U.S. Department of Labor

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

BRB No. 16-0004 BLA

MARY L. BROTHERS (Widow of EARL BROTHERS) Claimant-Respondent v. PITTSBURG & MIDWAY COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/22/2016 DECISION and ORDER

Appeal of the Decision and Order on Third Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Third Remand (06-BLA-5678) of Administrative Law Judge Joseph E. Kane 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, involving a survivor's claim filed on June 13, 2005, is before the Board for the fourth time.

After the Board remanded this case for the second time,[1] the administrative law judge credited the miner with over fifteen years of underground coal mine employment, and found that the evidence established that the miner suffered from a totally disabling respiratory impairment. 20 C.F.R. §718.204(b). The administrative law judge, therefore, determined that claimant[2] invoked the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at Section 411(c)(4) of the Act.[3] 30 U.S.C. § 921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the evidence established that the miner suffered from a totally disabling respiratory or pulmonary impairment. *Brothers v. Pittsburg & Midway Coal Mining Co.*, BRB No. 13-0234 BLA (Feb. 20, 2014) (unpub.). The Board, therefore, also vacated the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption, and remanded the case for further consideration.[4] *Id.*

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[1] The full procedural history of this case is set forth in the Board's decision in *Brothers v. Pittsburg & Midway Coal Mining Co.*, BRB No. 13-0234 BLA (Feb. 20, 2014) (unpub.).

[2] Claimant is the surviving spouse of the miner, who died on May 9, 2005. Director's Exhibit 18.

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

[4] In the interest of judicial economy, the Board addressed employer's contentions of error regarding the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. *Brothers*, BRB No. 13-0234 BLA, slip op, at 7-10. The Board rejected employer's contentions of error, and affirmed the administrative law judge's finding that employer did not establish rebuttal of the Section 411)(c)(4) presumption. *Brothers*, BRB No. 13-0234 BLA, slip op. at 10. Consequently, the Board instructed the administrative law judge that, if on remand, he determined that claimant invoked the Section 411(c)(4) presumption, he could reinstate the award of benefits. *Id*.

On remand, the administrative law judge again found that the evidence established that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and therefore found that claimant invoked the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[5] 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).

Total Disability

Employer argues that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b) and, therefore, erred in finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act. Employer specifically contends that the administrative law judge erred in finding that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Background

In his January 25, 2013 Decision and Order on Second Remand, the administrative law judge noted that, although there was no affirmative blood gas study evidence, the miner's treatment records contained the results of blood gas studies conducted on December 24, 1993, April 13, 1996, April 14, 1996,[6] and February 26, 2002. Decision

[5] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 12. 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 (1989) (en banc).

[6] The administrative law judge noted that two separate blood gas studies were

and Order on Second Remand at 14-15, 17; Director's Exhibit 26 at 20, 29, 50.

In considering the blood gas studies contained in the miner's treatment records, the administrative law judge noted that, although the studies were not subject to the quality standards set forth in 20 C.F.R. Part 718, he was required to determine whether the results of the tests were sufficiently reliable to support a finding of total disability. Decision and Order on Second Remand at 17. Because the April 13, 1996 and April 14, 1996 blood gas studies were conducted while the miner was experiencing respiratory failure, the administrative law judge found that the results of these studies were unreliable, and entitled to "no weight." *Id.*

The administrative law judge next found that, although the December 24, 1993 and February 26, 2002 blood gas studies were also conducted during episodes of acute respiratory distress, the illnesses at those times were not as extreme as the illness in April of 1996. Decision and Order on Second Remand at 17. The administrative law judge, therefore, determined that the results of these studies were reliable. *Id.* The administrative law judge noted that, while the December 24, 1993 blood gas study produced non-qualifying values,[7] the February 26, 2002 blood gas study produced qualifying values. *Id.* The administrative law judge accorded greater weight to the more recent qualifying February 26, 2002 blood gas study, and found that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id.* at 17-18.

By Decision and Order dated February 20, 2014, the Board rejected employer's argument that the February 26, 2002 blood gas study was subject to the quality standards set forth in 20 C.F.R. Part 718. *Brothers*, BRB No. 13-0234 BLA, slip op. at 6, *citing* 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008) (recognizing that the quality standards apply only to evidence developed in connection with a claim for benefits). However, the Board held that the administrative law judge, in determining that the 2002 blood gas study was reliable, did not set forth a valid rationale in support of his finding. *Id.* The Board specifically held that the administrative law judge "did not explain how he determined that the miner's acute respiratory illness did

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performed on April 14, 1996. Decision and Order on Second Remand at 14, 17; Director's Exhibit 26 at 29.

[7] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

not render the 2002 test unreliable . . . ." *Id.* The Board further held that the administrative law judge, in assessing whether the results of the blood gas study were affected by his acute respiratory illness, "improperly substituted his medical judgment for that of a medical expert." *Id.* The Board, therefore, vacated the administrative law judge's finding that the 2002 blood gas study was a reliable indicator of a totally disabling pulmonary impairment, and remanded the case for further consideration. *Id.* at 6-7. The Board instructed the administrative law judge, on remand, to reconsider his finding that the 2002 blood gas study is reliable, and to determine whether there is adequate medical evidence in the record to persuade him of the study's reliability as an indicator of a totally disabling pulmonary impairment. *Id.* at 7.

The Administrative Law Judge's Decision and Order on Third Remand

On remand, the administrative law judge again found that the February 26, 2002 blood gas study constituted reliable evidence regarding the presence of a totally disabling pulmonary impairment, explaining that:

> The 2002 [blood gas study] was taken at the request of Dr. Taylor during an [emergency room] visit. Dr. Taylor was the [m]iner's treating physician. Dr. Taylor made no comments about the lack of reliability of the test and he relied on it for the diagnosis of the [m]iner. Dr. Taylor diagnosed the [m]iner with [chronic obstructive pulmonary disease] and chronic bronchitis. Dr. Taylor treated the [m]iner for these conditions throughout the next few years. Dr. Houser disregarded all of the [blood gas studies] in the record because they were performed while the [m]iner was seeking treatment. He explained this by referencing the regulatory quality standards. However, he never explained how and if he determined that the 2002 [blood gas study] was unreliable, therefore I give his opinion little weight on the issue. As there is no credible evidence finding the 2002 [blood gas study] unreliable and Dr. Taylor relied on this testing for his diagnosis of the [m]iner, I find it reliable and give it probative weight on the issue of total disability. I find that the 2002 [blood gas study] supports a finding of total disability.

Decision and Order on Third Remand at 7.

Discussion

Employer contends that the administrative law judge erred in his consideration of whether the results of the qualifying February 26, 2002 blood gas study were reliable enough to establish that the miner suffered from a totally disabling pulmonary impairment. We agree. The miner was admitted to the emergency room on February 26,

2002 for treatment of "chronic obstructive pulmonary disease *with exacerbation*," and "*acute* and chronic bronchitis." Director's Exhibit 26 at 16. At that time, the miner was noted to be suffering from an active cough, wheezes and rhonchi, and prolonged expiration. *Id.* Dr. Taylor, the miner's treating physician, noted that the miner's breathing improved "over two days." *Id.* Dr. Taylor further noted that the miner was discharged on March 1, 2002 against medical advice because he was still suffering from "considerable bronchospasm." *Id.*

Despite the Board's instruction to do so, the administrative law judge, on remand, failed to explain how he determined that the miner's *acute* respiratory illness did not render the 2002 blood gas study unreliable. In fact, the administrative law judge, on remand, failed to address the significance of the fact that the 2002 blood gas study was taken while the miner was being treated in the emergency room for *exacerbation* of his chronic obstructive pulmonary disease, and for "*acute* and chronic bronchitis." Director's Exhibit 26 at 16.

We also agree with employer that the administrative law judge mischaracterized Dr. Houser's opinion by stating that the doctor (1) disregarded the results from the 2002 blood gas study because it was performed while the miner was "seeking treatment;" and (2) failed to explain how and if he determined that the 2002 blood gas study was unreliable. Contrary to the administrative law judge's characterization, Dr. Houser did not indicate that the results of the 2002 blood gas study were unreliable because the study was performed while the miner was seeking treatment. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Rather, Dr. Houser explained that the results were unreliable because the miner was being treated in the emergency room for *acute* respiratory conditions. Noting that Appendix C to 20 C.F.R. Part 718 provides that blood gas studies "shall not be performed during or soon after an acute respiratory or cardiac illness," Dr. Houser explained that, because the February 26, 2002 blood gas study was obtained during an episode of "*acute exacerbation* or decompensation rather than at a baseline functional status," it did not constitute "sufficient evidence" to support a finding of a disabling respiratory impairment. Employer's Exhibit 2 at 3 (emphasis added). Thus, contrary to the administrative law judge's characterization, Dr. Houser, a Board-certified pulmonologist, provided an explanation for why he found that the results of the 2002 blood gas study were not reliable. *Tackett*, 7 BLR at 1-706.

Because the administrative law judge failed to provide a valid basis for determining that the results of the February 26, 2002 blood gas study were reliable, we vacate his finding that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). On remand, the administrative law judge is instructed to reconsider whether the results of the February 26, 2002 blood gas study are reliable, and, therefore, sufficient to establish the existence of a totally disabling respiratory

impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii). If the administrative law judge finds the arterial blood gas study evidence sufficient to establish total disability, he must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established that the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[8] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

In summary, if the administrative law judge, on remand, finds that the evidence establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), claimant is entitled to invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. In that case, in light of the Board's previous affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the presumption, claimant will be entitled to benefits. However, if the administrative law judge finds that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b) and, therefore, determines that claimant did not invoke the Section 411(c)(4) presumption, he must address whether claimant has satisfied her burden to establish all elements of entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

[8] The Sixth Circuit has held that the presence in the record of "medical evidence on the issue of total disability due to a respiratory or pulmonary impairment" precludes the use of lay testimony to invoke the presumption of death due to pneumoconiosis. *Coleman v. Director, OWCP*, 829 F.2d 3, 5, 10 BLR 2-287, 2-290 (6th Cir. 1987); *see also* 20 C.F.R. §718.204(d)(3); *Sword v. G & E Coal Co.*, 25 BLR 1-127, 1-131-32 (2014) (Hall, J., dissenting).

Accordingly, the administrative law judge's Decision and Order on Third Remand awarding benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge