simple conversation, rather than relying upon the miner's recitation of his symptoms. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Because the administrative law judge's inference is reasonable, we affirm his determination that Dr. Sutherland observed claimant become short of breath when engaging in conversation.

[9] Employer asserts that the administrative law judge erred in finding that the miner's usual coal mine work as a motorman involved "heavy work." Employer's Brief at 13. We disagree. The administrative law judge noted that although the miner was primarily a motorman, his duties also included the loading of coal and the setting of roof bolts. Decision and Order at 7; Hearing Transcript at 13. We, therefore, affirm the administrative law judge's characterization of the miner's usual coal mine work as "heavy." Moreover, we note that any mischaracterization by the administrative law judge of the exertional requirements of the miner's usual coal mine work in this case would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Dr. Sutherland's opinion that the miner was totally disabled from a pulmonary standpoint was based upon his observation that the miner could not engage in a conversation without becoming short of breath and was incapable of doing work around his house . Employer has not explained how a miner with this degree of impairment would be capable of performing any type of coal mine work.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Sutherland's opinion was more persuasive than that of Dr. Tuteur. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10]

In light of our affirmance of the administrative law judge's findings that claimant established that the miner had over fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to rebut the presumption by establishing both that the miner had neither legal nor clinical pneumoconiosis,[11] 20

[10] Employer argues that the administrative law judge erred in not considering Dr. Oesterling's opinion pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer's Brief at 14. We disagree. Based upon his review of the autopsy slides, Dr. Oesterling opined that he "would not anticipate that [the miner] experienced significant respiratory distress and/or disability due to coal workers' pneumoconiosis." Director's Exhibit 11 at 4. Dr. Oesterling similarly opined that the mild emphysematous change revealed by the autopsy slides "was not sufficient to have produced significant lifetime respiratory distress and/or disability." *Id.* at 4. However, Dr. Oesterling did not provide any opinion as to whether the miner suffered from a disabling pulmonary or respiratory impairment overall. We note that Dr. Oesterling diagnosed progressive myocardial ischemia but did not comment upon whether it was the cause of a disabling pulmonary or respiratory impairment. *Id.* at 3. Because Dr. Oesterling addressed only whether the miner was totally disabled due to pneumoconiosis and emphysema, his opinion is not relevant to the issue addressed pursuant to 20 C.F.R. §718.204(b)(2)(iv), i.e., whether the miner was totally disabled from a pulmonary or respiratory standpoint, regardless of cause.

[11] 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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as

C.F.R. §718.305(d)(2)(i), or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.

The administrative law judge found that the evidence did not establish that the miner did not suffer from legal pneumoconiosis. The administrative law judge also found that the evidence did not establish that the miner did not suffer from clinical pneumoconiosis. Decision and Order at 20-21. Because employer does not challenge these findings, they are affirmed. *See Skrack*, 6 BLR at 1-711.

In addressing whether employer could establish that "no part" of the miner's death was caused by pneumoconiosis, the administrative law judge considered the opinions of Drs. Tuteur and Oesterling. The administrative law judge discredited Dr. Tuteur's opinion because the doctor relied upon the absence of a respiratory or pulmonary disability during the miner's lifetime to rule out pneumoconiosis as a contributor to his death. Decision and Order at 22; Employer's Exhibit 4. The administrative law judge discounted Dr. Oesterling's opinion because the doctor "did not exclude a respiratory or pulmonary impairment as a contributor to the [m]iner's death." Decision and Order at 22; Director's Exhibit 11. The administrative law judge, therefore, found that employer failed to establish that "no part of the [m]iner's death was due to pneumoconiosis." *Id.* at 22-23.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Tuteur and Oesterling. We disagree. The administrative law judge found that Dr. Tuteur relied "on the absence of a respiratory disability during the [m]iner's lifetime to ground his conclusion that the [m]iner's pneumoconiosis was too mild to have contributed to the miner's death."[12] Decision and Order at 22; Employer's Exhibit 4. The administrative law judge noted that Dr. Tuteur's opinion that the miner

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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." 20 C.F.R. §718.201(a)(1).

[12] After noting that "there was no disability secondary to any pulmonary condition during life," Dr. Tuteur opined that coal workers' pneumoconiosis played no part in the miner's death. Employer's Exhibit 4 at 4.

did not suffer from a totally disabling pulmonary impairment was contrary to his own determination that the evidence established that the miner suffered from a totally disabling pulmonary impairment during his lifetime. Decision and Order at 22. Having found that Dr. Tuteur's basis for excluding pneumoconiosis as a contributor to the miner's death was undermined, the administrative law judge permissibly discredited his opinion. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340. Additionally, because Dr. Oesterling did not address the cause of the miner's death, his opinion does not assist employer in establishing that no part of the miner's death was caused by pneumoconiosis. Director's Exhibit 11. As no other evidence would support a finding to the contrary, we affirm the administrative law judge's determination that employer failed to prove that no part of the miner's death was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(2)(ii).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge