U.S. Department of Labor

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

BRB Nos. 18-0366 BLA
and 18-0523 BLA

MABEL SAMONS (o/b/o and Widow of CASEY SAMONS) Claimant-Petitioner v. NATIONAL MINES CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/30/2020 DECISION and ORDER

Appeal of the Decision and Order on Third Remand – Denying Benefits in the Miner's Subsequent Claim and Decision and Order Denying Benefits in the Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington D.C., for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Third Remand – Denying Benefits in the Miner's Subsequent Claim and Decision and Order Denying Benefits in the Survivor's Claim (2006-BLA-05820, 2007-BLA-05332) of Administrative Law Judge Larry S. Merck, on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent miner's claim filed on March 14, 2003[2] and a survivor's claim filed on July 21, 2005.[3] It is before the Board for the fourth time.[4]

Most recently, in consideration of claimant's appeal of the miner's claim, the Board vacated the administrative law judge's finding that claimant failed to establish total disability. *Samons v. Nat'l Mines Corp.*, BRB Nos. 15-0497 BLA and 15-0500 BLA, slip op. at 5-6 (July 26, 2016) (unpub.); 20 C.F.R. §718.204(b)(2). The Board held he erred in determining the exertional requirements of the miner's usual coal mine employment and in weighing the medical opinions. *Id*. Thus the Board vacated the denial of benefits in the

[1] The miner died on July 9, 2005. Director's Exhibit 61. Claimant, the miner's widow, is pursuing the miner's claim on behalf of his estate. Director's Exhibit 52.

[2] Section 411(c)(4) of the Act applies to claims filed after January 1, 2005 that were pending on March 23, 2010. 20 C.F.R. §718.305(a). It provides a rebuttable presumption that a miner's total disability or death was due to pneumoconiosis if he had 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(b). Based on the filing date of the miner's claim, Section 411(c)(4) is not available in the miner's claim. 20 C.F.R. §718.305(a).

[3] The Board consolidated the appeals of the denials of the miner's and survivor's claims for purposes of decision only.

[4] We incorporate the procedural history and factual background of these cases as set forth in the Board's prior decisions. *See Samons v. Nat'l Mines Corp.*, BRB Nos. 15-0497 BLA and 15-0500 BLA (July 26, 2016) (unpub.); *Samons v. Nat'l Mines Corp.*, BRB Nos. 13-0486 BLA and 13-0501 BLA (June 16, 2014) (unpub.); *Samons v. Nat'l Mines Corp.*, BRB Nos. 11-0343 BLA and 12-0076 BLA (Jan. 27, 2012) (unpub.).

miner's claim and remanded it for further consideration of this issue.[5] *Id*. at 8-9. In the survivor's claim, the Board noted the issue of total disability was relevant to whether claimant could invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). *Id*. at 9. Therefore the Board vacated the denial in the survivor's claim and instructed the administrative law judge to address, if necessary,[6] whether claimant invoked the presumption and whether employer rebutted it. *Id*. If claimant did not establish total disability in either claim, the Board instructed the administrative law judge he may reinstate the denial of benefits.[7] *Id*. at 9-10, n.14.

In his Decision and Order on Third Remand, which is the subject of this appeal, the administrative law judge found claimant failed to establish total disability in either the miner's claim or the survivor's claim. Therefore he denied benefits in both claims.

On appeal, claimant argues the administrative law judge erred in finding she did not establish total disability. Employer/carrier responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response. Claimant has filed a reply brief, reiterating her arguments.

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[5] The Board previously affirmed the administrative law judge's findings that claimant established at least thirty-one years of underground coal mine employment, legal pneumoconiosis, clinical pneumoconiosis arising out of coal mine employment, and a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a), 718.203, 725.309; *Samons*, BRB Nos. 13-0486 BLA and 13-0501 BLA, slip op at 10-11; *Samons*, BRB Nos. 11-0343 BLA and 12-0076 BLA, slip op. at 3 n.6.

[6] The Board instructed the administrative law judge that if he found total disability established in the miner's claim, he should address whether the miner was totally disabled due to pneumoconiosis. *Samons*, BRB Nos. 15-0497 BLA and 15-0500 BLA, slip op. at 8-9; 20 C.F.R. §718.204(c). If claimant established the miner was totally disabled due to pneumoconiosis, she established entitlement to benefits in the miner's claim and automatic entitlement to survivor's benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2012). Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis.

[7] In the survivor's claim, the Board previously affirmed the administrative law judge's finding that claimant did not meet her burden of establishing the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b); *Samons*, BRB Nos. 11-0343 BLA and 12-0076 BLA, slip op. at 8-9.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order on Third Remand if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 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, 362 (1965).

To be entitled to benefits in the miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish entitlement in the survivor's claim, claimant must establish the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(b)(1), (2). Statutory presumptions may assist claimant in establishing the elements of entitlement, but failure to establish any of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A miner is considered 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). Absent contrary probative evidence, a claimant may establish total disability based on pulmonary function studies,[9] arterial blood gas studies, evidence of cor

[8] The record reflects that the miner's coal mine employment occurred in Kentucky and Ohio. Director's Exhibit 4. 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, 1-202 (1989) (en banc).

[9] The Board previously affirmed, as unchallenged, the administrative law judge's findings that claimant did not establish total disability based on the pulmonary function or arterial blood gas studies or through evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *Samons*, BRB Nos. 11-0343 BLA and 12-0076 BLA, slip op. at 4 n.7. In the current appeal claimant alleges error in the administrative law judge's finding that the pulmonary function studies do not establish total disability. Claimant's Brief at 3, 17, 24-28. The Board's previous affirmance of this finding in both claims constitutes the law of the case. Because claimant has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

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 all relevant supporting evidence against all 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).

Pursuant to the Board's instructions, the administrative law judge reconsidered the exertional requirements of the miner's usual coal mine employment. He reiterated his finding that the miner's usual coal mine employment involved working either as a brattice man, tractor operator, or a belt man. Decision and Order on Third Remand at 11-12. He further took judicial notice of the *Dictionary of Occupational Titles* (DOT). *Id*. at 12 n.1. Based on the definitions in the DOT and the corresponding strength ratings, he determined work as a brattice man required heavy work, tractor operator required medium work, and belt man required light work. *Id*. at 16. Because the exertional requirements of these jobs were substantially dissimilar, and based on the descriptions in the DOT, he found the miner's usual coal mine employment required "exerting *up to* 100 pounds of force occasionally, *up to* 50 pounds of force frequently, and *up to* 20 pounds of force constantly."[10] *Id*. at 17.

The administrative law judge then considered the medical opinions of Drs. Simpao, Baker, Jurich, Fino, and Dahhan.[11] Dr. Simpao opined the miner had a moderate restrictive pulmonary impairment. Director's Exhibit 7. Dr. Baker opined the miner had a pulmonary

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[10] In *Samons*, BRB Nos. 15-0497 BLA and 15-0500 BLA, slip op. at 7-9, the Board recognized the administrative law judge found the miner's usual coal mine employment was either as a brattice man, a tractor operator, or a belt man. The Board instructed the administrative law judge that if, on remand, he found the exertional requirements of these jobs "are sufficiently similar, it is not necessary that he specifically determine which of these jobs was the miner's usual coal mine employment." *Id*. If, however, he found the "positions are substantially different," he "may exercise his discretion to determine, as he did before, the range of exertion, or average exertion, required by the miner's usual coal mine work." *Id*.

[11] The parties submitted the same evidence in the miner's and survivor's claims, with the exception that Dr. Fino's opinion was designated solely for use in the miner's claim, while Dr. Caffrey's opinion was designated solely for use in the survivor's claim. The administrative law judge noted Dr. Caffrey did not address the issue of total disability. Decision and Order on Third Remand at 20 n.2.

or respiratory impairment and was disabled because he should avoid dusty conditions. Claimant's Exhibit 3. On a February 6, 2009 questionnaire, he indicated the miner was totally disabled due to coal workers' pneumoconiosis and obstructive airway disease. *Id*. Dr. Jurich, the miner's treating physician, opined the miner did not have the respiratory capacity to perform the work of a coal miner. Director's Exhibits 9, 10, 60, 63. When asked to provide a "detailed rationale, including objective and clinical findings to support [his] conclusion," Dr. Jurich stated the miner could "barely walk." *Id*. He also indicated he prescribed the miner supplemental oxygen due to his hypoxemia. *Id*. In his deposition, he reiterated the miner does not have the "respiratory capacity to perform the work of a coal miner or perform comparable work in a dust-free environment" and stated the miner's pulmonary function studies "indicate disability." Director's Exhibit 35 at 15-16. In contrast, Drs. Fino and Dahhan opined the miner was not totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 30, 36, 37, 40, 41, 44, 46, 49; Employer's Exhibits 2, 3, 5, 6.

The administrative law judge discredited the opinions of Drs. Simpao, Baker, and Jurich because he found "it is not clear that each physician had a complete and accurate understanding of the exertional requirements of the [m]iner's usual coal mine jobs." Decision and Order on Third Remand at 19-20. He also found their opinions are not well-reasoned and documented and thus are entitled to diminished weight. *Id*. He assigned greatest weight to the opinions of Drs. Fino and Dahhan because he found they are well-reasoned and documented and because they "are highly qualified." *Id*. Further, he found they had an accurate understanding of the miner's usual coal mine employment. *Id*. Thus he found claimant failed to establish total disability.

Drs. Baker and Jurich

Claimant asserts the administrative law judge erred in discrediting the opinions of Drs. Baker and Jurich. Claimant's Brief at 22-24. The Board previously instructed the administrative law judge to determine whether Drs. Baker and Jurich, "who offered explicit opinions as to whether the miner was totally disabled, had an accurate understanding of the exertional requirements of the miner's usual coal mine work and adequately explained their conclusions." *Samons v. Nat'l Mines Corp.*, BRB Nos. 13-0486 BLA and 13-0501 BLA, slip op. at 8 (June 16, 2014) (unpub.). The administrative law judge found these opinions are not reasoned and documented on the issue of total disability because "it is not clear that each physician had a complete and accurate understanding of the exertional requirements of the [m]iner's usual coal mine jobs." Decision and Order on Third Remand at 19-20. Claimant raises no specific allegation of error with regard to the administrative law judge's

credibility finding.[12] *See* 20 C.F.R. §802.211; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus it is affirmed.

Dr. Simpao

Claimant contends the administrative law judge erred in weighing Dr. Simpao's opinion. Claimant's Brief at 16, 23-24, n.8. We disagree. The Board previously instructed the administrative law judge to determine "whether Dr. Simpao provided information sufficient to allow the administrative law judge to treat his diagnosis of a moderate restrictive impairment as a diagnosis of a totally disabling impairment." *Samons*, BRB Nos. 13-0486 BLA and 13-0501 BLA, slip op. at 8. Upon further consideration of the doctor's opinion, the administrative law judge permissibly concluded that "Dr. Simpao's diagnosis of a moderate impairment is too vague and too general to be useful in determining

[12] We further reject claimant's assertion the administrative law judge misrepresented Dr. Jurich's opinion regarding the miner's inability to walk. Claimant's Brief at 22. While claimant asserts Dr. Jurich's opinion as a whole "pointed to a respiratory disability," she does not identify any error in the administrative law judge's credibility findings. *Id*. Specifically, the administrative law judge noted that "[c]omparing Dr. Jurich's comment that the [m]iner could 'barely walk'" with the exertional requirements of the miner's usual coal mine employment "could be deemed an opinion of total disability." Decision and Order on Third Remand at 19, *quoting* Director's Exhibit 35 at 15. As the administrative law judge summarized, however, when asked at his deposition to specify the extent of the miner's pulmonary impairment, Dr. Jurich stated the miner carried "multiple diagnoses" that "contribute to his disability." Director's Exhibit 35 at 15; Decision and Order on Third Remand at 19. Although "chronic obstructive airways disease is one of the diagnoses that contribute to his impairment," Dr. Jurich indicated the miner's "impairment rating would be based upon a totality of the diagnosis." *Id*. at 15-16. Thus, in addition to Dr. Jurich's failure to identify the exertional requirements of the miner's usual coal mine employment, the administrative law judge permissibly found his statement that the miner could "barely walk" not well-reasoned and documented, or sufficient to meet claimant's burden to establish a totally disabling respiratory impairment, because although Dr. Jurich identified obstructive airways disease as one of the diagnoses contributing to the miner's impairment, he "did not identify the other contributing conditions or address the degree of the contribution of the obstructive airways disease to the [m]iner's impairment." Decision and Order on Third Remand at 19; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

whether the [m]iner could perform his usual coal mine job."[13] Decision and Order on Third Remand at 19 (internal quotations omitted); *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Cornett v. Benham Coal Co.*, 227 F.3d 569, 578 (6th Cir. 2000). *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

As we affirm the administrative law judge's discrediting of Drs. Simpao, Baker, and Jurich and there are no other medical opinions in the record supportive of claimant's burden of proof,[14] we affirm the administrative law judge's finding that the medical opinion evidence does not establish that the miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(iv); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order on Third Remand at 19-20. We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence, like and unlike, fails to establish total disability. 20 C.F.R. §718.204(b)(2); *Shedlock*, 9 BLR at 1-198. Because claimant failed to establish total disability, an essential element of entitlement in the miner's claim, we affirm the denial of benefits in that claim. *Trent*, 11 BLR at 1-27.

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[13] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Simpao, Baker, and Jurich, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[14] As claimant bears the burden to prove total disability, we need not address claimant's arguments regarding the credibility of Drs. Dahhan's or Fino's opinions that claimant is not totally disabled. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Brief at 18-21. With respect to Dr. Fino, we note that he opined the miner was not totally disabled because the objective testing indicated he had no respiratory impairment. Director's Exhibits 36, 40. While claimant asserts the administrative law judge erred in assessing whether Dr. Fino had an adequate understanding of the miner's usual coal mine employment, Claimant's Brief at 18-21, Dr. Fino's opinion that the miner had *no respiratory impairment* renders a discussion of the exertional requirements of the miner's work unnecessary. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73 (4th Cir. 1997) (holding that an administrative law judge "may rely on a physician's report that does not discuss the exertional requirements of the miner's work if the physician concludes that the miner suffers from no impairment at all"); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). Thus any error claimant alleged in the administrative law judge's finding that Dr. Fino sufficiently identified the exertional requirements of the miner's usual coal mine employment is harmless. *See Larioni*, 6 BLR at 1-1278.

Further, we affirm in the survivor's claim that claimant failed to establish the miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §§718.204(b)(2)(iv), 718.305(b)(1)(iii); Decision and Order on Third Remand at 19-20. Because claimant did not establish total disability, we affirm the administrative law judge's finding that claimant is unable to invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order on Third Remand – Denying Benefits in the Miner's Subsequent Claim and Decision and Order Denying Benefits in the Survivor's Claim is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge