U.S. Department of Labor

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

BRB No. 19-0067 BLA

DELMA JEAN STACY (Widow of LONNIE E. STACY) Claimant-Petitioner v. PRESERVATI CONSTRUCTION COMPANY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/18/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Delma Jean Stacy, Oceana, West Virginia.

Andrea L. Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2017-BLA-05469) of Administrative Law Judge Theresa C. Timlin pursuant to 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 October 1, 2014.

The administrative law judge credited the miner with 22.04 years of qualifying coal mine employment but found claimant did not establish the miner was totally disabled and, therefore, could not invoke the Section 411(c)(4) presumption of death due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). Evaluating whether claimant established entitlement to benefits without the benefit of any presumption, the administrative law judge found she established simple clinical pneumoconiosis arising out of coal mine employment, but did not establish the miner's death was due to pneumoconiosis. Thus, she denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order Denying Benefits below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's decision if it is rational, supported by substantial

[1] Claimant is the widow of the miner, who died on January 10, 2012. Director's Exhibit 8. The miner filed two prior claims for benefits that were denied. Director's Exhibits 1, 2. Because the miner was not "determined to be eligible to receive benefits" at the time of his death, claimant is not entitled to automatically receive survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes 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.

evidence, and in accordance with applicable law.[3] 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

To invoke the Section 411(c)(4) presumption, claimant must establish that, in addition to fifteen years of qualifying coal mine employment, the miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(iii). A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). Total disability is established by qualifying pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge accurately found claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), as none of the pulmonary function or blood gas studies were qualifying[4] and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 17-18; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's most recent coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2.

[4] 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. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). The administrative law judge further found both studies did not conform to the quality standards required under the regulations. 20 C.F.R. §§718.103, 718.105; Decision and Order at 17-18.

The administrative law judge also found the medical opinions of Drs. Gaziano[5] and Carlson,[6] the only opinions addressing disability, insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 5-6, 20. She permissibly determined that although both physicians considered whether the miner was disabled as a whole man, neither physician opined whether the miner's respiratory or pulmonary impairment standing alone was sufficient to preclude his usual coal mine employment. 20 C.F.R. §718.204(b)(1); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order at 20. Moreover, as the administrative law judge accurately observed, both physicians simply summarized the pulmonary diagnoses made by others; neither examined the miner or reviewed any objective clinical testing. Decision and Order at 22-23. As it is supported by substantial evidence, we affirm the administrative law judge's finding the medical opinions do not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Thus, we further affirm the administrative law judge's finding that the weight of the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2). *See Compton*, 211 F.3d at 212; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 20.

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[5] Dr. Gaziano, as Chairman of the West Virginia Workers' Compensation Commission Interdisciplinary Examining Board (IEB), prepared a report relaying the findings of the miner's functional capacity evaluation conducted in conjunction with his application for state disability benefits. Director's Exhibit 12. He noted in 2004 the IEB determined the miner had a "45% whole person impairment," which included a 20% impairment for "occupational pneumoconiosis." *Id.* Considering all of the miner's injuries and impairments, the IEB concluded the miner could perform sedentary work. *Id.* While Dr. Gaziano added that due to his occupational pneumoconiosis the miner should only consider occupations "which did not expose him to excessive fumes, dust, or temperature extremes," such a recommendation is not adequate to establish total disability. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Director's Exhibit 12.

[6] Dr. Carlson noted that on August 4, 1998, the Chairman of the state Occupational Pneumoconiosis Board found sufficient evidence to diagnose "occupational pneumoconiosis with [twenty percent] pulmonary function impairment attributable to this disease." Director's Exhibit 10. He concluded the miner had a "[fifty-one] percent whole person impairment" based on all of his injuries, including spine, ankle, and knee injuries, and could not perform his usual coal mine work "on an orthopedic bases." *Id.* Dr. Carlson additionally noted the miner was "limited by fatigue and dysthria as a result" of his occupational pneumoconiosis. *Id.* He did not address whether this limitation was disabling.

Consequently, we affirm the administrative law judge's finding claimant did not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4). *See* 20 C.F.R. §718.305(b), (c)(2); Decision and Order at 20.

Part 718 Entitlement

In a survivor's claim where the Section 411(c)(3)[7] and 411(c)(4) presumptions are not invoked, claimant must establish the miner had pneumoconiosis arising out of coal mine employment and that the miner's 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). Failure to establish any one of the requisite elements of entitlement precludes an award of benefits. *See Trumbo*, 17 BLR at 1-87-88. In the current case, the administrative law judge determined claimant established the miner had simple, clinical pneumoconiosis arising out of his coal mine employment[8] but did not establish death causation. Decision and Order at 23-24.

Death Due to Pneumoconiosis

A miner's death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of his death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Where a miner's death was due to a traumatic injury or medical condition unrelated to pneumoconiosis, claimant must establish pneumoconiosis was a substantially contributing cause of death.[9] 20 C.F.R. §718.205(b)(5). Pneumoconiosis is a "substantially contributing cause" if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Bill Branch*

[7] The administrative law judge accurately noted that while the autopsy contained a description of coal macules and nodules, it did not include a description in terms of size or diameter and Dr. Mahmoud, the autopsy prosector, only diagnosed simple coal workers' pneumoconiosis. Decision and Order at 21-22; Director's Exhibit 11 at 5. Thus, because there is no evidence that the miner had complicated pneumoconiosis, claimant cannot 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); *see* 20 C.F.R. §718.304; Decision and Order at 21-22.

[8] The administrative law judge found claimant established the existence of clinical pneumoconiosis based on the autopsy evidence. Decision and Order at 23; Director's Exhibit 11.

[9] An exception applies if the 20 C.F.R. §718.304 presumption is invoked. 20 C.F.R. §718.205(b)(5).

Coal Corp. v. Sparks, 213 F.3d 186, 190 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80 (4th Cir. 1992).

The only evidence addressing death causation consists of the autopsy report and death certificate, both authored by Dr. Mahmoud.[10] *See* Director's Exhibits 8, 11. As the administrative law judge observed, while Dr. Mahmoud diagnosed coal workers' pneumoconiosis by autopsy, on the death certificate and in the autopsy report he attributed the miner's death to multiple injuries due to a motor vehicle accident and did not identify pneumoconiosis as a contributing cause. Decision and Order at 24; Director's Exhibit 8, 11. Rather, in his autopsy report Dr. Mahmoud explicitly stated the miner's coal workers' pneumoconiosis was "not contributory to death." Decision and Order at 24; Director's Exhibit 11. Further, the administrative law judge correctly noted there is nothing in the record that suggests the miner's pneumoconiosis hastened his death from the injuries to his trunk and extremities he received in the accident. Decision and Order at 24; Director's Exhibits 8, 11. Thus we affirm, as supported by substantial evidence, the administrative law judge's determination that claimant did not establish death causation and we affirm her denial of benefits. *See Compton*, 211 F.3d at 212; *Hicks*, 138 F.3d at 533; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc); Decision and Order at 24.

[10] The administrative law judge accurately found none of the other evidence of record concluded pneumoconiosis was a substantially contributing cause of the miner's death. Decision and Order at 24; *see* Director's Exhibits 10, 12.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge