U.S. Department of Labor

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

BRB Nos. 16-0606 BLA
and 16-0607 BLA

EMALENE BROWN (Widow of and o/b/o ALVIN S. BROWN) Claimant-Petitioner v. L & A COAL COMPANY and AIG INSURANCE COMPANY c/o CHARTIS Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/27/2017 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in Miner's and Survivor's Claims of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Emalene Brown, Monticello, Kentucky.

Tighe Estes (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel,[2] the Decision and Order Denying Benefits in Miner's and Survivor's Claims (2012-BLA-05668 and 2014-BLA-05149) of Administrative Law Judge John P. Sellers, III, rendered on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case involves a miner's subsequent claim[3] filed on January 31, 2011 and a survivor's claim filed on July 24, 2013.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), in the miner's claim,[4] the administrative law judge credited the miner with at least nineteen years of

[1] Claimant is the widow of the deceased miner, who died on May 2, 2013. Director's Survivor Exhibit 6.

[2] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] The miner filed his initial claim for benefits on October 31, 2002, which was denied by the district director on November 12, 2003 on the ground that the miner failed to establish any of the requisite elements of entitlement. Director's Living Miner Exhibit 1. No further action was taken on this claim.

The miner filed a second claim for benefits on January 14, 2005, which was denied by Administrative Law Judge Ralph A. Romano on February 16, 2007 for failure to establish any of the requisite elements of entitlement. Director's Living Miner Exhibit 1. In a Decision and Order issued on February 29, 2008, the Board affirmed Judge Romano's denial of benefits. *A.B.* [*Brown*] *v. L & A Coal Co.*, BRB No. 07-0535 BLA (Feb. 29, 2008)(unpub.); Director's Living Miner Exhibit 1. The miner took no further action until he filed the instant claim for benefits on January 31, 2011. Director's Living Miner Exhibit 3.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground coal mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

qualifying coal mine employment, based on the parties' stipulation. The administrative law judge, however, found the evidence insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[5] The administrative law judge therefore found that claimant failed to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) and, as total respiratory or pulmonary disability is a requisite element of entitlement under 20 C.F.R. Part 718, denied benefits in the miner's claim.

In the survivor's claim, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits in both the miner's subsequent claim and the survivor's claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in either claim.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Miner's Claim

To be entitled to benefits under the Act in the miner's subsequent claim, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of

[5] The administrative law judge further found that the record contains no evidence of complicated pneumoconiosis and, thus, claimant is not entitled to the irrebuttable presumption of total disability or death due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 15 n.6.

[6] Because the miner's last coal mine employment was in Kentucky, 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); Director's Living Miner Exhibits 1, 5.

coal mine employment, that the miner had a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment was 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

When a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The miner's last claim was denied because he failed to establish any of the requisite elements of entitlement. Director's Living Miner Exhibit 1. Consequently, claimant had to submit new evidence establishing one of the requisite elements of entitlement to proceed with the miner's claim. 20 C.F.R. §725.309(c).

In weighing the newly submitted evidence, the administrative law judge found that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the four newly submitted pulmonary function studies of record, conducted on March 16, 2009, June 13, 2011, October 25, 2011, and November 28, 2011.[7] Decision and Order at 5-7, 15-17; Director's Living Miner Exhibits 12, 14; Claimant's Living Miner Exhibit 2; Employer's Living Miner Exhibit 5. The administrative law judge noted that the pulmonary function study conducted on March 16, 2009 produced non-qualifying results, while the pulmonary function studies conducted on June 13, 2011, October 25, 2011, and November 28, 2011 produced qualifying results but were all deemed invalid by reviewing physicians.[8] *Id*.

[7] While the administrative law judge initially stated that the record contains three newly submitted pulmonary function studies, Decision and Order at 15, he subsequently addressed all four of the newly submitted pulmonary function studies. *See* Decision and Order at 5-7, 15-17.

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

The administrative law judge determined that the June 13, 2011 study, administered in connection with Dr. Alam's examination, produced qualifying values both before and after bronchodilation. Decision and Order at 16; Director's Living Miner Exhibit 12. He further determined that the administering technician recorded the miner's cooperation and understanding as "good" and that Dr. Alam interpreted the study without addressing its validity, whereas Drs. Gaziano,[9] Broudy[10] and Westerfield[11] invalidated the study for suboptimal effort. *Id.*; Director's Living Miner Exhibit 14; Employer's Living Miner Exhibits 6, 7, 11. The administrative law judge noted that Drs. Alam, Gaziano, Broudy and Westerfield are all Board-certified pulmonologists, but that Dr. Alam's opinion was not sought to address the invalidations of his testing by the other physicians. Decision and Order at 17. As the testing performed approximately two years earlier produced significantly higher values, the administrative law judge rationally found that it lent some support to the conclusion that Dr. Alam's 2011 values were the product of suboptimal effort. *Id.* Thus, based on the opinions of Drs. Gaziano, Broudy, and Westerfield, the administrative law judge determined that the June 13, 2011 pulmonary function study was not a reliable study and, therefore, found that it cannot establish total disability. *Id*.

The administrative law judge further found that the qualifying October 25, 2011, and November 28, 2011 studies were also insufficient to establish total disability as they were deemed invalid by Dr. Broudy, the administering physician, for poor effort. Decision and Order at 17; Director's Living Miner Exhibit 14; Employer's Living Miner Exhibit 5. Additionally, Dr. Westerfield concurred with Dr. Broudy that the studies

[9] Dr. Gaziano initially reviewed the June 13, 2011 pulmonary function study and indicated that "[v]ents are acceptable." Director's Living Miner Exhibit 12. He later testified at deposition, however, that the tracings appeared valid from the standpoint of reproducibility and length of expiration, but that the miner's failure to reach the requisite plateau indicated suboptimal effort that would tend to underestimate the forced vital capacity. Employer's Living Miner Exhibit 11 at 6, 7, 10; Decision and Order at 16.

[10] Dr. Broudy reviewed the June 13, 2011 pulmonary function study and indicated that it was "invalid because of variable and suboptimal effort." Director's Living Miner Exhibit 14. He later testified at deposition that the graphs showed an abrupt cessation in the flow rate, indicating invalidity due to poor effort. Employer's Living Miner Exhibit 6 at 10-11.

[11] Dr. Westerfield reviewed the June 13, 2011 pulmonary function study tracings and indicated that the proper plateau was not reached, demonstrating inadequate expiration and invalidity for interpretation. Employer's Living Miner Exhibit 7.

showed inconsistent and suboptimal effort and, therefore, were invalid for interpretation. Employer's Living Miner Exhibit 8 at 13-14.

Based on this evidence, the administrative law judge permissibly found that the June 13, 2011, October 25, 2011, and November 28, 2011 pulmonary function studies were insufficient to establish total disability. Decision and Order at 17; *see* 20 C.F.R. §718.101(b) (providing that "any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered"). In the absence of valid qualifying pulmonary function studies, the administrative law judge rationally determined that claimant was unable to establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2)(i). *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Consequently, we affirm the administrative law judge's finding that the pulmonary function studies of record do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), as supported by substantial evidence.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), the administrative law judge properly found that total respiratory disability was not established, as the blood gas studies yielded non-qualifying values and there was no evidence establishing that the miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 17; Director's Living Miner Exhibits 12, 14.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Alam, Perper, Broudy, and Westerfield. Decision and Order at 17-20. In his report dated June 13, 2011, Dr. Alam noted a severely reduced FEV1 but no hypoxia on resting blood gas study, and opined that the miner was disabled from a pulmonary standpoint. Director's Living Miner Exhibit 12. While Dr. Alam interpreted his pulmonary function study as showing "severe obstruction with a possible concomitant restrictive impairment," the administrative law judge permissibly discredited the opinion because he had previously found Dr. Alam's pulmonary function study to be unreliable. Decision and Order at 17-18; Director's Living Miner Exhibit 12; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark*, 12 BLR at 1-155; *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984).

Next, the administrative law judge determined that Dr. Perper performed a thorough review of the medical evidence of record, but failed to provide a basis for his opinion that the miner suffered from a totally disabling respiratory or pulmonary impairment. Decision and Order at 18; Claimant's Living Miner Exhibit 1. While Dr.

Perper concluded that the miner had "abnormal restrictive and possibly also obstructive respiratory impairment, hypoxemia and reduced oxygen saturation[,]" the administrative law judge noted that the miner's blood gas studies were non-qualifying and were described as showing no or only mild hypoxia. *Id*. Additionally, as Dr. Perper is a Board-certified pathologist and not a Board-certified pulmonologist, the administrative law judge found that the other physicians were better qualified to offer an opinion regarding the miner's pulmonary status. *Id.* As the only valid pulmonary function study of record was non-qualifying and was described as showing no obstruction or restriction, the administrative law judge permissibly accorded Dr. Perper's opinion diminished weight for failure to adequately explain how the underlying documentation he reviewed supported his conclusion that the miner was totally disabled by a pulmonary or respiratory impairment. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 19.

The administrative law judge further found that the opinions of Drs. Broudy and Westerfield were insufficient to establish total disability. Both physicians opined that the lack of valid pulmonary function studies made a diagnosis of the degree of pulmonary disability very difficult. Director's Living Miner Exhibit 14; Employer's Living Miner Exhibit 7. Dr. Broudy opined that the miner retained the pulmonary and respiratory capacity to perform his usual coal mine employment at the time of his examination. Director's Living Miner Exhibit 14. Dr. Westerfield opined that he could not establish a pulmonary impairment in the miner because the pulmonary function studies were consistently invalid, and the multiple blood gas studies produced normal results. Employer's Living Miner Exhibits 7, 8.

Because there is no other new medical opinion evidence supportive of a finding that the miner suffered from a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

While claimant could still demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 by establishing the existence of pneumoconiosis, the administrative law judge determined that claimant's failure to establish total disability precluded entitlement to benefits. Reviewing the earlier evidence of record *de novo*, the administrative law judge concurred with the conclusions of Administrative Law Judge Ralph A. Romano and the Board that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). In light of our affirmance of the administrative law judge's finding that the newly submitted evidence also does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), a

requisite element of entitlement, we affirm the administrative law judge's denial of benefits in the miner's claim. *See Trent*, 11 BLR at 1-27; *Perry* 9 BLR at 1-2.

Survivor's Claim

In a survivor's claim, where the Section 411(c)(3)[12] and Section 411(c)(4) presumptions do not apply, claimant must establish that pneumoconiosis caused or was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause of death "if it hastens the miner's death." 20 C.F.R. §718.205(b)(6). Pneumoconiosis may be found to have hastened a miner's death, however, only if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). A physician who opines that pneumoconiosis hastened death through a "specifically defined process" must explain how and why it did so. *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04, 24 BLR 2-257, 2-266 (6th Cir. 2010).

In addressing whether claimant established that the miner's death was due to pneumoconiosis, the administrative law judge accurately found that none of the medical evidence of record attributed the miner's death to pneumoconiosis. Decision and Order at 23. Specifically, the administrative law judge found that the death certificate indicated that the miner's death was due to blunt force trauma to his head.[13] Decision and Order at 23; Director's Survivor Exhibit 6. The administrative law judge further found that Dr. Perper, who diagnosed both clinical and legal pneumoconiosis, nonetheless opined that

[12] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability or death due to pneumoconiosis if the miner suffers or suffered from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *see E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). The irrebuttable presumption is not available in this case because the record contains no evidence of complicated pneumoconiosis. Decision and Order at 15 n.6.

[13] The record indicates that the miner's death was due to blunt force trauma to the head following an ATV accident. Hearing Transcript at 32-33; *see* Director's Survivor Exhibit 6; Employer's Survivor Exhibit 12 at 11-12.

the miner's death was not caused by, contributed to, or hastened by pneumoconiosis, based on the death certificate's notation that the miner died within minutes of sustaining a traumatic head injury.[14] Claimant's Survivor Exhibit 1.

The administrative law judge acknowledged claimant's testimony theorizing that the miner's pneumoconiosis may have triggered one of his coughing spells, causing a heart attack which, in turn, resulted in the miner's fatal ATV accident. Hearing Transcript at 32-34. However, the administrative law judge found that there was no medical evidence to support claimant's supposition. Decision and Order at 23; *see also* 20 C.F.R. §718.205(b)(5).

As substantial evidence supports the administrative law judge's finding that the medical evidence of record does not link the miner's death to pneumoconiosis, we affirm his finding that claimant failed to establish that the miner's death was caused by, contributed to, or hastened by pneumoconiosis. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 23.

Because claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions, and did not establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of survivor's benefits. *See* 20 C.F.R. §718.205(b); *Trumbo*, 17 BLR at 1-87-88.

[14] While not specifically discussed by the administrative law judge, Drs. Broudy and Westerfield also opined that the miner's death was not caused by, contributed to, or hastened by pneumoconiosis. *See* Employer's Survivor Exhibits 6, 8.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge