U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0204 BLA

IRMA C. LESTER (Widow of HENRY S. LESTER) Claimant-Petitioner v. CAROL COAL CORPORATION and KNOX CREEK COAL CORPORATION Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/30/2017 DECISION and ORDER

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Irma C. Lester, Abingdon, Virginia.[1]

[1] 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).

Kathleen H. Kim (Maia Fisher, Associate Solicitor of Labor; 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,[2] without the assistance of counsel, appeals the Decision and Order (2012-BLA-05820) of Administrative Law Judge John P. Sellers, III denying benefits 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 May 11, 2011.

After crediting the miner with more than fifteen years of underground coal mine employment,[3] the administrative law judge found that the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that the miner was totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012). Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge also found that the Section 718.304 presumption is inapplicable.[5] 20 C.F.R. §718.304.

[2] Claimant is the widow of the miner, who died on April 13, 2011. Director's Exhibit 9.

[3] The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibit 4; Hearing Transcript at 25. Accordingly, this case arises within the jurisdiction 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).

[4] Section 411(c)(4) of the Act 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 respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[5] Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), 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 receive survivor's benefits without having to establish that the

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 opinion evidence did not establish the existence of legal pneumoconiosis[6] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge found, however, that the evidence established that the miner suffered from clinical pneumoconiosis[7] pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish that the miner's death was due to clinical pneumoconiosis. 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. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of benefits.[8]

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. *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. 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).

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miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Claimant cannot benefit from this provision, as the miner's claims for benefits were denied. Director's Exhibit 1.

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[7] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[8] Employer's counsel withdrew from this case on August 2, 2016, because employer, which was self-insured, is in bankruptcy. The Director, Office of Workers' Compensation Programs, states that the Black Lung Disability Trust Fund is liable for any benefits awarded in this case. Director's Brief at 1 n.1.

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 24 n.19. We, therefore, affirm the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

The Section 411(c)(4) Presumption

Under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and its implementing regulation, 20 C.F.R. §718.305, there is a rebuttable presumption that a miner's death was due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. In considering whether the evidence established the existence of a totally disabling respiratory impairment, the administrative law judge accurately found that all the pulmonary function studies and arterial blood gas studies of record are non-qualifying.[9] Decision and Order at 15. The administrative law judge also accurately found that there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. *Id.* We, therefore, affirm the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Smiddy, Tuteur, and Fino.[10] The administrative law judge noted that Dr. Smiddy opined that the miner was "100% totally and permanently disabled by his coal workers[']pneumoconiosis and certainly would not be able to do the type of employment required for coal mine related work." Decision and Order at 16; Director's Exhibit 10. The administrative law judge, however, found that Dr. Smiddy's assessment of the extent of the miner's pulmonary impairment was based upon a misreading of the miner's

[9] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] The administrative law judge accurately noted that Drs. Robinette and Cox did not address the extent of the miner's pulmonary disability. Decision and Order at 16; Director's Exhibit 10.

pulmonary function studies.[11] *Id.* The administrative law judge also found that Dr. Smiddy did not indicate an understanding of the exertional requirements of the miner's usual coal mine employment. *Id.* The administrative law judge, therefore, permissibly found that Dr. Smiddy's opinion was not well-reasoned.[12] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); Decision and Order at 16; Director's Exhibit 10.

Although Dr. Tuteur opined that the miner was totally and permanently disabled, the administrative law judge noted that Dr. Tuteur opined that the miner's disability was "initially predominantly because of advancing coronary artery disease eventually complicated by the consequences of [gastroesophageal reflux disease] and recurrent aspiration." Decision and Order at 16, quoting Employer's Exhibit 6 at 6. Because the administrative law judge permissibly interpreted Dr. Tuteur's opinion as indicating that the miner was "impaired primarily from a cardiac or cardiovascular standpoint,"[13] we

[11] Dr. Smiddy noted that the miner's August 13, 2002 pulmonary function study revealed an FEV1 value that was 65% of the predicted result. Director's Exhibit 10. The administrative law judge, however, noted that it was the FEV1/FVC ratio that produced a value that was 65% of the predicted value, not the FEV1 value. Decision and Order at 16. The pulmonary function study actually produced an FEV1 value that was 73% of the predicted value. Director's Exhibit 10.

[12] Dr. Smiddy was the miner's treating physician. Director's Exhibit 10. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "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); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003) (holding that the "case law and applicable regulatory scheme make clear that [administrative law judges] must evaluate treating physicians just as they consider other experts"). In this case, the administrative law judge acknowledged Dr. Smiddy's status as the miner's treating physician, but permissibly found that the doctor's disability assessment was not well-reasoned. Consequently, the administrative law judge properly found that Dr. Smiddy's opinion was not entitled to controlling weight as the miner's treating physician pursuant to 20 C.F.R. §718.104(d).

[13] Although the administrative law judge acknowledged that Dr. Tuteur suggested that the miner's gastroesophageal reflux disease and recurrent aspiration created a respiratory impairment which eventually contributed to the miner's overall level of impairment, the administrative law judge found that Dr. Tuteur did not opine that the

affirm his determination that Dr. Tuteur's opinion does not support a finding of a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-6-7 (4th Cir. 1994); Decision and Order at 16-17.

The administrative law judge finally found that Dr. Fino's opinion that the miner was not totally disabled from a respiratory or pulmonary standpoint was supported by the non-qualifying pulmonary function and blood gas study evidence. Decision and Order at 17; Employer's Exhibit 7. The administrative law judge, therefore, permissibly found that Dr. Fino's opinion was well-reasoned. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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 is unable to invoke the presumption of death due to pneumoconiosis pursuant to Section 411(c)(4). Consequently, we address the administrative law judge's finding of whether claimant is entitled to benefits pursuant to 20 C.F.R. Part 718.

Pneumoconiosis as a Substantially Contributing Cause of Death

Where the Section 411(c)(3) and 411(c)(4) statutory presumptions do not apply, claimant must affirmatively establish that pneumoconiosis 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 noted that the miner's death certificate, as well as the opinions of Drs. Robinette and Cox, attributed the miner's death to pneumoconiosis. Decision and Order at 24-26.

Dr. Rupe completed the miner's death certificate. Although Dr. Rupe attributed the miner's death to aspiration due to congestive heart failure and coal workers' pneumoconiosis, Director's Exhibit 9, the administrative law judge found that Dr. Rupe provided no basis for his opinion. Decision and Order at 24-25. The administrative law judge, therefore, permissibly determined that the miner's death certificate was not sufficiently reasoned. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000).

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miner's respiratory or pulmonary impairment, by itself, would have rendered the miner totally disabled. Decision and Order at 17.

In a letter dated April 28, 2011, Dr. Robinette opined that the miner "apparently had hematemesis of coffee ground material and may have aspirated and probably died from complications of his underlying pneumoconiosis, [chronic obstructive pulmonary disease], and [congestive heart failure] which were multifactorial." Director's Exhibit 10. In a subsequent letter dated November 9, 2011, Dr. Robinette opined that:

> [The miner] had black lung disease with an occupational pneumoconiosis, chronic bronchitis, and chronic airflow obstruction. He continued to suffer significant morbidity from this disorder which probably contributed to his death. It is acknowledged that he had multiple medical problems that were age related including severe cardiac disease.

Director's Exhibit 10.

The administrative law judge found that there was "nothing in Dr. Robinette's opinion to explain *how* the miner's pneumoconiosis contributed [to] or hastened his death." Decision and Order at 25. The administrative law judge, therefore, permissibly found that Dr. Robinette's opinion was inadequately explained and, therefore, was not sufficiently reasoned. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-263; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

Dr. Cox also attributed the miner's death to pneumoconiosis, stating that:

> I believe that it is very difficult to determine how much [the miner's] coal workers' pneumoconiosis contributed to his death. He had severe heart disease, peripheral vascular disease, [and] renal disease. I did not see him on his terminal admission to the hospital, but according to the notes he appear[s] to have died from aspiration pneumonitis. However he did have severe lung disease and I believe this did contribute to his death and may have actually been the major problem at the time of his terminal event. If he did not have his lung disease I do believe that his life expectancy may have been better. Of course the other issue is that he continued to smoke and not all of his lung disease may have been coal workers[']pneumoconiosis, however a pulmonary specialist would be a better person to address this particular question.
>
> I don't believe his severe heart vascular disease was caused by his lung disease, but on the other hand his lung condition clearly worsened his heart condition.

Director's Exhibit 10.

The administrative law judge found that Dr. Cox's opinion was deficient for the same reason as that of Dr. Robinette, namely the fact that the doctor "never explained the connection between the [m]iner's pneumoconiosis and his death." Decision and Order at 25. The administrative law judge found that Dr. Cox "provided no explanation to show how the [m]iner's pneumoconiosis was in any way related to the aspiration that led to his death." *Id.* The administrative law judge, therefore, permissibly found that Dr. Cox's opinion, like that of Dr. Robinette, was not sufficiently reasoned. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-263; *Clark*¸ 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

Drs. Tuteur and Fino, the only other physicians of record to address the cause of the miner's death, opined that the miner's death was unrelated to his coal dust exposure. Employer's Exhibits 6, 7. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). We, therefore, affirm the denial of benefits.

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