BRB No. 13-0247 BLA

DELLA BERNICE GOODMAN (Widow of KENNETH GOODMAN)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 01/16/2014
ROUND MOUNTAIN COAL	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Della Bernice Goodman, Devonia, Tennessee, *pro se*.[1]

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Tennessee, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

[1] Ron Carson, 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 Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

PER CURIAM:

Claimant[2] appeals, without the assistance of counsel, the Decision and Order (2011-BLA-5342) of Administrative Law Judge Daniel F. Solomon denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[3] This case involves a survivor's claim filed on April 26, 2010.

In considering the claim, the administrative law judge found that, because there was no evidence of complicated pneumoconiosis, claimant was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2013). The administrative law judge also found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2013).[4] Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, requesting that the case be remanded to the administrative law judge for his consideration of whether claimant is entitled to the Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). In a reply brief, employer contends that a remand is not required, because claimant cannot establish the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by

[2] Claimant is the surviving spouse of the miner, who died on February 22, 2010. Director's Exhibit 7.

[3] The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the 2010 amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[4] The administrative law judge did not address whether the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013).

substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[5] 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).

Death Due to Pneumoconiosis

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable, or the presumption set forth at 20 C.F.R. §718.305 is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4). 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).

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

Because the administrative law judge accurately found that there is no evidence of complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant is not entitled to the Section 411(c)(3) irrebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 (2013); Decision and Order at 2. Consequently, claimant cannot establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b)(3).

The Section 411(c)(4) Presumption

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this survivor's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling

[5] The record indicates that the miner's coal mine employment was in Tennessee. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

respiratory impairment are established.[6] 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The implementing regulation is set forth at 20 C.F.R. §718.305.

The Director requests that this case be remanded for the administrative law judge to consider claimant's entitlement to the presumption, set forth in Section 411(c)(4), that the miner's death was due to pneumoconiosis. Because the administrative law judge has not addressed whether claimant can establish fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, we grant the Director's request, vacate the denial of benefits, and remand this case to the administrative law judge for his consideration of whether claimant is entitled to invocation of the presumption set forth at 20 C.F.R. §718.305.[7] If the administrative law judge finds that claimant is entitled to invocation of the presumption of death due to pneumoconiosis at 20 C.F.R. §718.305, the Department's regulations provide that the burden of proof shifts to employer to establish rebuttal by establishing both that the miner did not have legal and clinical pneumoconiosis, or by establishing that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2); *see also Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

[6] The amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*); *see also* 20 C.F.R. §725.212(a)(3). Although the miner filed a claim during his lifetime, it remains pending. Consequently, claimant is not currently eligible to receive benefits under 20 C.F.R. §725.212(a)(3). However, if the miner is ultimately awarded benefits pursuant to his lifetime claim, claimant would be entitled to receive benefits under 20 C.F.R. §725.212(a)(3).

[7] Employer argues that the administrative law judge's failure to address the length of the miner's coal mine employment is harmless, because the evidence is insufficient to establish fifteen or more years of coal mine employment. Employer's Reply Brief at 2. Although employer notes that the district director credited the miner with only twelve years and eleven months of coal mine employment, claimant, in support of her claim, asserted that the miner worked in coal mine employment for a total of twenty-three years from 1957 to 1982. Director's Exhibit 2. Consequently, the administrative law judge must address whether the record establishes the requisite fifteen years of qualifying coal mine employment necessary to support invocation of the Section 411(c)(4) presumption.

Pneumoconiosis as a Substantially Contributing Cause of Death

Where the Section 411(c)(3) and 411(c)(4) presumptions do not apply, claimant must affirmatively establish that pneumoconiosis was the cause or was a substantially contributing cause of the miner's death. *See* 20 C.F.R. §§718.1, 718.205(b)(1),(2). Pneumoconiosis is a substantially contributing cause of death "if it hastens the miner's death." 20 C.F.R. §718.205(b)(6). The administrative law judge found that, although the miner's death certificate "mentions" coal workers' pneumoconiosis, it does not list it as a cause of death. Decision and Order at 3. In fact, the miner's death certificate lists coal workers' pneumoconiosis as a "significant condition contributing to death."[8] Director's Exhibit 7. However, the United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis may be found to have hastened a miner's death only if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). A physician who opines that pneumoconiosis hastened death through a "specifically defined process" must explain how and why it did so, and ordinarily ought to explain the extent to which it did so, as expressed in a length of time. *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04, 24 BLR 2-257, 2-266 (6th Cir. 2010). Because the physician who completed the miner's death certificate failed to explain how pneumoconiosis hastened death through a specifically defined process that reduced the miner's life by an estimable time, the death certificate, standing alone, is not sufficient to meet the standard set forth in *Williams* and *Conley*. *See Conley*, 595 F.3d at 303, 24 BLR at 2-266; *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Review of the record reveals no evidence explaining the entry on the death certificate, or any other evidence supportive of a finding that the miner's death was due to pneumoconiosis. Consequently, the administrative law judge's mischaracterization of the miner's death certificate was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We, therefore, affirm the administrative law judge's determination that claimant did not affirmatively establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b)(1),(2).

In sum, on remand, the administrative law judge must address whether claimant is entitled to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis, as implemented at 20 C.F.R. §718.305. If the administrative law judge finds invocation established, he must determine whether employer has rebutted the presumption.[9] *See*

[8] Dr. Bruton completed the miner's death certificate. Director's Exhibit 7.

[9] Employer cannot rely upon the administrative law judge's finding that claimant did not carry her burden to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(b)(1),(2) to relieve it of its burden to rebut the Section

Copley, 25 BLR at 1-89. If the administrative law judge finds that claimant cannot invoke the presumption, or that employer has rebutted the presumption, he must deny benefits.

Accordingly, the administrative law judge's Decision and Order denying 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.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

411(c)(4) presumption with affirmative evidence. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).