U.S. Department of Labor

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

BRB No. 17-0261 BLA

SARA E. MOSLEY (Widow of HENRY MOSLEY)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 02/28/2018
BLACKWOOD FUEL COMPANY	)	
and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Employer/Carrier-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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Sara E. Mosley, Pennington Gap, Virginia.

Bonnie Hoskins (Hoskins Law Offices PLLC), Lexington, Kentucky, for employer.

Sarah M. Hurley, (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals,[1] without the assistance of counsel,[2] the Decision and Order – Denying Benefits (2013-BLA-05556) of Administrative Law Judge Alan L. Bergstrom, rendered on a survivor's claim filed on May 16, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that the evidence was insufficient to establish that the miner was totally disabled, and thus found that claimant was unable to invoke the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012).[3] Considering claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found that while claimant established that the miner had pneumoconiosis, the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. He denied benefits accordingly.

Claimant generally challenges the administrative law judge's Decision and Order. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, arguing that the case should be remanded for further consideration as to whether claimant established that the miner had a totally disabling respiratory or pulmonary impairment for invocation of the Section 411(c)(4) presumption.

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[1] Claimant is the widow of the miner, Henry Mosley, who filed a claim for benefits that was finally denied on April 12, 2001. Miner's Claim Director's Exhibit 1. As the miner was not determined eligible to receive benefits at the time of his death, claimant is not entitled to derivative survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

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

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis if she 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 also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational and consistent 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).

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

In this survivor's claim, the issue is whether the miner was totally disabled "at the time of his death." 20 C.F.R. §718.305(b)(1)(iii). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies; 2) arterial blood gas studies; 3) medical evidence that the miner had pneumoconiosis and suffered from cor pulmonale with right-sided congestive heart failure; or 4) where total disability cannot be established by the preceding methods, the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition was totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered two pulmonary function studies. He found that a pulmonary function study dated March 9, 2001, was non-qualifying for total disability.[5] Decision and Order at 17; Director's Exhibit 11. The administrative law judge observed that a January 18, 2011 pulmonary function study contained in the miner's treatment records was qualifying for total disability but he gave it no weight because it "was not accompanied by information regarding the miner's height, or level of cooperation or understanding, and did not include flow-volume loops or tracings" as required by [20 C.F.R.] Part 718, Appendix B." Decision and Order at 17 n.8; *see* Director's Exhibit 14.

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

[5] A "qualifying" pulmonary function or blood gas study yields results that are equal to or less than the values specified in the tables found at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

The Director correctly asserts that, contrary to the administrative law judge's finding, a pulmonary function study obtained as part of a miner's treatment or hospitalization need not comply with the quality standards in order to establish total disability. 20 C.F.R. §718.101(b); *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Despite the inapplicability of the specific quality standards, however, an administrative law judge must still determine if the pulmonary function study results are sufficiently reliable to support a finding of total disability. *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Because the administrative law judge did not address whether the January 18, 2011 qualifying pulmonary function study was sufficiently reliable despite failing to satisfy the quality standards, we vacate the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[6] the administrative law judge weighed the medical opinions of Drs. Molony and Castle. Decision and Order at 18-19. In a letter dated November 12, 2012, Dr. Molony indicated that he was the miner's primary treating physician for ten years and that the miner had been diagnosed with coal workers' pneumoconiosis (CWP) around 2003 by Dr. A. Ahmed. Director's Exhibit 9. Dr. Molony stated: "[The miner] had numerous chronic diseases and became totally bedfast before his death on October 18, 2011. I definitely believe that the severe [chronic obstructive pulmonary disease (COPD)] and CWP contributed to his demise." Director's Exhibit 9. Dr. Molony did not specifically state whether the miner had a totally disabling respiratory or pulmonary impairment.

The administrative law judge stated that Dr. Molony's opinion was not credible because the treatment records "do not document clinical or legal pneumoconiosis or provide a rational basis for including 'CWP' in the continuing list of medical conditions." Decision and Order at 19. In contrast, the administrative law judge credited Dr. Castle's opinion that the miner was not totally disabled.[7] *Id.* The administrative law judge

[6] The administrative law judge found that because there are no blood-gas studies in the record, claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 8. Furthermore, he concluded that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence indicating that the miner had cor pulmonale with right-sided congestive heart failure. *Id.* at 17-18.

[7] In a report dated January 14, 2013, Dr. Castle reviewed the miner's treatment records and opined that the pulmonary function study dated March 19, 2001, did not demonstrate a totally disabling respiratory impairment. Employer's Exhibit 1. He indicated that there were no arterial blood gas studies in the records he reviewed. *Id.* Dr. Castle opined that there was no evidence that the miner was totally disabled from a

determined that Dr. Castle's opinion was reasoned and documented and entitled to greater probative weight. *Id*. Thus, the administrative law judge concluded that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

The Director asserts that the administrative law judge erred in rejecting Dr. Molony's opinion relevant to the issue of total disability because the doctor did not credibly explain his diagnosis of pneumoconiosis. Director's Brief at 3. We agree. Under the regulations, the issue of whether the miner suffered from a totally disabling respiratory or pulmonary impairment is a separate inquiry from whether he suffered from pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2). Because a physician may provide a reasoned opinion that the miner was totally disabled distinct from his opinion regarding the existence of pneumoconiosis, we hold that the administrative law judge did not give a rational reason for discrediting Dr. Molony's opinion pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Furthermore, the Director accurately states that the administrative law judge erred in failing to consider whether there is sufficient information in the medical treatment or autopsy reports from which to conclude that the miner was totally disabled.[8] A physician need not phrase his or her opinion in terms of "total disability" in order to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985) ("[i]t is not essential for a physician to state specifically that an individual is totally impaired. . . ."). The Director correctly points out that "[s]tatements or notes set forth in treatment records regarding limits on a miner's activities due to a pulmonary condition may be relevant to a total disability determination even if the records do not use the phrase 'totally disabled' or specifically address the miner's ability to perform his prior coal mine job." Director's Brief at 4, *citing Raines*, 758 F.2d at 1534. A medical opinion may support a finding of total disability if it provides sufficient

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respiratory or pulmonary standpoint. *Id*. In a supplemental report dated January 15, 2016, Dr. Castle reviewed medical records that had been submitted in conjunction with the denied miner's claim, reiterating that the earlier pulmonary function and arterial blood gas studies were normal. Employer's Exhibit 2. He also reviewed the autopsy evidence and opined that there was pathological evidence of simple coal workers' pneumoconiosis, but no evidence of total disability. *Id*.

[8] The Director asserts that "[a]lthough Dr. Molony's opinion is brief, his diagnosis of severe [chronic obstructive pulmonary disease (COPD)] is documented in his treatment notes and borne out by the miner's hospitalization records." Director's Brief at 4.

information from which the administrative law judge can reasonably infer that a miner is, or was, unable to do his last coal mine job.[9] *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142, 19 BLR 2-257, 2-263 (4th Cir. 1995); *Poole*, 897 F.2d at 894, 13 BLR at 2-356; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

In this case, the administrative law judge did not properly address whether Dr. Molony's diagnosis of "severe" COPD was corroborated by the treatment and hospital records.[10] The administrative law judge also did not consider whether Dr. Molony's opinion, along with the treatment and hospital records, establish that the miner had a totally disabling respiratory or pulmonary impairment. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Moreover, the administrative law judge did not address whether the autopsy report by Dr. Oesterling, diagnosing end-stage lung disease, indicates that the miner was totally disabled from a respiratory or pulmonary impairment at the time of death. Employer's Exhibit 5. We therefore vacate the administrative law judge's determination that claimant did not establish that the miner was totally disabled and further vacate his finding that claimant failed to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

[9] It is claimant's burden to establish the exertional requirements of the miner's usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc); *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984). As noted by the administrative law judge, on April 23, 1996, the miner testified that his last job was as a heavy equipment operator for employer. Decision and Order at 4; Director's Exhibit 1. The administrative law judge should consider whether there is sufficient evidence in the record to establish the exertional requirements of the miner's last coal mine job. Following proper procedure for official notice, the administrative law judge also has discretion to rely on the Dictionary of Occupation Titles to determine the physical demands of the job of a heavy equipment operator. *See* 29 C.F.R. §18.45; *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990).

[10] The Director correctly notes that Dr. Molony's treatment notes are replete with diagnoses of COPD and there are multiple hospitalizations where the miner was admitted with "acute exacerbation of COPD," "shortness of breath," "wheezing," "bronchopneumonia" and "acute bronchitis." Director's Exhibit 11.

Death Due to Pneumoconiosis Without Aid of the Section 411(c)(4) Presumption

In the interest of judicial economy, we also consider the administrative law judge's finding pursuant to 20 C.F.R. §718.205(b). For survivors' claims where the Section 411(c)(3)[11] and 411(c)(4) statutory presumptions are not invoked, a claimant must affirmatively establish 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(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to pneumoconiosis if the evidence establishes that it was a substantially contributing cause of death. 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). Failure to establish any one of the required elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

Based on our review of the evidence and the administrative law judge's Decision and Order, we see no error in the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). The only evidence to support claimant's burden of proof is Dr. Molony's statement on the death certificate that the miner's death was caused by pneumoconiosis, and Dr. Molony's statement in his November 12, 2012 letter that severe COPD and CWP contributed to the miner's death.[12] The administrative law judge permissibly assigned little weight to Dr. Molony's statements since the physician did not provide any rationale for how CWP or COPD caused or hastened the miner's death. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); *Clark v. Karst-*

[11] Because there is no evidence in the record that the miner had complicated pneumoconiosis, the administrative law judge correctly found that claimant is unable to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 16 n.7.

[12] The autopsy was performed by Dr. Dennis and included a diagnosis of mild coal workers' pneumoconiosis, but there was no indication of the extent to which pneumoconiosis contributed to the miner's death. Director's Exhibit 8. Dr. Oesterling reviewed the miner's autopsy slides and opined that the degree of pneumoconiosis was too minimal to have contributed to the miner's death. Employer's Exhibit 5. Dr. Oesterling identified an acute infection and end-stage lung disease but he concluded that the miner's multiple lung diseases, including emphysema and chronic interstitial pneumonia, were unrelated to coal dust exposure. *Id*. Dr. Castle also opined that the miner's death was not caused, contributed to, or hastened by pneumoconiosis. Employer's Exhibit 2.

Robbins Coal Co., 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge specifically noted that, "the last records from Dr. Molony are dated March, 2011[,] seven months before [the miner's] death in October, 2011." Decision and Order at 22.

Because the administrative law judge permissibly determined the credibility of the evidence, we affirm the administrative law judge's finding that Dr. Molony's "conclusory statements" on both the death certificate and in his November 12, 2012 letter, do not satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.205(b). *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 321, 25 BLR 2-255, 2-262 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 315-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992).

Remand Instructions

On remand, the administrative law judge must reweigh the pulmonary function study and medical opinion evidence as to whether the miner was totally disabled *at the time of his death* pursuant to 20 C.F.R. §§718.204(b)(2)(i), (iv).[13] The administrative law judge must specifically determine whether Dr. Molony's opinion, considered in conjunction with the miner's treatment and hospital records, is sufficient to satisfy claimant's burden of proof. If the administrative law judge finds that total disability has been established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), aff'd on recon., 9 BLR 1-236 (1987) (en banc).

[13] Dr. Castle's opinion does not constitute contrary evidence of the miner's respiratory disability at the time of death, as Dr. Castle did not consider any objective studies after 2001. Employer's Exhibits 1, 2. Dr. Castle also discussed pulmonary function studies that were not mentioned by the administrative law judge. Employer's Exhibit 2. On remand, the administrative law judge must address whether all of the pulmonary function studies referenced by Dr. Castle in his supplemental report were admitted into the record in the survivor's claim. If so, the administrative law judge must determine the weight to accord that evidence pursuant to 20 C.F.R. §718.204(b)(2)(i). If the studies were not properly admitted into the record, the administrative law judge should reconsider the credibility of Dr. Castle's opinion on remand. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting); Employer's Exhibit 2.

If claimant establishes on remand that the miner was totally disabled, the administrative law judge must make a specific determination as whether the miner had at least fifteen years of qualifying coal mine employment, either in underground mines or working in conditions substantially similar to underground mines.[14] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. If claimant establishes fifteen years of qualifying coal mine employment and that the miner was totally disabled, she will have invoked the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4). If the presumption is invoked, the administrative law judge must consider whether employer has disproved the existence of legal pneumoconiosis[15] and then address whether employer can rebut the Section 411(c)(4) presumption by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(2)(ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698 (4th Cir. 2015). In considering all of the issues on remand, the administrative law judge is directed to explain the bases for all of his findings of fact and conclusions of law in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[16]

[14] We affirm as unchallenged on appeal, the administrative law judge's finding that the miner worked for thirty-three years and eight months in coal mine employment, of which five years were spent underground and the remaining twenty-seven years above-ground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16. On remand, the administrative law judge must determine whether the miner's above-ground coal mine employment was performed at an underground mine site or in conditions that were substantially similar to those of an underground mine. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

[15] The administrative law judge found that claimant established the existence of clinical pneumoconiosis, based on the autopsy evidence. The administrative law judge may therefore conclude that a rebuttal finding pursuant to 20 C.F.R. §718.305(d)(2)(i) is precluded, as employer must disprove both clinical and legal pneumoconiosis. If reached, we instruct the administrative law judge to address the existence of legal pneumoconiosis to the extent that the second rebuttal method requires employer to establish that no part of the miner's respiratory disability was caused by clinical or legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii). *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

[16] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge