U.S. Department of Labor

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

BRB No. 18-0103 BLA

BRENDA S. QUESENBERRY (Widow of CARL QUESENBERRY) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/30/2019 DECISION and ORDER

Appeal of the Decision and Order of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2014-BLA-05728) of Administrative Law Judge Dana Rosen awarding 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 July 16, 2013.

The administrative law judge found that the miner had at least fifteen years of underground coal mine employment[1] and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant[2] invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). She further determined that employer did not rebut the presumption and awarded benefits.

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

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[1] The record indicates that the miner's coal mine employment was in Virginia and West Virginia. Director's Exhibits 1, 4. 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).

[2] Claimant is the surviving spouse of the miner, who died on May 21, 2013. Director's Exhibit 11.

[3] 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 or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

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 death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012). Claimant cannot benefit from Section 422(*l*), however, as the miner's lifetime claim for benefits was denied. Director's Exhibit 1.

[4] Because employer does not challenge the administrative law judge's finding that the miner had at least fifteen years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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).

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

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful 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 consider all of the relevant evidence and weigh the 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 found that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] She noted that Dr. Perper based his diagnosis of a totally disabling pulmonary impairment upon his extensive review of the miner's medical records and found his opinion well-reasoned and entitled to significant weight. Decision and Order at 42, 45. The administrative law judge further found that the medical opinions of Drs. Dy, Figueroa, Schor, and Fino corroborate Dr. Perper's assessment. *Id.* at 44-49. Finally, she found that claimant's testimony was credible and supports a finding of total disability. *Id.* at 49. The administrative law judge, therefore, found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer contends that the administrative law judge erred in finding Dr. Perper's opinion sufficient to establish total disability. We disagree, as substantial evidence

[5] The administrative law judge noted that the parties did not submit any pulmonary function studies or arterial blood gas studies, thereby precluding a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii). Decision and Order at 44. Similarly, because there is no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure, she found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.*

supports the administrative law judge's finding. During an April 14, 2017 deposition,[6] Dr. Perper was asked whether the miner suffered from a totally disabling respiratory or pulmonary impairment prior to his death. Dr. Perper responded:

> Yes, I do, because he had the clinical manifestations of impaired respiration, and, eventually, he had marked hypoxemia, reduced oxygenation of blood, and, basically his respiratory condition was, before he died, very severe and required, not just during the last hospitalization, but well before, the supply of supplemental oxygen because of the hypoxia.

Claimant's Exhibit 7 at 15.

The administrative law judge accurately noted that Dr. Perper considered the miner's "physical condition as described in the medical treatment records." Decision and Order at 45. Dr. Perper relied upon hospital records documenting that the miner was using supplemental oxygen at home in 2012, "well before" his last hospitalization.[7] Claimant's Exhibit 7 at 15. Records showing that the miner was prescribed DuoNebs, a bronchodilator, in 2012 for chronic obstructive pulmonary disease further supported Dr. Perper's assessment. Decision and Order at 49; Director's Exhibit 42.

[6] Although Dr. Perper initially prepared a medical report dated March 12, 2015, he acknowledged during his deposition that this report contained clerical errors. Claimant's Exhibit 7 at 25. Dr. Perper testified that he corrected the errors, and emphasized that he based his current opinions on the autopsy conducted by Dr. Dy on June 6, 2013, not an autopsy by Dr. Dennis as stated in the original report. *Id.* at 24-25. Because Dr. Perper corrected his earlier clerical errors, and testified that he relied on the miner's medical evidence in forming his opinions, the administrative law judge permissibly found that Dr. Perper's deposition testimony was credible and acted within her discretion in "not rely[ing] upon the contents of Dr. Perper's March 2015 report." Decision and Order at 13, 16; *see Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). Because the administrative law judge did not rely on Dr. Perper's March 12, 2015 report, we decline to address employer's arguments regarding the inaccuracies and inconsistencies it contains. *See* Employer's Brief at 7-11.

[7] Upon the miner's admission to Bluefield Regional Medical Center on October 29, 2012, Dr. Schor noted that the miner was using "oxygen at home as a supplement" due to his chronic obstructive pulmonary disease. Claimant's Exhibit 2 at 7.

Similarly, Drs. Dy, Figueroa, Schor, and Fino each opined that pneumoconiosis or other related respiratory problems caused the miner's death.[8] Decision and Order at 44-48. The administrative law judge also permissibly credited claimant's "persuasive" and "consistent" testimony that the miner's breathing problems progressed after he left coal mine employment, he was prescribed "puffers,"[9] and he became short of breath when walking up the stairs in their home. Decision and Order at 49; Hearing Transcript at 15.

Although employer argues that the individual pieces of evidence cited by the administrative law judge as supportive of Dr. Perper's opinion would not be sufficient, by themselves, to establish total disability, the administrative law judge permissibly considered "the cumulative effect of all the evidence in resolving the issue of total disability."[10] *Burnett v. Director, OWCP*, 7 BLR 1-781, 1-783 (1985). The Board is not authorized to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion). As employer raises no other arguments with respect to the administrative law judge's weighing of the evidence, we affirm her finding that claimant established total disability at 20 C.F.R. §718.204(b)(2).

[8] Dr. Perper attributed the miner's death to coal workers' pneumoconiosis. Claimant's Exhibit 7 at 15. Dr. Dy, the autopsy prosector, opined that the extent of the miner's anthracosis compromised his pulmonary functions "during the time when he needed it most, while recuperating from a pneumonic process." Director's Exhibit 14. Dr. Figueroa, one of the miner's treating physicians, completed the death certificate, listing "chronic lung disease" as a cause of death. Director's Exhibit 11. Dr. Schor, another treating physician, opined that the miner's pneumoconiosis "was a substantially contributing factor in his death due to pulmonary failure." Director's Exhibit 15. Finally, Dr. Fino, one of employer's physicians, acknowledged that the miner "died a respiratory death." Employer's Exhibit 3 at 4.

[9] Because the miner was prescribed "puffers," the administrative law judge inferred that the miner "needed nebulizers and inhalers to assist his breathing." Decision and Order at 49.

[10] Employer points to no contrary probative evidence, *i.e.*, evidence that the miner did not suffer from a totally disabling respiratory or pulmonary impairment.

In light of our affirmance of the administrative law judge's findings that miner had at least fifteen years of underground coal mine employment, and a totally disabling respiratory or pulmonary impairment, we affirm her determination that claimant invoked the Section 411(c)(4) presumption.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[11] 20 C.F.R. §718.305(d)(2)(i), or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.

Pneumoconiosis

The administrative law judge accurately noted that all of the physicians agree that the miner had clinical pneumoconiosis. Decision and Order at 35. She therefore found that employer failed to rebut the presumed fact of clinical pneumoconiosis. *Id.* We affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Death Causation

In addressing whether employer could establish that "no part" of the miner's death was caused by clinical pneumoconiosis, the administrative law judge considered the opinions of Drs. Caffrey and Fino. Although both physicians acknowledged that the miner had clinical pneumoconiosis, the administrative law judge found that neither adequately explained how he determined that the disease played no role in the miner's death. Decision and Order at 39-41; Director's Exhibit 42; Employer's Exhibit 3. Employer argues that

[11] "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). "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

the administrative law judge erred in weighing their opinions. Employer's Brief at 17-21. We disagree.

In support of his opinion that clinical pneumoconiosis "was not considered a medical problem" during the miner's lifetime but was detected only on autopsy, Dr. Caffrey stated that the miner's medical treatment records did not contain a diagnosis of clinical pneumoconiosis. Director's Exhibit 42 at 5. However, the administrative law judge noted that one of the miner's treating physicians, Dr. Schor, diagnosed him with clinical pneumoconiosis on June 20, 2012. Decision and Order at 39; Claimant's Exhibit 5. The administrative law judge, therefore, rationally found that Dr. Caffrey's opinion was "not well-supported because Dr. Caffrey did not review the entirety of the [m]iner's medical records." Decision and Order at 39; *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). Additionally, the administrative law judge permissibly found that Dr. Caffrey did not adequately explain how he determined that the miner's clinical pneumoconiosis played no role in his death. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 951 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 40.

The administrative law judge also permissibly discredited Dr. Fino's opinion on the basis that he acknowledged that the miner suffered a "respiratory death," but provided no explanation for how he determined that clinical pneumoconiosis played no role based upon his review of a "limited autopsy protocol." Decision and Order at 41, *quoting* Employer's Exhibit 3; *see Hicks*, 138 F.3d at 533; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The administrative law judge further noted Dr. Fino's opinion that the miner's objective studies showed "normal lungs" in 2000 and 2001, but reasonably questioned Dr. Fino's reliance upon objective studies taken years before the miner's death given Dr. Fino's acknowledgement that clinical pneumoconiosis can be a progressive disease. 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-10 (3d Cir. 2002); Decision and Order at 41.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the opinions of Drs. Caffrey and Fino are not sufficiently reasoned. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Because the administrative law judge permissibly discredited their opinions, we affirm her determination that employer failed to establish that no part of the miner's death was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(ii).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge