U.S. Department of Labor

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

BRB No. 17-0480 BLA

BETTY SEXTON (Widow of WENDELL SEXTON) Claimant-Petitioner v. CRAGER FORK MINING, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/12/2018 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Betty Sexton, Garrett, Kentucky.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2014-BLA-05901) of Administrative Law Judge Joseph E. Kane rendered 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 involves a survivor's claim filed on October 28, 2013.

After crediting the miner with at least fifteen years of coal mine employment the administrative law judge found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) because the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2).[2] Moreover, because the evidence did not establish the existence of complicated pneumoconiosis claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

Considering whether claimant could establish entitlement to survivor's benefits without the aid of the Section 411(c)(3) or Section 411(c)(4) presumptions, the

[1] Claimant is the widow of the miner, who died on January 11, 2012. Director's Exhibit 4. The miner filed a claim for benefits on October 7, 2011, which was denied by the district director on May 3, 2012, and no further action was taken on that claim. Miner's Claim (MC) Director's Exhibit 1. Therefore, claimant is not entitled to benefits under Section 422(*l*) of the Act, which provides that a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §932(*l*).

[2] In a survivor's claim, Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. In finding that claimant established the requisite fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption, the administrative law judge did not discuss the nature of the miner's employment. Decision and Order at 4. The record reflects, however, that the miner worked underground. Director's Exhibit 5 at 11; Employer's Exhibit 4. Moreover, employer conceded that the miner had fifteen years of coal mine employment and did not allege that any part of those years did not constitute qualifying coal mine employment. Employer's Brief to the Administrative Law Judge at 4.

administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.107. The administrative law judge further found that, even assuming the existence of pneumoconiosis, the evidence did not establish that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205, and he denied benefits accordingly.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation, did not file a response brief in this appeal.

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 (1989). We 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.[3] 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).

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities (greater than one centimeter in diameter) that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, 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(a)-(c).

Here, the primary evidence relevant to the existence of complicated pneumoconiosis consists of x-ray interpretations pursuant to 20 C.F.R. §718.304(a). The administrative law judge considered four interpretations of two x-rays dated June 13, 2011 and November 10, 2011.[4] Decision and Order at 10. Dr. Alexander, a dually-qualified Board-certified

[3] The record indicates that the miner's coal mine employment was in Kentucky. MC Director's Exhibits 1-119, 1-140. 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).

[4] The administrative law judge evaluated the x-ray evidence relevant to the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) in the course of evaluating the

radiologist and B reader, interpreted the June 13, 2011 x-ray as showing a "40 x 35 mm large opacity in right mid zone," which he said "could represent category A complicated [coal workers' pneumoconiosis] or lung cancer – needs further evaluation." Miner's Claim (MC) Director's Exhibit 1-92. Dr. Meyer, who is also dually-qualified, read the same x-ray as negative for complicated pneumoconiosis, stating that a "4 cm mass" in the right mid lung was "consistent with lung cancer." Employer's Exhibit 3. Dr. Alexander similarly raised the possibility of category A complicated pneumoconiosis on the November 10, 2011 x-ray, stating: "40 x 45 mm large opacity in the right mid zone – suspect lung cancer more than complicated [coal workers' pneumoconiosis] – needs further evaluation." MC Director's Exhibit 1-101. Dr. Meyer interpreted the November 10, 2011 x-ray as negative for complicated pneumoconiosis, stating that a "4.5 cm mass" in the right mid lung was "consistent with bronchogenic carcinoma." Employer's Exhibit 2.

The administrative law judge permissibly determined that because "Dr. Alexander could not make a definitive finding of complicated pneumoconiosis" on either x-ray interpretation, and Dr. Meyer found "no evidence of complicated pneumoconiosis" in both cases, the x-ray evidence "does not support a finding of complicated pneumoconiosis." Decision and Order at 10; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-287 (4th Cir. 2010).

The administrative law judge also considered the miner's treatment records and computed tomography (CT) scans relevant to 20 C.F.R. §718.304(c).[5] Decision and Order at 10. The administrative law judge accurately noted that the miner's treatment records discuss his treatment for lung cancer but do not address the existence of complicated pneumoconiosis. *Id.*; *see* Director's Exhibit 5. Similarly, the administrative law judge accurately observed that CT scans contained in the treatment records document the miner's lung cancer, but do not address the existence of complicated pneumoconiosis. Decision and Order at 10; *see* Director's Exhibit 5. Thus, the administrative law judge permissibly found that the weight of the medical evidence does not establish complicated pneumoconiosis, and that claimant did not invoke the irrebuttable presumption at 20 C.F.R. §718.304. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th

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evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See* Decision and Order at 5, 9-11.

[5] As the record contains no biopsy or autopsy reports, claimant cannot establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 11.

The Section 411(c)(4) Presumption

Under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and its implementing regulation, 20 C.F.R. §718.305, there is a rebuttable presumption that a miner's death was due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established.

In the absence of contrary probative evidence, a miner's disability shall be established by pulmonary function studies; blood gas studies; evidence of cor pulmonale with right-sided congestive heart failure; or medical opinions. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv).

In finding that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge correctly noted that none of the pulmonary function studies and arterial blood gas studies of record are qualifying,[6] and that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 5-6; Employer's Exhibit 4; Director's Exhibit 5 at 12, 51.

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinion of Dr. Alam, along with the miner's treatment records, and found that neither is sufficient to establish total disability. Decision and Order at 6-7. Dr. Alam examined the miner on November 10, 2011 and opined that the miner was not totally disabled based on the results of his pulmonary function and arterial blood gas studies. Employer's Exhibit 2. Considering the miner's treatment records, the administrative law judge correctly noted that they "do not discuss whether the [m]iner was totally disabled" or whether he "could perform his last coal mine employment," and that he could not substitute his judgment for that of a doctor. Decision and Order at 7; *see Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Director's Exhibit 5. Because there are no other medical opinions addressing whether the miner was totally disabled from a respiratory or pulmonary standpoint, we affirm the administrative law judge's finding that the medical

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

opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Weighing all of the relevant evidence together, the administrative law judge rationally determined that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc); Decision and Order at 7. Based on our affirmance of this finding, we further affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.305(b), (c)(2); Decision and Order at 4, 7.

Pneumoconiosis as a Substantially Contributing Cause of Death

Where entitlement to benefits is not established through the Section 411(c)(3) or the 411(c)(4) statutory presumption, claimant must establish that pneumoconiosis was a substantially contributing cause of the miner's death. *See* 20 C.F.R. §§718.1, 718.205(b)(1), (2). Before any finding of entitlement can be made in a survivor's claim, however, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

Existence of Pneumoconiosis

Relevant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four readings of two x-rays dated June 13, 2011 and November 10, 2011. Decision and Order at 9-10. The administrative law judge accurately noted that Dr. Alexander read the June 13, 2011 x-ray as positive for pneumoconiosis, while Dr. Meyer read it as negative for pneumoconiosis. *Id*.; MC Director's Exhibit 92; Employer's Exhibit 3. Similarly, the administrative law judge correctly observed that Dr. Alexander read the November 10, 2011 x-ray as positive for pneumoconiosis, while Dr. Meyer read the same x-ray as negative. Decision and Order at 9-10; MC Director's Exhibit 101; Employer's Exhibit 2. Based on the equal number of positive and negative readings of each x-ray by equally qualified readers, the administrative law judge permissibly found that both x-rays are in equipoise. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 10. Therefore, he found the weight of the x-ray evidence overall is insufficient to carry claimant's burden of

proof.[7] As this finding is supported by substantial evidence, it is affirmed. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Further, as the record contains no biopsy or autopsy evidence, claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Nor can claimant establish the existence of pneumoconiosis pursuant to either of the presumptions listed at 20 C.F.R. §718.202(a)(3), as we have affirmed the administrative law judge's findings that claimant failed to establish the existence of complicated pneumoconiosis or total respiratory disability. *See supra.*

Pursuant to 20 C.F.R. §718.107, the administrative law judge accurately noted that while the miner's treatment records contain CT scan interpretations, none was positive for pneumoconiosis. Decision and Order at 10; *see* Director's Exhibit 5. Therefore claimant is unable to establish the existence of pneumoconiosis by "other medical evidence." 20 C.F.R. §718.107.

The administrative law judge next considered whether the evidence established the existence of clinical or legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 11; Employer's Exhibit 2. The administrative law judge correctly noted that Dr. Alam diagnosed clinical pneumoconiosis based on Dr. Alexander's positive interpretation of the November 11, 2011 x-ray and the miner's history of coal dust exposure. Decision and Order at 11; Employer's Exhibit 2. The administrative law judge permissibly accorded little weight to Dr. Alam's diagnosis of clinical pneumoconiosis, finding it to be "simply a restatement" of Dr. Alexander's positive x-ray interpretation and inconsistent with his prior finding that the November 11, 2011 x-ray is inconclusive. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 11.

Legal pneumoconiosis includes any chronic pulmonary disease or respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). Relevant to the existence of legal pneumoconiosis, the administrative law judge properly found that Dr. Alam's opinion does not support such a diagnosis because although Dr. Alam diagnosed emphysema, he "did not relate the emphysema to coal dust exposure." Decision and Order at 11; *see* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); Employer's Exhibit 2. In addition,

[7] The administrative law judge further correctly noted that the x-ray interpretations in the miner's treatment records do not address whether the miner had pneumoconiosis. Decision and Order at 10; *see* Director's Exhibit 5.

the administrative law judge correctly observed that although the miner's treatment records document "end state [chronic obstructive pulmonary disease]," the records similarly "do not discuss whether coal dust exposure caused or contributed to the [m]iner's conditions." Decision and Order at 12; *see* Director's Exhibit 5. As substantial evidence supports the administrative law judge's determinations, we affirm his finding that the medical opinion evidence and treatment records do not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Because there is no other evidence supportive of a finding of clinical or legal pneumoconiosis, we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.107. Decision and Order at 12. As claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumption, and did not establish the existence of pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge