U.S. Department of Labor

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

BRB Nos. 19-0105 BLA
and 19-0270 BLA

RUDY J. BURKHART (o/b/o and Widow of LLOYD BURKHART)	)	
Claimant-Respondent	)	
v.	)	
MANALAPAN MINING COMPANY, INCORPORATED	)	
and	)	
	)	DATE ISSUED: 01/31/2020
CONNECTICUT INDEMNITY COMPANY c/o ARROWPOINT CAPITAL	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer/carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits (2017-BLA-05443, 2017-BLA-05444) of Administrative Law Judge Scott R. Morris 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 miner's subsequent claim[1] filed on April 9, 2015 and a survivor's claim[2] filed on November 28, 2016.[3]

After crediting the miner with 17.38 years of underground coal mine employment,[4] the administrative law judge found the miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found claimant invoked the Section 411(c)(4) presumption the miner was totally disabled due to pneumoconiosis and established a change in an applicable condition of entitlement.[5] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309(c). He further found employer did not rebut the presumption and awarded benefits. Based on the award in the miner's claim, he

[1] The miner filed a prior claim on August 21, 1989. Director's Exhibit 1. In an undated letter, the district director denied the claim because the miner did not establish any element of entitlement. *Id.*

[2] The miner died on August 10, 2015. Director's Exhibits 56, 63. Claimant, the widow of the miner, is pursuing the miner's claim.

[3] Employer's appeal in the miner's claim was assigned BRB No. 19-0105 BLA and its appeal in the survivor's claim was assigned BRB No. 19-0270 BLA. The Board consolidated these appeals for purposes of decision only. *Burkhart v. Manalapan Mining Co.*, BRB Nos. 19-0105 BLA, 19-0270 BLA (Mar. 14, 2019) (Order) (unpub.).

[4] The record reflects that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law 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).

[5] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

found claimant entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[6] 30 U.S.C. §932(*l*) (2012).

On appeal, employer argues the administrative law judge erred in not allowing it to conduct a post-hearing deposition of its medical expert, Dr. Fino. Employer further argues the administrative law judge erred in finding the miner had at least fifteen years of coal mine employment and a totally disabling respiratory or pulmonary impairment, and therefore erred in finding the Section 411(c)(4) presumption invoked. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits 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, 362 (1965).

To be entitled to benefits under the Act, 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. Statutory presumptions may assist claimants 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).

Evidentiary Issue

On October 20, 2017, employer filed a motion requesting leave to conduct a post-hearing deposition of Dr. Fino.[7] By Order dated October 23, 2017, the administrative law

[6] Section 422(*l*) provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his 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*) (2012).

[7] Employer's counsel advised the administrative law judge that it received Dr. Fino's October 9, 2017 medical report on October 10, 2017. Due to "other travel and professional commitments," employer's counsel stated he would be unable to complete Dr. Fino's deposition by the date of the hearing on October 31, 2017. Employer's counsel requested leave to complete Dr. Fino's deposition by December 31, 2017.

judge advised the parties he would address the issue at the scheduled hearing on October 31, 2017. At the hearing, the administrative law judge denied employer's motion. Hearing Transcript at 12.

Employer subsequently moved for reconsideration, asserting the denial of its request was an abuse of discretion and constituted an arbitrary and capricious ruling. Neither claimant nor the Director responded to employer's motion.

By Order dated December 12, 2017, the administrative law judge again denied the request. He noted the applicable regulation provides that "[n]o post hearing deposition . . . shall be permitted unless authorized by the administrative law judge upon the motion of a party to the claim." 20 C.F.R. §725.458; December 12, 2017 Order at 3. Relying on *Lee v. Drummond Coal Co.*, 6 BLR 1-544, 1-547 (1983), he stated the moving party must establish "the necessity for the evidence" by showing (1) the evidence is probative and not merely cumulative, (2) reasonable steps were taken to secure the evidence before the hearing or the evidence was unknown or unavailable at an earlier time, and (3) the evidence is reasonably necessary to ensure the opportunity for a fair hearing.[8] Because employer failed to satisfy the second and third elements of the *Lee* standard, the administrative law judge declined to consider any post-hearing deposition testimony Dr. Fino provided.

Employer states it received Dr. Fino's report only twenty-one days before the date of the hearing in part because the records he reviewed were "voluminous." Employer's Brief at 10. Employer further states it "acted expeditiously in attempting to secure medical evidence and a report from its expert, and was not able to schedule the expert's deposition prior to the formal hearing[.]" Employer's Brief at 12. These statements, however, do not address the basis of the administrative law judge's finding that employer did not take reasonable steps to secure the deposition prior to the hearing. He found employer did not identify when it gave Dr. Fino the records to review, why it received Dr. Fino's report only twenty-one days prior to the hearing, or attempt to schedule his deposition prior to receiving his report. December 12, 2017 Order at 4. Nor does employer challenge the administrative law judge's finding that the deposition was not necessary for a fair hearing because employer "failed to identify any reason" why Dr. Fino's untimely deposition testimony "would buttress his written report."[9] *Id.*; Employer's Brief at 10-13. Because employer does not identify any error in the administrative law judge's decision, we affirm as within his discretion the denial of employer's motion to conduct and submit Dr. Fino's

[8] Additionally, "at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived." 20 C.F.R. §725.458.

[9] Employer also did not challenge these findings in its post-hearing brief.

post-hearing deposition. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc) (An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters.).

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

Length of Coal Mine Employment

Claimant bears the burden to establish the number of years the miner worked in coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In finding the miner had 17.38 years of qualifying coal mine employment, the administrative law judge relied on the miner's employment history forms (CM-911a) identifying coal mine employment from 1968 to 1988 and his Social Security Administration (SSA) Earnings Record showing income from coal mine employers during this time period.[10] Director's Exhibits 1 at 41-43; 4; 7. Finding the miner's employment history forms "probative," "credible," and consistent with the other evidence, the administrative law judge credited him with full years of coal mine employment from 1968 to 1971, 1973 to 1982, 1984 to 1985, and 1987. Decision and Order at 15. The administrative law judge found these years of employment confirmed by the SSA Earnings Record showing income during each of these years, including all four quarters from 1968 to 1971 and 1973 to 1977 and "significant amounts"[11] in other years. *Id.* He therefore credited the miner with at least seventeen years of coal mine employment. *Id.*

For 1972, the administrative law judge credited the miner with only a partial year of employment because his SSA Earnings Record reflects coal mining income during only three quarters. Decision and Order at 16. Because he could not determine the beginning

[10] The administrative law judge also noted wage records from various coal mine employers show income from 1974 to 1982, 1984, and 1988. Decision and Order at 13-14.

[11] The SSA Earnings Record does not report income on a quarterly basis after 1977; it then reports yearly income only. Considering the SSA Earnings Record in isolation, the administrative law judge found that the miner's quarterly earnings from 1968 to 1977, and significant yearly income from 1978 to 1982 and 1984, "amounts to, at least fifteen years of regular coal mine employment from 1968 to 1984." Decision and Order at 15 n.12.

and ending dates, he applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[12] to credit the miner with an additional 0.38 of a year[13] of coal mine employment for a total of 17.38 years. *Id.*

Employer contends that no evidence in the record establishes the beginning and ending dates of any of the miner's coal mine employment; thus, the "only rational basis by which the length of [the miner's coal mine] employment can be calculated is the method prescribed at 20 C.F.R. §725.101(a)(32)(iii)." Employer's Brief at 8-9. Using this method of calculation, employer concedes that the miner had a full year of coal mine employment in 1971, 1974 to 1982, and 1984, a total of eleven years. *Id.* at 7-8.

For the remaining years (1968 to 1970, 1972, 1973, 1985, and 1987), employer divides the miner's yearly earnings, as reflected in his SSA Earnings Record, by the average daily earnings for coal miners for each year as set forth in Exhibit 610 of the Black Lung Benefits Act Procedure Manual. Employer's Brief at 7-8. Based on this method of calculation, employer states the miner is entitled to credit for an additional 493.92 working days. *Id.* Assuming a 365-day work-year, employer divides this figure by 365 days to conclude the miner is entitled to an additional 1.35 years of coal mine employment (one year and 128.92 days). *Id*. Thus, employer contends the evidence established only 12.35 years of coal mine employment.

The administrative law judge's reliance on the miner's employment history form and SSA Earnings Record to credit him with seventeen full years of employment and an additional .38 of a year is rational and supported by substantial evidence. 20 C.F.R. §725.101(32)(ii) (providing that "[t]he dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records,

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[12] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides that "if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics."

[13] The administrative law judge divided the miner's earnings of $2,126.80 by the average daily earnings of employees in coal mining of $44.61 to credit the miner with 47.7 working days. *See* Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. He then divided that figure by 125 to credit the miner with .38 of a year of coal mine employment.

earnings statements, coworker affidavits, and sworn testimony"); *see Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019).

Further, by its terms, the formula at 20 C.F.R. §725.101(a)(32)(iii) is permissive, not mandatory. 20 C.F.R. §725.101(a)(32)(iii) (administrative law judge "may" use formula if beginning and ending dates cannot be determined or last less than a calendar year). Even assuming the administrative law judge should have applied the formula, employer's proposed calculations underestimate the miner's coal mine employment. The United States Court of Appeals for the Sixth Circuit has held that a claimant need not establish a full calendar year employment relationship to be credited with a full year under 20 C.F.R. §725.101(a)(32)(iii). *Shepherd*, 915 F.3d at 402-05. Rather, if the result of the formula "yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year." *Id.* at 402. If the result is less than 125 days, "the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125." *Id.* Using employer's own calculations for the number of days the miner worked from 1968 to 1970, 1972, 1973, 1985, and 1987, the miner is entitled to an additional 3.95 years of coal mine employment (493.92 days divided by 125), for a total of 14.95 years of coal mine employment.

Moreover, employer omits from its calculation the miner's earnings with Belmon Coals in 1972. The administrative law judge accurately noted the miner identified coal mine employment in 1972 on his employment history form and his SSA Earnings Record shows income that year of $1,479.03 from Belmon Coals.[14] Decision and Order at 16; Director's Exhibit 7. Using the formula at 20 C.F.R. §725.101(a)(32)(iii), the administrative law judge found the miner was entitled to an additional 33.15 days of coal mine employment with Belmon, thereby entitling him to an additional 0.26 year of coal mine employment (33.15 days divided by 125). *Id.* Therefore, using the regulatory formula employer advocates, the miner would be credited with at least 15.21 years of coal mine employment.[15] Thus, we affirm the administrative law judge's determination the

[14] Employer's calculation identifies income of only $647.77 from Karst Robbins Coal, Grays Knob Coal, Harlan Fuel, and Coal Resources Group. Employer's Brief at 7.

[15] The administrative law judge also noted the miner listed coal mine employment not reflected on his SSA Earnings Record, namely hauling coal for Burkhart Trucking from 1959 to 1963. Decision and Order at 14; Director's Exhibit 4. The administrative law judge did not address whether the miner was entitled to credit for this employment. The administrative law judge also did not address the miner's 1988 W-2 statement indicating he earned $2,440.00 from Penny Branch Coal Company. Director's Exhibit 6.

miner established at least fifteen years of coal mine employment. Moreover, because employer does not challenge the administrative law judge's finding that "the miner worked his entire career in underground mining," we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by qualifying pulmonary function studies, qualifying 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 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).

Employer argues the administrative law judge erred in finding the pulmonary function studies established total disability. 20 C.F.R. §718.204(b)(2)(i). Dr. Ajjarapu conducted a pulmonary function study on April 29, 2015.[16] Director's Exhibit 10. The study produced qualifying values.[17] *Id.* Dr. Gaziano reviewed the study and found it acceptable. *Id.* However, in a pulmonary function study rebuttal report dated May 12, 2016, Dr. Fino reviewed the study and opined that it was invalid:

> A careful review of the forced vital capacity tracings . . . shows a lack of an abrupt onset to exhalation, a hesitancy and inconsistency in the expiratory flows, a premature termination to exhalation before 5 seconds, a lack of plateauing in the expiratory curves, a lack of reproducibility in the expiratory curves, and a complete lack of patient effort and cooperation.

[16] Dr. Ajjarapu conducted an earlier pulmonary function study on March 16, 2015. However, because Drs. Ajjarapu and Fino both invalidated the study, the administrative law judge found it invalid. Decision and Order at 18-19; Director's Exhibits 10-12.

[17] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

Director's Exhibit 12; 20 C.F.R. §725.414(a)(3)(ii).

In an additional statement, Dr. Ajjarapu disagreed with Dr. Fino's invalidation, opining that the study showed repeatability and "adequate pushoff." Director's Exhibit 10 at 5; *see* 20 C.F.R. §725.414(a)(2)(ii). She noted, contrary to Dr. Fino's opinion, there was not a premature termination exhalation before five seconds, explaining that exhalation lasted beyond seven seconds. *Id.* She noted the miner provided good effort and that Dr. Gaziano validated the study. *Id.*

The administrative law judge found Dr. Fino failed to explain how the miner's exhalation terminated before five seconds when the curves accompanying the study extended to seven seconds. Decision and Order at 19. The administrative law judge further noted the technician who administered the study identified "good effort" throughout the test. *Id.* The administrative law judge found Dr. Ajjarapu's rehabilitation of the study was well-reasoned and supported by Dr. Gaziano's validation report. *Id.* The administrative law judge therefore found the April 29, 2015 pulmonary function study valid and that it established total disability. *Id.*

Employer argues the administrative law judge erred in not addressing additional comments contained in Dr. Fino's October 9, 2017 medical report that respond to Dr. Ajjarapu's rehabilitation of the April 29, 2015 pulmonary function study. We disagree. By Order dated October 26, 2018, the administrative law judge noted that the evidentiary limitations set forth at 20 C.F.R. §725.414[18] do not provide for surrebuttal to pulmonary function studies.[19] October 26, 2018 Order at 2. He therefore ordered the parties to show cause why he should consider that part of Dr. Fino's October 9, 2017 report that was "surrebuttal" to Dr. Ajjarapu's response regarding the validity of the April 29, 2015 pulmonary function study. *Id.* Claimant responded, requesting that the administrative law

[18] The Board has upheld the validity of Section 725.414, *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004) (en banc), and has recognized the evidentiary limitations contained therein are mandatory. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004).

[19] The evidentiary limitations state that when a party introduces a pulmonary function study, the opposing party may submit "in rebuttal . . . no more than one physician's interpretation" of that study. 20 C.F.R. §725.414(a)(2), (3). Where such "rebuttal evidence" is submitted, the party that introduced the pulmonary function study is "entitled to submit an additional statement from the physician who originally interpreted" the study. *Id.* As the administrative law judge noted, the regulations do not provide for further rebuttals or replies.

judge disregard that portion of Dr. Fino's report that re-addressed the validity of the April 29, 2015 study, but employer did not file a response. By Order dated November 5, 2018, the administrative law judge admitted Dr. Fino's October 9, 2017 medical report but notified the parties he would not consider that portion of the report that served as surrebuttal to Dr. Ajjarapu's comments regarding the validity of the April 29, 2015 pulmonary function study.

Employer argues the administrative law judge ignored and mischaracterized Dr. Fino's opinion by not considering his surrebuttal. Employer does not acknowledge or challenge the administrative law judge's ruling, set forth in his November 5, 2018 Order, that he would not consider that portion of Dr. Fino's October 9, 2017 report addressing the validity of the April 29, 2015 pulmonary function study because it exceeds the evidentiary limitations. The administrative law judge's ruling is therefore affirmed. *Skrack*, 6 BLR at 1-711. We therefore reject employer's contention that the administrative law judge erred in not addressing Dr. Fino's surrebuttal comments. Because employer does not assert any additional error, we affirm the administrative law judge's finding the new pulmonary function study evidence established total disability. 20 C.F.R. §718.204(b)(2)(i).

Employer next argues the administrative law judge erred in relying upon Dr. Ajjarapu's opinion to support a finding of total disability. Employer's Brief at 15-16. We disagree. In reviewing the medical opinion evidence, the administrative law judge permissibly found Dr. Ajjarapu's opinion that the miner had a totally disabling pulmonary impairment well-reasoned as it was supported by the qualifying April 29, 2015 pulmonary function study. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 23. He also permissibly found Dr. Fino's contrary opinion undermined by his mistaken belief that the qualifying April 29, 2015 pulmonary function study was invalid. *Id.* The administrative law judge therefore found the medical opinion evidence established total disability. 20 C.F.R. §718.204(b)(2)(iv). Because it is based on substantial evidence, this finding is affirmed. We further affirm the administrative law judge's conclusion that the evidence, weighed together, establishes total disability at 20 C.F.R. §718.204(b)(2).[20] *See Shedlock*, 9 BLR at 1-198; Decision and Order at 23.

In light of our affirmance of the findings that claimant established the miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory

[20] In light of our affirmance of the administrative law judge's finding that the new evidence establishes total disability at 20 C.F.R. §718.204(b)(2), we also affirm his determination that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Decision and Order at 9.

impairment, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. Moreover, because employer does not challenge the administrative law judge's finding that it failed to establish rebuttal of the presumption, we affirm this finding. *Skrack*, 6 BLR at 1-711. We therefore affirm the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and employer raises no specific challenge to the survivor's claim, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge