U.S. Department of Labor

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

BRB No. 16-0304 BLA

KATHRYN E. WETZEL (Widow of NELSON WETZEL)	)	
Claimant-Petitioner	)	
v.	)	
HATTER COAL COMPANY	)	DATE ISSUED: 02/16/2017
and	)	
STATE WORKERS' INSURANCE FUND	)	
and	)	
TRAVELERS INDEMNITY COMPANY	)	
Employer/Carriers- Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Antonio D. Michetti (Diehl, Dluge, Michetti & Michetti), Sunbury, Pennsylvania, for claimant.

Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Allentown, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.
PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2014-BLA-05568) of Administrative Law Judge Scott R. Morris, rendered on a survivor's claim filed on May 15, 2013, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited the miner with 21.20 years of underground coal mine employment, and coal mine employment in substantially similar conditions, based on a review of the relevant evidence and the parties' stipulation. The administrative law judge further determined, however, that claimant was not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305, because she did not establish that the miner had a totally disabling respiratory or pulmonary impairment.[2] The administrative law judge also determined that claimant did not establish that the miner had pneumoconiosis under 20 C.F.R. §718.202(a), or that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the evidence she submitted was sufficient to establish that the miner had pneumoconiosis arising out of coal mine employment and that he was totally disabled. Employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.[3]

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[1] Claimant is the widow of the miner, who died on April 3, 2013. Decision and Order at 2; Director's Exhibit 8. The miner filed a claim for federal black lung benefits in 1976, which was denied. Closed LM-1 Claim.

[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 determination that the miner had 21.20 years of qualifying coal mine employment and his finding that claimant did not invoke the irrebuttable presumption of death due to

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 into the Act 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

The administrative law judge determined that claimant could not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii) because the record did not contain any pulmonary function studies or blood gas studies, and there is no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure.[5] Decision and Order at 8. The administrative law judge also considered the hearing testimony in which the miner's son described the miner's breathing difficulties and determined that it was credible on the issue of total disability. *Id.*; Hearing Transcript at 12-19. The administrative law judge next considered the medical opinions of Drs. Hertz and Sen pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 9-11; Director's Exhibits 10, 11; Employer's Exhibit 1. The administrative law judge determined that neither opinion was entitled to weight, as Drs. Hertz and Sen did not indicate whether the miner suffered from a totally disabling respiratory or pulmonary impairment at the time of his death.[6] Decision and Order at 11. The administrative law judge concluded,

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pneumoconiosis at 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

[5] We affirm the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i)-(iii) because they are unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[6] Dr. Hertz reviewed the miner's medical records and opined that his death was unrelated to pneumoconiosis. Director's Exhibit 10; Employer's Exhibit 1. Dr. Sen, the miner's treating physician, submitted a letter in which he stated that "coal workers pneumoconiosis/[chronic obstructive pulmonary disease (COPD)] . . . was a contributing cause in [the miner's] death." Director's Exhibit 11. The record also contains treatment notes from Dr. Sen reflecting diagnoses of pneumoconiosis, COPD, coronary artery disease, and congestive heart failure. Director's Exhibit 9. The treatment notes do not

therefore, that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* In light of the absence of credible medical evidence of total disability, the administrative law judge further found that claimant did not satisfy her burden under 20 C.F.R. §718.204(b)(2). *Id.*

With regard to the administrative law judge's determination that total disability was not established, claimant states, "the claimant's offered testimony of the decedent's son was credible evidence of a totally disabling respiratory or pulmonary impairment[]," which can be construed as an assertion that claimant established total disability at 20 C.F.R. §718.204(d)(3) by lay testimony. Claimant's Brief at [2] (unpaginated). Because the Board is not empowered to engage in de novo proceedings or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). General assertions of entitlement or the identification of evidence that supports entitlement are insufficient to invoke the Board's review. *See* 20 C.F.R. §802.211(b). In stating that the miner's son's testimony was "credible evidence" of total disability, claimant has not identified any purported error that the administrative law judge made. Claimant's Brief at [2] (unpaginated). Because our authority to review the administrative law judge's consideration of the lay testimony in this case has not been invoked, we affirm his findings with respect to this testimony. *See Sarf*, 10 BLR at 1-120-21.

Moreover, claimant has not raised any allegations of error regarding the administrative law judge's determinations that the medical opinion evidence, and the evidence as whole, were insufficient to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(b)(2). Accordingly, we affirm the administrative law judge's findings and further affirm the administrative law judge's determination that claimant did not invoke the rebuttable presumption at Section 411(c)(4). 20 C.F.R. §718.305(b)(1)(iii); *see Cox*, 791 F.2d at 446, 9 BLR at 2-47-48; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

II. Establishing Entitlement Without A Presumption

In a survivor's claim, where the Sections 411(c)(3) and 411(c)(4) presumptions do not apply, claimant must affirmatively establish, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo*

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reflect an explicit diagnosis of a totally disabling respiratory or pulmonary impairment. *Id*.

v. Reading Anthracite Co., 17 BLR 1-85, 1-87-88 (1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989). Failure to establish any one of the requisite elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

Pursuant to 20 C.F.R. §718.202(a)(1)-(3), the administrative law judge found that claimant did not establish that the miner suffered from pneumoconiosis because she did not submit any x-ray, biopsy, or autopsy evidence, and the referenced presumptions do not apply. Decision and Order at 12. The administrative law judge further determined that the medical opinions of Drs. Hertz and Sen did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id.* at 13. The administrative law judge noted Dr. Hertz's conclusion that the miner's medical records did not contain sufficient evidence for a diagnosis of pneumoconiosis. *Id.*; Director's Exhibit 10; Employer's Exhibit 1. The administrative law judge gave no weight to the diagnoses of clinical pneumoconiosis[7] that appear in Dr. Sen's treatment records, and the miner's hospital records, because there is no accompanying objective evidence to support them. Decision and Order at 13; Director's Exhibits 9, 11. The administrative law judge discredited Dr. Sen's diagnosis of legal pneumoconiosis,[8] in the form of chronic obstructive pulmonary disease (COPD), because he did not explain "how he came to the conclusion that [the m]iner's COPD was associated with his coal mine employment" and did not discuss the role of the miner's twenty pack-year smoking history. Decision and Order at 13. In light of these findings, the administrative law judge concluded that claimant did not establish

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[7] Clinical pneumoconiosis consists of "those 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." 20 C.F.R. §718.201(a)(1).

[8] 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). The regulation specifies that "a disease 'arising out of coal mine employment' is any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

that the miner suffered from pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. He further determined, "based on the evidence as a whole," that claimant failed to prove that the miner had pneumoconiosis. *Id*. at 14.

Regarding the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis, claimant states that the "credible medical opinion of Dr. Sen" was sufficient to establish that the miner had the disease. Claimant's Brief at [2] (unpaginated). As was the case with respect to the administrative law judge's finding on the issue of total disability, claimant has not raised a specific error sufficient to invoke Board review of the administrative law judge's finding as to the existence of pneumoconiosis. Because claimant has not identified any error in the administrative law judge's weighing of the medical opinion evidence, we affirm his determination that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). *See Cox*, 791 F.2d at 446, 9 BLR at 2-47-48; *Sarf*, 10 BLR at 1-120-21. In light of our affirmance of the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis under each subsection of 20 C.F.R. §718.202(a), we further affirm his determination, based on a consideration of all of the evidence, that claimant did not establish the existence of pneumoconiosis. Decision and Order at 14.

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's determination that an award of benefits in this survivor's claim is precluded. *See* 20 C.F.R. §718.202(a); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge