U.S. Department of Labor

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

BRB Nos. 17-0493 BLA
and 17-0494 BLA

WILMA PARSONS (Widow of and o/b/o, FRED PARSONS, deceased)	)	
Claimant-Respondent	)	
v.	)	
STONEY GAP COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/31/2018
and	)	
EMPLOYER'S INSURANCE OF WAUSAU	)	
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 Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2016-BLA-05023, 2016-BLA-05024) of Administrative Law Judge Alan L. Bergstrom, rendered on a miner's claim and a survivor's claim[1] filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established 19.57 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment and thus invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[2] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits in the miner's claim. He also found that claimant was entitled to derivative benefits in the survivor's claim pursuant to Section 422(*l*) of the Act.[3]

On appeal, employer contends that the administrative law judge erred in weighing the blood gas studies, and thus erred in finding that the miner was totally disabled and that claimant invoked the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's finding that it did not rebut the presumption, asserting that he erred in failing to consider Dr. Meyer's x-ray readings and in misstating the medical opinion evidence. Claimant responds, urging affirmance of the awards of benefits. The

[1] The miner filed a claim on April 22, 2014, but died on May 23, 2015, while his claim was pending. Miner's Claim (MC) Director's Exhibits 2, 5. Claimant, the miner's widow, is pursuing her husband's claim on his behalf. MC Director's Exhibit 5. She also filed a survivor's claim on June 12, 2015. Survivor's Claim (SC) Director's Exhibit 2. By order issued on May 11, 2016, the administrative law judge consolidated the claims.

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

[3] Under Section 422(*l*) of the Act, a survivor of a miner who was 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).

Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.

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.[4] 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).

I. The Miner's Claim

A. Total Disability and Invocation of the Section 411(c)(4) Presumption

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a claimant may establish total disability based on pulmonary function tests, 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). If the administrative law judge finds that total disability has been established under one or more subsections, the evidence supportive of a finding of total disability must be weighed against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988).

The administrative law judge found that the pulmonary function studies were non-qualifying[5] and that there is no evidence that the miner had cor pulmonale. Decision and Order at 23. Accordingly, the administrative law judge determined that claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered three blood gas studies. The June 11, 2014 study by Dr. Ajjarapu and the September 17, 2014 study by Dr. Brooks were non-qualifying for total disability at rest and with exercise,

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-201 (1989) (en banc); MC Director's Exhibit 3.

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

while the January 19, 2015 study by Dr. Dahhan was qualifying at rest and with exercise. Decision and Order at 21; Miner's Claim (MC) Director's Exhibits 13, 15. The administrative law judge credited Dr. Dahhan's study and found that claimant established total disability based on the most recent qualifying blood gas study evidence. Decision and Order at 21.

Employer contends that the administrative law judge erred in crediting the most recent blood gas study because there was less than one year between the non-qualifying and qualifying values. We disagree. In resolving the conflict in the evidence, the administrative law judge noted correctly that the record established that the miner was on home oxygen. The administrative law judge found that "it is unclear if the June and September 2014 [non-qualifying] blood gas studies were performed while the miner was using supplemental oxygen" and employer does not dispute that finding. Decision and Order at 21. The administrative law judge was further persuaded that the miner was totally disabled because the three blood gas studies performed from 2014 to 2015 showed a decline in the miner's respiratory condition over time. *Id*.

Thus, contrary to employer's contention, the administrative law judge did not mechanically credit the more recent qualifying blood gas study. Further, employer has not shown error in his explanation for crediting that study. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988) (the question of a miner's ability to perform his usual coal mine work is to be assessed at the time of the hearing); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Consequently, the administrative law judge's finding that claimant established total disability based on the blood gas study evidence is affirmed. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc).

The administrative law judge also determined that claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).[6] As employer raises no challenge to this finding, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23. We further affirm the administrative law judge's overall determination that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), taking into consideration the contrary probative evidence. Thus, we affirm the administrative law judge's finding that claimant invoked

[6] The two medical opinions of record by Drs. Ajjarapu and Dahhan are in agreement that the miner was totally disabled by a respiratory or pulmonary impairment, based on the results of the blood gas study evidence. MC Director's Exhibits 13, 15.

the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).[7] 30 U.S.C. §921(c)(4).

B. Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[8] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

The administrative law judge found that employer failed to establish rebuttal under either method. Employer contends that the administrative law judge did not consider all of the relevant evidence on clinical pneumoconiosis and misstated the evidence relevant to disability causation. Employer's arguments have merit, in part. For the following reasons, we affirm the administrative law judge's finding that employer did not disprove clinical pneumoconiosis, but vacate his finding that employer did not establish that pneumoconiosis played no role in the miner's total disability.

In finding that employer failed to disprove clinical pneumoconiosis, the administrative law judge reviewed three readings of three x-rays. Dr. DePonte, dually qualified as a Board-certified radiologist and B reader, interpreted two x-rays dated June 11, 2014 and April 8, 2015 as positive for pneumoconiosis, while Dr. Dahhan, a B-reader, interpreted a January 19, 2015 x-ray as negative. Decision and Order at 25; MC Director's Exhibits 13-15. Crediting Dr. DePonte's radiological qualifications, the administrative law judge found that a preponderance of the x-ray evidence is positive for pneumoconiosis. Decision and Order at 25.

We reject employer's contention that the administrative law judge failed to properly consider Dr. Meyer's deposition testimony concerning his readings of the June 11, 2014,

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 19.57 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

April 8, 2015, and January 19, 2015 x-rays. Employer does not dispute that Dr. Meyer's x-ray readings are not part of the record in this case. By Order dated May 11, 2016, the administrative law judge notified the parties that the transcript of Dr. Meyer's March 18, 2016 deposition testimony did not include the three x-ray readings referenced by the physician.[9] May 11, 2016 Order at 4. Because employer did not respond to the order, we see no error in the administrative law judge's finding that Dr. Meyer's testimony "as to those particular chest x-ray re-readings cannot be considered." Decision and Order at 26. Thus, we reject employer's contention that the administrative law judge erred in giving Dr. Meyer's deposition testimony regarding the existence of clinical pneumoconiosis little weight.[10] As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the evidence based on the documentation underlying a physician's opinion and the explanations given to support the medical findings. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). We therefore affirm the administrative law judge's finding that employer failed to disprove that claimant has clinical pneumoconiosis and thus employer is unable to establish the first method of rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Because the administrative law judge found that employer failed to disprove clinical pneumoconiosis, he determined that it was not necessary to address whether employer disproved legal pneumoconiosis. Decision and Order at 26. The administrative law judge therefore considered whether employer established the second method of rebuttal at 20 C.F.R. §718.305(d)(1)(ii), and found that employer's evidence was insufficient to establish that no part of the miner's respiratory disability was due to pneumoconiosis. *Id*. at 26-27.

[9] Employer asserts for the first time in this appeal that Dr. Meyer's readings were submitted to the district director but inadvertently left out of the director's exhibits. Employer submits copies of the x-ray readings in Appendix A to its brief. We are unable to consider employer's evidence, as the Board's review is limited to evidence in the record considered by the administrative law judge. 20 C.F.R. §802.301(b) (Parties shall not submit new evidence to the Board.).

[10] The administrative law judge noted, "[e]ven if the [readings were of record and] considered, [Dr. Meyer's] classification of the film[s] as '3' means no weight would be given to his interpretation of the June 11, 2014 and January 19, 2015 chest x-rays." Decision and Order at 26. Based on our affirmance of the administrative law judge's rejection of Dr. Meyer's testimony regarding the x-ray evidence, it is not necessary that we address employer's challenge to the administrative law judge's alternative finding. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1985).

Employer correctly asserts that in considering the second method of rebuttal the administrative law judge referenced the reports of Drs. Fino, Castle, and Habre, which are not part of the record in this case. The administrative law judge erred in failing to address whether employer disproved the presumed fact of disability causation based on the reports of Drs. Ajjarapu and Dahhan, which were submitted by the parties.[11] *See McCune C. Central Appalachian Coal Co.*, 6 BLR, 1-996, 1-998 (1984) (trier-of-fact's failure to consider relevant evidence requires remand); MC Director's Exhibits 13, 15; MC Employer's Exhibit 4. As the administrative law judge did not address the relevant evidence, we vacate his finding that employer failed to rebut the Section 411(c) presumption and we vacate the award of benefits.

C. Remand Instructions

The administrative law judge is instructed on remand to reconsider whether employer established rebuttal of the Section 411(c)(4) presumption based on the correct evidentiary record. Although employer failed to disprove clinical pneumoconiosis, the administrative law judge should also determine whether employer has disproven legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i)(A), as that finding is necessary to properly consider the second method of rebuttal, i.e., whether employer has established that "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201."[12] 20 C.F.R. §718.305(d)(1)(ii); *see Minich Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-156 (2015) (Boggs, J., concurring and dissenting). If employer fails to rebut the Section 411(c)(4) presumption on remand, the administrative law judge may reinstate the award of benefits in the miner's claim. If employer establishes rebuttal under the second method, benefits are precluded. In renderings his findings on remand, the administrative law judge must comply with the Administrative Procedure

[11] The administrative law judge summarized the opinions of Drs. Ajjarapu and Dahhan, Decision and Order at 10-12, but did not discuss their opinions in finding that employer did not rebut the presumed fact of disability causation. Instead, he found that "Dr. Fino and Dr. Castle offer no such specific and persuasive reasons related to the causation of [the miner's] totally disabling respiratory impairment as not involving pneumoconiosis" and that Dr. Habre's opinion did not aid employer in establishing rebuttal. Decision and Order at 27.

[12] To disprove the presumed fact of legal pneumoconiosis, employer must demonstrate that the miner did not have a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A).

Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

II. The Survivor's Claim

In light of our decision to vacate the award of benefits in the miner's claim, we must also vacate the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*).[13] 30 U.S.C. §932)(*l*). If, on remand, the administrative law judge again awards benefits in the miner's claim, claimant is automatically entitled to benefits. If the administrative law judge denies benefits in the miner's claim, however, he must consider whether claimant can establish entitlement to survivor's benefits by establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988).

[13] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is an eligible survivor of the miner. *See Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part and vacated in part, 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

GREG J. BUZZARD
Administrative Appeals Judge