U.S. Department of Labor

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

BRB No. 15-0497 BLA
and 15-0500 BLA

MABEL SAMONS (o/b/o/ and Widow of CASEY SAMONS) Claimant-Petitioner v. NATIONAL MINES CORPORATION OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/26/2016 DECISION and ORDER

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

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand – Denial of Benefits in the Miner's Claim and the Decision and Order – Denial of Benefits in the Survivor's Claim (2006-BLA-5820 and 2007-BLA-5332) of Administrative Law Judge Larry S. Merck (the administrative law judge).[1] The miner's subsequent claim and the survivor's claim were filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] This case is before the Board for the third time.

When the miner's claim was most recently before the Board,[3] pursuant to employer's appeal, the Board vacated the administrative law judge's determination that

[1] The miner's prior claim, filed on August 9, 1976, was finally denied on March 13, 1989, because the miner failed to establish any element of entitlement. Director's Exhibit 1. The miner filed the current claim, his second, on March 14, 2003. Director's Exhibit 54. The miner died on July 9, 2005, while his current claim was pending. Director's Exhibit 61. Claimant, the miner's widow, is pursuing the miner's claim on behalf of his estate. Director's Exhibit 52. Claimant also filed a survivor's claim on July 21, 2005. Director's Exhibit 3.

[2] Congress amended the Act in 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments do not apply to the miner's claim in this case, because it was filed before January 1, 2005. Relevant to the survivor's claim, the amendments 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 respiratory impairment are established. 30 U.S.C. §921(c)(4). The amendments also revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a 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 that the miner's death was due to pneumoconiosis. Pub. L. No. 111-148, §1556(b), (c).

[3] The procedural history of this case is detailed in the Board's prior decisions. *Samons v. National Mines Corp.*, BRB Nos. 11-0343 BLA and 12-0076 BLA (Jan. 27, 2012)(unpub.) and *Samons v. National Mines Corp.*, BRB Nos. 13-0486 BLA and 13-0501 BLA (June 16, 2014)(unpub.). In its initial decision, with respect to the miner's claim, the Board affirmed the administrative law judge's finding of at least thirty-one years of coal mine employment, and his findings that claimant established the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), and a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309. *Samons*, BRB Nos. 11-0343 BLA and 12-0076 BLA, slip op. at 3 n.6. However, the Board vacated the administrative law judge's finding that

the medical opinion evidence established total disability under 20 C.F.R. §718.204(b)(2)(iv). Specifically, the Board held that the administrative law judge's finding, that the miner was totally disabled from performing his usual coal mine work, was based on an erroneous finding that his usual coal mine work required moderate to heavy labor.[4] The Board therefore vacated the administrative law judge's award of benefits in the miner's claim, and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge, on remand, to again determine the exertional requirements of the miner's usual coal mine work. The Board also instructed the administrative law judge to then compare those requirements with the physicians' assessments of the miner's pulmonary impairment, in order to determine whether that impairment rendered the miner totally disabled. Further, the Board instructed the administrative law judge to reconsider the relevant medical opinions in determining whether the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), if that issue is reached. *Samons v. National Mines Corp.*, BRB Nos. 13-0486 BLA and 13-0501 BLA (June 16, 2014) (unpub.).

Because the Board vacated the administrative law judge's award of benefits in the miner's claim, the Board also vacated the administrative law judge's determination that claimant was automatically entitled to benefits in the survivor's claim pursuant to Section 932(*l*).[5] *Samons*, BRB Nos. 13-0486 BLA and 13-0501 BLA.

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the medical opinion evidence was insufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, vacated the denial of benefits. *Id*. at 6.

[4] The exertional requirements of a miner's usual coal mine employment provide a basis of comparison for the administrative law judge to evaluate a medical assessment of a miner's capabilities and reach a conclusion regarding total disability. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988*); Cregger v. U. S. Steel Corp.*, 6 BLR 1-1219 (1984). A miner's "usual coal mine employment" is "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

[5] In its initial decision, with respect to the survivor's claim, the Board affirmed the administrative law judge's finding that claimant did not affirmatively establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Hence, claimant's entitlement to survivor's benefits was precluded on that basis. *Samons v. National Mines Corp.*, BRB Nos. 11-0343 BLA and 12-0076 BLA, slip op. at 8. The Board further held, however, that because it had vacated the administrative law judge's finding that claimant failed to establish that the miner was totally disabled at 20 C.F.R. §718.204(b)(2)(iv), the

On remand, the administrative law judge found that the evidence of record was not sufficient to allow him to determine the exertional requirements of the miner's usual coal mine work and that, therefore, claimant failed to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim.

On appeal, claimant challenges the administrative law judge's finding that she failed to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.

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.[6] 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).

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. Failure to establish any one 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).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(b); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). If the Section 411(c)(4) presumption is invoked and not rebutted, a miner's death is considered to be due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4). Alternatively, if Section 411(c)(4) is not invoked, a miner's death is

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administrative law judge was required to reconsider, on remand, whether claimant is entitled to invocation of the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4). *Id*. at 9 n.13.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director,* 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

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, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(b)(1)-(3). 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); *Conley v. Nat'l Mines Corp*., 595 F.3d 297, 303-04, 24 BLR 2-257, 2-266-67 (6th Cir. 2010).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we agree with claimant that a remand is warranted. In his 2013 decision, in response to the Board's instruction to determine the nature of the miner's usual coal mine work, the administrative law judge summarized the relevant evidence of record[7] and concluded:

> Although somewhat contradictory as to when he performed each job title, the evidence establishes that [the miner] worked as a loader, belt man, motorman, brattice man, and tractor operator at various times during his coal mine employment. However, I need not make a determination as to which of these jobs [the miner] was performing during his usual coal mine employment because I find, based on the testimony of Drs. Dahhan and Fino, that each of these jobs required moderate to heavy labor. Accordingly, I find that the exertional requirements of [the miner's] usual coal mine employment included moderate to heavy labor.

[7] The Employment History Forms (Department of Labor Form CM-911a) filed in both claims indicate that the miner last worked for employer as a brattice man. Director's Exhibits 1 at 340, 4 at 2. In a letter dated July 28, 1978, employer stated that the miner worked as a tractor operator. Director's Exhibit 1 at 329. The miner testified at the hearing in his initial claim that he hand loaded coal and ran motors, loading machines, and continuous miners, and did just "about everything in the coal mines." Director's Exhibit 1 at 228-29. Dr. Brandon indicated on his reading of a May 1980 x-ray that the miner worked 32.5 years underground as "a motorman, loading machine, tractor driver." Director's Exhibit 1 at 208. In the July 14, 1981 Decision and Order denying benefits, Administrative Law Judge Frederick D. Neusner found that the miner "was a hand loader; and he ran coal loading machines, continuous miners and motor cars." Director's Exhibit 1 at 173. At the hearing in the miner's subsequent claim and the survivor's claim, claimant testified that the miner "ran machinery, shuttle cars and things like that." Hearing Transcript at 19. Dr. Simpao reported that the miner's jobs included running a scoop, a roof bolter and a shuttle car operator. Director's Exhibit 7.

2013 Decision and Order at 27. Upon review of that decision, the Board held that the characterizations of the miner's employment offered by Drs. Dahhan and Fino, upon which the administrative law judge solely relied, are not sufficiently complete to establish that each of the five jobs performed by the miner required moderate to heavy labor.[8] *Samons*, BRB Nos. 13-0486 BLA and 13-0501 BLA, slip op. at 6. Because the administrative law judge's reliance on the opinions of Drs. Dahhan and Fino did not amount to substantial evidence to support of his finding that the miner's work required moderate to heavy labor, the Board vacated that finding and remanded the case to the administrative law judge for further consideration of the nature of the miner's usual coal mine work. *Id.*

In his most recent decision, the administrative law judge again attempted to resolve the conflicting evidence regarding the nature of the miner's usual coal mine work, as instructed by the Board. The administrative law judge found that, while the miner performed multiple jobs during his thirty-two years of underground employment, the record reflected that the miner's most recent coal mine job was either as a brattice man, a tractor operator, or a belt man. Decision and Order on Second Remand at 13. Specifically, the administrative law judge stated:

> [T]he Miner reported in his initial claim and on his Employment History Form filed in relation to his subsequent claim that his most recent mining job was as a brattice man. Employer reported in a letter dated July 28, 1978, that [the] Miner was last employed as a tractor operator. Dr. Fino, in a medical report dated April 8, 2004, recorded that [the] Miner's most recent coal mine employment was as a belt man. There are no additional references in the record to [the] Miner's most recent coal mine employment.

Decision and Order on Second Remand at 13 (internal citations omitted). Thus, the administrative law judge found that "[t]his claim must be denied because the record is conflicting regarding the [m]iner's usual coal mine employment." Decision and Order on Second Remand at 12.

The administrative law judge further found that, even if he could determine which of the miner's jobs was his usual coal mine work, the record still lacked adequate evidence to determine the exertional requirements of a brattice man, a tractor operator, or

[8] The Board noted that Dr. Dahhan only discussed the miner's jobs as a roof bolter, tractor man and motorman, and "Dr. Fino only described the exertional requirements of the miner's job as a belt man. *Samons*, BRB Nos. 13-0486 BLA and 13-0501 BLA, slip op. at 6.

a belt man, and thus lacked adequate evidence to allow him to determine if the miner had the respiratory capacity to perform these jobs.[9] *Id.* at 13-14. The administrative law judge concluded that "because there is not enough evidence in the record" from which to determine the exertional requirements of the miner's usual coal mine employment, "benefits cannot be awarded at this time." Decision and Order on Second Remand at 12, *citing Cregger v. U. S. Steel Corp.,* 6 BLR 1-1219, 1-1221 (1984) (holding that it is claimant's burden to establish the exertional requirements of the miner's usual coal mine employment).

Claimant asserts that the administrative law judge "should not have denied [benefits because] he was unable to make a decision" as to the exertional requirements of the miner's usual coal mine work. Claimant's Brief at 4, 17-21. Claimant contends that the record contains sufficient evidence from which the administrative law judge could reasonably conclude that the miner's usual coal mine work required moderate to heavy labor.[10] Claimant's Brief at 19-20. Claimant further contends that if the administrative law judge found that the record evidence was not sufficient, he could have taken judicial notice of the Department of Labor's *Dictionary of Occupational Titles,* and the position descriptions listed therein, in order to render a disability determination. Claimant's Brief at 20. Claimant's assertions have merit.

While it is claimant's burden to establish the exertional requirements of his usual coal mine employment, *see Cregger* 6 BLR at 1-1221, the administrative law judge previously found that, consistent with this burden, claimant "establishe[d] that [the miner] worked as a loader, belt man, motorman, brattice man, and tractor operator at

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[9] In considering the record with regard to the exertional requirements of the miner's coal mine employment, the administrative law judge stated that "[the miner] does not describe the duties of his jobs, including tractor man, motor man, roof bolter, brattice man, or belt man, in Form CM-913." Decision and Order on Second Remand at 13. The administrative law judge also noted that these duties were not adequately discussed during his hearing. In addition, the administrative law judge stated that "[the miner] failed to adequately describe his positions to the physicians examining him for this claim." *Id.*

[10] Claimant asserts that while Drs. Dahhan and Fino did not explicitly address every physical requirement of a roof bolter, tractor man, motor man, or belt man, both physicians testified to a broader knowledge of these respective positions. Claimant's Brief at 17-18. Specifically, Dr. Dahhan testified that he is "familiar with the exertional requirements" of a roof bolter, tractor man and motor man, and Dr. Fino testified that "[b]elt men, in [his] experience, have a heavy labor job." Claimant's Brief at 10, citing Director's Exhibits 37 at 2; 40 at 14.

various times during his coal mine employment." 2013 Decision and Order at 27. The administrative law judge was also able to determine, more specifically, that the miner's usual coal mine employment was either as a brattice man, a tractor operator, or a belt man. Decision and Order on Second Remand at 13. The fact that this evidence may be conflicting does not authorize the administrative law judge to declare that a determination cannot be made. *See generally Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024, 24 BLR 2-297, 2-314 (10th Cir. 2010).

The United States Court of Appeals for the Sixth Circuit has recognized that it is the job of the administrative law judge to evaluate conflicting evidence, draw appropriate inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Further, as claimant asserts, to assist in fulfilling this duty, the administrative law judge has the discretion to take judicial notice of the *Dictionary of Occupational Titles*, provided that he follows the correct procedure in doing so.[11] *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989). Moreover, the Board has recognized that the position descriptions in the *Dictionary of Occupational Titles* may be especially useful in a case where the miner is deceased. *See Onderko*, 14 BLR at 1-4. For the foregoing reasons, we vacate the administrative law judge's finding, pursuant to 20 C.F.R. §718.204(b)(2), that the evidence is not sufficient to establish that the miner was totally disabled from a respiratory standpoint.

On remand, the administrative law judge is instructed to reconsider his total disability finding. In so doing, the administrative law judge must consider all of the evidence of record relating to the miner's usual coal mine work,[12] and consider whether

[11] Pursuant to 29 C.F.R. §18.45, an administrative law judge is granted discretion to take judicial notice "of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice, at the hearing *or by reference in the administrative law judge's decision*, of the matters so noticed, and shall be given *adequate opportunity* to show the contrary." 29 C.F.R. §18.45 (emphasis added); *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Jordan v. James G. Davis Construction Corp.*, 9 BRBS 528.9 (1978).

[12] In the prior decision, the Board did not hold that the exertional requirements discussed by Drs. Dahhan and Fino were not relevant or lacked any probative value; the Board held that this evidence was not sufficiently complete to establish, as found by the administrative law judge, that every job the miner performed required moderate to heavy labor.

to re-open the record to take judicial notice of the *Dictionary of Occupational Titles.* If the administrative law judge determines, as is within his discretion, that the exertional requirements of a brattice man, a tractor operator, and a belt man are sufficiently similar, it is not necessary that he specifically determine which of these jobs was the miner's usual coal mine employment. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. If the administrative law judge establishes that the exertional requirements of these positions are substantially different, the administrative law judge 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. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. After determining the applicable exertional requirements, the administrative law judge is required to determine whether the medical opinion evidence is sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).

If, on remand, the administrative law judge finds that the medical opinion evidence establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must then weigh the evidence supportive of a finding of total respiratory disability against the contrary probative evidence to determine whether a preponderance of the evidence establishes that the miner was totally disabled from a pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). In so doing, the administrative law judge is required to set forth all of his findings in compliance with the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a).[13] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Should the administrative law judge find total respiratory disability established, but deny benefits in the miner's claim because the evidence does not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), the administrative law judge must determine whether claimant is entitled to the Section 411(c)(4) presumption of death due to pneumoconiosis in the survivor's claim. 20 C.F.R. §718.305. Finally, if the administrative law judge again awards benefits in the miner's claim, claimant's automatic

[13] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

entitlement to benefits pursuant to Section 932(*l*) in the survivor's claim must be reinstated.[14]

Accordingly, the administrative law judge's Decision and Order on Second Remand – Denial of Benefits in the Miner's Claim and Decision and Order – Denial of Benefits in the Survivor's Claim are vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[14] Should the administrative law judge find that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2), claimant's entitlement to benefits in the survivor's claim is precluded, as she would not be entitled to the rebuttable presumption of death due to pneumoconiosis set forth in Section 411(c)(4), and the Board previously affirmed the administrative law judge's finding that claimant did not affirmatively establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b). *Samons*, BRB Nos. 11-0343 BLA and 12-0076 BLA, slip op. at 8-9.