U.S. Department of Labor

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

BRB No. 17-0236 BLA

MAGALENE F. DEEL (Widow of ARNOLD DEEL) Claimant-Petitioner v. ISLAND CREEK COAL COMPANY and HEALTHSMART CASUALTY CLAIMS SOLUTIONS, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/12/2018 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Magalene F. Deel, Vansant, Virginia.

Matthew J. Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel,[2] the Decision and Order Denying Benefits (2012-BLA-05620) of Administrative Law Judge Larry W. Price, 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). This case involves a survivor's claim filed on January 7, 2013.

After crediting the miner with 35.24 years of underground coal mine employment the administrative law judge found that because there is no evidence of complicated pneumoconiosis in the record, claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Because the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge also found that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012).

[1] Claimant is the widow of the miner, who died on May 3, 2011. Director's Exhibit 9. The miner filed a claim for benefits on April 7, 1997. The district director denied the miner's claim on April 14, 1998, following an informal conference, and the miner took no further action. Director's Exhibit 1. Accordingly, claimant is not entitled to benefits under Section 422(*l*) of the Act, which provides that a survivor of a miner 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. *See* 30 U.S.C. §932(*l*).

[2] Cindy Viers, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Viers is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Turning to whether claimant could affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge found that the medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that, even assuming the existence of pneumoconiosis, the evidence did not establish that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not 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 below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are 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).

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

The administrative law judge accurately noted that the record contains no evidence of complicated pneumoconiosis. Decision and Order at 11. We therefore affirm the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. 20 C.F.R. §§718.202(a)(3), 718.304.

Invocation of Section 411(c)(4) Presumption

Having credited the miner with at least fifteen years of qualifying coal mine employment, the administrative law judge next considered whether claimant established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, could invoke the Section 411(c)(4) presumption that the miner's death was due to

[4] The record indicates that the miner's last coal mine employment was in Virginia. Director's Exhibit 4. The Board will therefore 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).

pneumoconiosis. The administrative law judge initially found, correctly, that as all the pulmonary function studies and blood gas studies of record are non-qualifying,[5] claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 5, 12; Employer's Exhibits 9, 10, 11.

Under 20 C.F.R. §718.204(b)(2)(iii), a claimant may establish that a miner was totally disabled by offering medical evidence establishing that the miner suffered from cor pulmonale with right-sided congestive heart failure. Dr. Sutherland, one of the miner's treating physicians, stated that the miner suffered from cor pulmonale.[6] Decision and Order at 6, 12; Director's Exhibit 13. The administrative law judge found, however, that Dr. Sutherland provided no documentation or explanation for his conclusion that the miner had cor pulmonale, and that there was there was nothing in Dr. Sutherland's treatment notes to support his diagnosis. *Id.* Thus, the administrative law judge permissibly discredited Dr. Sutherland's diagnosis of cor pulmonale as unreasoned and undocumented. *See Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *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 (1986) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 12; Director's Exhibit 13. Moreover, the administrative law judge also correctly found that Dr. Sutherland did not diagnose cor pulmonale *with right-sided congestive heart failure*, as required by the regulation, and there is no other evidence of it in record.[7] Decision and Order at 12; Director's Exhibits 9, 11, 12; Employer's Exhibits 1, 2, 3, 6, 7. We therefore affirm the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[5] A "qualifying" pulmonary function study or 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] In a report dated August 8, 2012, Dr. Sutherland stated that the miner's years of coal dust exposure would have caused pulmonary hypertension and that "[the miner's] cause of death, Corpulmonale [*sic*], was a direct result of pneumoconiosis." Director's Exhibit 13.

[7] The death certificate, signed by Dr. Swank, stated that the miner's death was due to coronary artery disease and listed hypertension and hyperlipidemia as other significant conditions contributing to death. Director's Exhibit 9.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Sutherland, Fino,[8] Rosenberg,[9] and Swank, as well as the medical records from Cardiovascular Associates.[10] Decision and Order at 12-13. Only Dr. Sutherland opined that the miner was totally disabled. Decision and Order at 12. In a letter dated August 8, 2012, Dr. Sutherland stated that the miner worked in and around coal mines and suffered from restrictive and obstructive lung disease as a result of his coal mine employment. Director's Exhibit 13. Dr. Sutherland opined that the miner's lung condition would have "prevented him from doing any gainful employment" and that the miner was permanently and totally disabled. *Id*. Dr. Sutherland stated that this opinion was based on his many years of treating the miner.[11] *Id*.

The administrative law judge correctly noted that Dr. Sutherland provided no explanation or documentation, such as pulmonary function studies or blood gas studies, to support his conclusion that the miner was totally disabled. The administrative law judge also found that while Dr. Sutherland was a treating physician, Dr. Sutherland's treatment records do not contain pulmonary function studies, blood gas studies, or other evidence to support his diagnosis of total disability. Decision and Order at 12; Director's Exhibit 12. Therefore, the administrative law judge permissibly found that Dr. Sutherland's opinion is not sufficiently documented or reasoned to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[12] *See Hicks*, 138 F.3d at 536, 21

[8] Based on his review of medical records, Dr. Fino opined that there was no evidence of a disabling lung disease or pulmonary impairment, and that Dr. Sutherland had no valid objective evidence to diagnose cor pulmonale. Decision and Order at 6-7; Employer's Exhibit 6.

[9] Dr. Rosenberg reviewed the medical evidence and opined that the miner had no obstructive or restrictive impairment and, from a pulmonary perspective, was not disabled from performing his previous coal mining duties. Employer's Exhibit 7.

[10] The administrative law judge correctly found that neither Dr. Swank, a treating physician, nor the treatment records from Cardiovascular Associates, provided a diagnosis or opinion that the miner was disabled from a pulmonary or respiratory standpoint. Decision and Order at 13; Director's Exhibit 11; Employer's Exhibits 1, 2.

[11] In his August 8, 2012 letter, Dr. Sutherland stated that his father treated the miner from 1982 through 1986, and that he himself treated the miner from October 1987 until the miner's death. Director's Exhibit 13.

[12] The regulations state that a treating physician's opinion may be accorded controlling weight "[p]rovided that the weight given to the opinion of a miner's treating

BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 12-13; Director's Exhibit 13.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Clark*, 12 BLR at 1-155; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly found that the record contains no credible medical opinion evidence supportive of a finding of a totally disabling respiratory or pulmonary impairment, his finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

Because claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant did not invoke the presumption of death due to pneumoconiosis pursuant to Section 411(c)(4).

Part 718 Entitlement

When, as in this case, the Section 411(c)(3) and 411(c)(4) statutory presumptions do not apply, claimant must affirmatively establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Before any finding of entitlement can be made in a survivor's claim, however, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

Relevant to the existence of pneumoconiosis, the administrative law judge considered eight interpretations of two x-rays dated August 24, 2004 and April 13, 2008, pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 3, 13-14. Dr. Miller, who is dually-qualified as a Board-certified radiologist and a B reader, read the August 24, 2004 x-ray as positive for pneumoconiosis. Director's Exhibit 13. Drs. Smith, Wolfe, and

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physician shall also 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). Because the administrative law judge permissibly found Dr. Sutherland's opinion to be unreasoned, there was no need for the administrative law judge to further analyze Dr. Sutherland's opinion pursuant to 20 C.F.R. §718.104(d).

DePonte, all of whom are also dually-qualified radiologists, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibits 4, 13. Dr. Alexander, a dually-qualified radiologist, read the April 13, 2008 x-ray as positive for pneumoconiosis. Director's Exhibit 13. Drs. Smith, Wolfe, and Miller, also dually-qualified radiologists, read this x-ray as negative for pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibits 5, 14. Noting that all of the physicians providing the x-ray interpretations are equally qualified, the administrative law judge permissibly found that the negative readings of each x-ray outweighed the positive reading and that, therefore, the weight of the x-ray evidence overall is insufficient to carry claimant's burden of proof. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 14. As this finding is supported by substantial evidence, it is affirmed. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge considered the autopsy report of Dr. Dennis, and the opinions of Drs. Oesterling and Caffrey, who reviewed the autopsy report and tissue slides. Dr. Dennis, a Board-certified pathologist, opined that, in addition to emphysematous changes with pulmonary embolization, the miner had simple coal workers' pneumoconiosis.[13] Claimant's Exhibit 1. Dr. Oesterling, a Board-certified pathologist, opined that the changes in the miner's lung do not warrant a diagnosis of coal workers' pneumoconiosis as the changes due to coal dust exposure were too small to constitute macular coal dust disease. Employer's Exhibit 12. Dr. Oesterling further stated, at best, the miner's lungs showed anthracotic cuffing of vascular structures. *Id*. Finally, Dr. Caffrey, who is also a Board-certified pathologist, similarly opined that the necessary findings to make a diagnosis of coal workers' pneumoconiosis were not present. Employer's Exhibit 8. Dr. Caffrey stated that the slides "do show anthracotic pigment but the anthracotic pigment [did] not stimulate the production of reticulin or collage[n], therefore a diagnosis of [coal workers' pneumoconiosis] cannot be made." *Id*.

[13] In his autopsy report, Dr. Dennis provided a "Gross and Microscopic Diagnosis" of: (1) pulmonary congestion and edema bilaterally with pulmonary embolization; (2) emphysema moderate to severe with centrilobular change predominantly spreading out into the periphery with panacinar and panlobular expressions present; and (3) anthracosilicosis simple variety with minimal fibrosis. Dr. Dennis concluded that the patient died as a result of pulmonary pathology primarily emphysematous change with pulmonary embolization, which he found to be prominent. Claimant's Exhibit 1.

Based on his determination that Drs. Oesterling and Caffrey provided more detailed reasoning for their conclusions that the anthracotic pigment in the miner's lungs had not developed into coal workers' pneumoconiosis, the administrative law judge permissibly found that their opinions outweighed the opinion of Dr. Dennis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276; Decision and Order at 15. The administrative law judge further found that, "at the very most," the pathology evidence is in equipoise. Decision and Order at 15. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the preponderance of the autopsy evidence does not establish the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(2). *See Compton*, 211 F.3d at 207-08, 22 BLR at 2-168; Decision and Order at 15.

The administrative law judge further found that the pathology evidence did not establish the existence of legal pneumoconiosis, at 20 C.F.R. §718.202(a)(2). The administrative law judge correctly noted that while Drs. Dennis and Caffrey identified the presence of emphysema in the miner's lungs, neither physician opined that it was related to the miner's coal dust exposure. *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 15. We therefore affirm the administrative law judge's finding that autopsy evidence does not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).[14] *See Compton*, 211 F.3d at 207-08, 22 BLR at 2-168; Decision and Order at 15.

The administrative law judge next considered the medical opinions of Drs. Fino, Sutherland, and Rosenberg, as well as the miner's treatment records from Cardiovascular Associates, pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 15-16. The administrative law judge accurately found that neither Dr. Rosenberg nor the medical records from Cardiovascular Associates diagnosed the existence of clinical or legal pneumoconiosis and, therefore, are not supportive of claimant's burden. Decision and Order at 16; Director's Exhibit 11; Employer's Exhibits 1, 7.

In contrast, Dr. Fino "assumed" that clinical pneumoconiosis was present, based on his review of the medical evidence, and Dr. Sutherland diagnosed pneumoconiosis.[15]

[14] Because there was no evidence of complicated pneumoconiosis and claimant did not invoke the Section 411(c)(4) presumption, the administrative law judge properly found that claimant could not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 15.

[15] The administrative law judge correctly noted that Dr. Sutherland effectively diagnosed legal pneumoconiosis, as he stated that the miner had restrictive and obstructive lung disease due to coal dust exposure. Dr. Sutherland did not specify, however, whether the miner also had clinical pneumoconiosis. Director's Exhibit 13.

Decision and Order at 15-16; Director's Exhibit 12; Employer's Exhibit 6. The administrative law judge correctly noted that Dr. Fino based his conclusion regarding the existence of clinical pneumoconiosis on the positive x-ray readings by Drs. Miller and Alexander. Decision and Order at 16; Employer's Exhibit 6. Finding that Dr. Fino's assumption as to the existence of clinical pneumoconiosis is based on a limited review of the x-ray evidence and is inconsistent with his own finding that the weight of the x-ray evidence is negative, the administrative law judge rationally accorded it no weight. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 16. The administrative law judge also properly found that Dr. Fino's opinion does not support a diagnosis of legal pneumoconiosis as he did not attribute any impairment to coal mine dust exposure. See 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); Decision and Order at 16; Employer's Exhibit 6. Rather, he specifically opined that there was no objective evidence that the miner suffered from any obstructive or restrictive impairment. Employer's Exhibit 6.

Turning to Dr. Sutherland's opinion, the administrative law judge noted that he did not reference any autopsy findings or x-rays to support a diagnosis of clinical pneumoconiosis. Decision and Order at 15-16; Director's Exhibit 13. Similarly, while Dr. Sutherland opined that the miner suffered from restrictive and obstructive lung disease due to coal dust exposure, he did not explain his findings or provide any documentation, such as the results of objective testing, to support his diagnosis of legal pneumoconiosis. Decision and Order at 16; Director's Exhibit 13. Further, Dr. Sutherland's treatment records, which reflect that he had not treated the miner for a respiratory condition since 2003, at least seven years prior to his death, do not document either clinical or legal pneumoconiosis. *Id.* For these reasons, the administrative law judge permissibly found that Dr. Sutherland's opinion is not a reasoned and documented diagnosis of pneumoconiosis. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order at 15-16. Because there is no other medical opinion evidence supportive of a finding of clinical or legal pneumoconiosis, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits in this survivor's claim under 20 C.F.R. Part 718. *Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge