U.S. Department of Labor

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

BRB No. 19-0106 BLA

CYNTHIA A. FUNARI (Widow of ANTHONY FUNARI) Claimant-Respondent v. PENNSYLVANIA MINES CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/27/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Ralph J. Trofino, Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05290) of Administrative Law Judge Drew A. Swank rendered on a claim filed 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 December 9, 2014.[1]

The administrative law judge found the miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment. Thus, he determined claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[2] He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding the miner was totally disabled by a respiratory impairment at the time of his death and, therefore, that claimant invoked the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision if it is rational, supported by substantial evidence, and

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[1] Claimant is the widow of the miner, who died on September 6, 2014. Director's Exhibit 8. The record does not reflect that the miner was found eligible for benefits during his lifetime. Thus, claimant is not eligible for automatic survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

[2] Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding the miner had at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-13.

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).

Invocation of Section 411(c)(4) Presumption

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, 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 total disability against the relevant 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 the record contains no pulmonary function studies or blood gas studies. Decision and Order at 10. He further permissibly found Dr. Perper's diagnosis of cor pulmonale is insufficient to establish total disability because Dr. Perper did not provide that claimant also suffered from right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); *Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997); Decision and Order at 10; Claimant's Exhibit 1. We therefore affirm claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii).

The administrative law judge next considered the medical opinions of Drs. Qian, Perper, Swedarsky and Oesterling. Decision and Order at 10-12, 14; *see* 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found neither Dr. Qian, the autopsy prosector, nor Dr. Perper rendered an opinion regarding total disability. *See* Decision and Order at 11; Director's Exhibit 9; Claimant's Exhibit 1. He also determined Dr. Swedarsky's opinion was not credible because the physician did not provide a definitive position on whether the miner was totally disabled.[5] Decision and Order at 11; Employer's

[4] This cases arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] At his October 2, 2017 deposition, Dr. Swedarsky stated that because total disability is a clinical diagnosis, not an anatomical diagnosis, he was unable to rule out a

Exhibit 1. Similarly, the administrative law judge found Dr. Oesterling's opinion entitled to less weight because he did not address whether any pulmonary impairment was totally disabling and instead focused on disability causation. Decision and Order at 12; Employer's Exhibits 2, 6. However, the administrative law judge credited claimant's testimony the miner was treated for several years for a chronic lung impairment, as supported by his treatment records, finding it sufficient to establish total disability on the evidence as a whole. Decision and Order at 13-14; Hearing Transcript at 14-16, 19, 23; Employer's Exhibits 3-4. He therefore determined claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Decision and Order at 14.

We agree with employer the administrative law judge did not adequately consider Dr. Oesterling's disability opinion. *See* Employer's Brief at 3-4. Dr. Oesterling stated "the structural [lung] changes due to coal dust were too minimal to have produced lifetime pulmonary disability," and the miner's "breathing problems" and "respiratory distress" were instead due to other factors including heart disease and obesity. *See* Decision and Order at 12; Employer's Exhibits 2, 6. The administrative law judge correctly observed that the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present; the cause of the impairment is a distinct and separate issue. *See* 20 C.F.R. §§718.204(a),(c); 718.305(d); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); Decision and Order at 12. However, as employer alleges, Dr. Oesterling also testified that there was no evidence of pulmonary dysfunction in the miner's medical records, no marked alterations in his pulmonary function, and no "big changes in his pulmonary gas determinations." Employer's Exhibit 6 at 56-57. Further, Dr. Oesterling stated that if the miner was having difficulty oxygenating his blood when in the hospital being treated for other ailments then he would have expected pulmonary function or blood gas studies to assess any impairment. There were none. *Id*. at 61-62. The administrative law judge did not adequately address why this testimony could not constitute a reasoned and documented opinion that the miner was not totally disabled from a pulmonary or respiratory impairment at the time of his death. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, we vacate his weighing of Dr. Oesterling's opinion at 20 C.F.R. §718.204(b)(2)(iv).

Employer next argues the administrative law judge erred in considering claimant's lay testimony because the record contains medical evidence addressing his pulmonary status. Employer's Brief at 5-6. Contrary to employer's argument, the administrative law judge did not err in considering claimant' testimony. The applicable regulation states that in a deceased miner's claim, lay testimony "must be considered sufficient to establish total

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pulmonary impairment, as the record does not contain any pulmonary function tests. Employer's Exhibit 5 at 51-52.

disability" if no relevant medical evidence exists, but a finding of total disability cannot be based "solely" on the testimony of a person who would be eligible for benefits if the claim were approved.[6] 20 C.F.R. §718.305(b)(4).

The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held under an analogous provision at 20 C.F.R. §727.203(a)(5) that consideration of lay evidence is available where the medical evidence of record is "insufficient to establish total disability or lack thereof," not merely absent. *Koppenhaver v. Director, OWCP*, 864 F.2d 287, 289 (3d Cir. 1988); *Hillibush v. U.S. Dept. of Labor*, 853 F.2d 197, 203-05 (3d Cir. 1988) (applying similar rule under 20 C.F.R. §718.305(b)); *see also Cook v. Director, OWCP*, 901 F.2d 33, 36 (4th Cir. 1990) (consideration of lay evidence is available where the medical evidence of record is insufficient to establish total disability); *Pekala v. Director, OWCP*, 13 BLR 1-1, 1-5 (1989) (use of lay testimony by itself to establish total disability is permissible when the available medical evidence is insufficient to affirmatively prove that no disease or disability was present). Thus, contrary to employer's argument, the administrative law judge is not prohibited from crediting claimant's testimony. *See* 20 C.F.R. §718.305(b)(4).

We agree with employer, however, the administrative law judge did not adequately explain how the medical treatment records, in conjunction with claimant's testimony, support the conclusion that the miner was disabled.[7] *See Wojtowicz*, 12 BLR 1-162, 1-165 (1989); Employer's Brief at 3-4, 6. As the administrative law judge observed, claimant testified the miner started having difficulty breathing when he was still working in coal mine employment, he was regularly treated for his breathing, and was prescribed several breathing medications. Decision and Order at 13; Hearing Transcript at 13. She further

[6] We note that the administrative law judge improperly relied on 20 C.F.R. §718.204(d)(2) when considering the lay testimony. *See* Decision and Order at 12-13. That regulation does not apply when considering the applicability of the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(iii). The Department of Labor explained it promulgated separate lay evidence rules for 20 C.F.R. §718.305 because the rules in 20 C.F.R. §718.204(d) were "incomplete for purposes of implementing the Section 411(c)(4) presumption" in survivors' claims. 77 Fed. Reg. 19,456, 19,461-62 (Mar. 30, 2012). On remand the administrative law judge should apply the lay evidence regulation at 20 C.F.R. §718.305(b)(4).

[7] The Administrative Procedure Act (APA) provides that every adjudicatory decision must 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).

testified the miner was frequently taken to the hospital via ambulance because he was unable to breathe. Decision and Order at 13; Hearing Transcript at 14-16, 19, 23. The administrative law judge indicated the miner's treatment records support that he "was actively treated for [chronic obstructive pulmonary disease] and bronchitis and note the medications [c]laimant enumerated [in her testimony]." Decision and Order at 13.

Based on this evidence, the administrative law judge permissibly found the miner's treatment records "support Claimant's testimony that the miner was treated for a chronic pulmonary impairment." *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985) (an administrative law judge is charged with determining the credibility of all witnesses); Decision and Order at 15. But he has not explained his additional conclusion that the treatment records taken together with claimant's testimony "demonstrate[] the existence of a totally disabling respiratory or pulmonary impairment."[8] Decision and Order at 15. Thus, we must vacate the administrative law judge's findings that claimant established total disability and invoked the Section 411(c)(4) presumption.

On remand, the administrative law judge must reconsider whether Dr. Oesterling's opinion addresses total disability in light of his complete testimony. *See* Employer's Exhibit 6 at 56-57, 61-62. In considering claimant's lay testimony, the administrative law judge must clarify the basis for any reliance on it in accordance with applicable regulations and case law. *See* 20 C.F.R. §718.305(b)(4); *Koppenhaver*, 864 F.2d at 289; *Hillibush*, 853 F.2d at 203-05. He must not rely solely on claimant's testimony, however, to find disability established. He must also adequately explain his findings as the Administrative Procedure Act requires. *See Wojtowicz*, 12 BLR at 1-165.

[8] A physician need not phrase his or her opinion in terms of "total disability" in order to support a finding of total disability under 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990). A medical opinion may support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that a miner is or was unable to do his last coal mine job. *See Poole*, 897 F.2d at 894; *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). The administrative law judge determined the miner's last coal mine job was a continuous miner operator requiring medium labor, such as exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or up to 10 pounds of force constantly to move objects. Decision and Order at 6-7, 7 n.8, *citing Dictionary of Occupational Titles*, App. C (4th Ed., Rev. 1991).

Because we vacate the administrative law judge's finding of total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption.[9] 30 U.S.C. §921(c)(4). If the administrative law judge finds the evidence does not establish total disability, he must consider whether the evidence establishes that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis by a preponderance of the evidence.[10] *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).

[9] We decline to address, at this time, employer's challenge to the administrative law judge's determination that it failed to rebut the Section 411(c)(4) presumption. On remand, should the administrative law judge again find that claimant invoked the Section 411(c)(4) presumption, employer may challenge the administrative law judge's rebuttal findings.

[10] Because there is no evidence the miner had complicated pneumoconiosis, the administrative law judge correctly found 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 9.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge