U.S. Department of Labor

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

BRB No. 18-0251 BLA

MILDRED MULLINS (Widow of BILL MULLINS) Claimant-Respondent v. TROJAN MINING & PROCESSING and TRAVELERS INDEMNITY COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/10/2019 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Clayton Daniel Scott (Porter, Banks, Baldwin & Shaw, PLLC), Paintsville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (16-BLA-05215) of Administrative Law Judge Richard M. Clark rendered pursuant to the Black Lund Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a survivor's claim filed on December 31, 2014.

The administrative law judge found the miner had thirty years of coal mine employment at underground mines and a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C §921(c)(4); 20 C.F.R. §718.204(b). He further found employer did not rebut the presumption, and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding that claimant established total disability and invocation of the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding that it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not filed a response brief in this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is 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. §921(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Claimant is the widow of the miner, who died on October 4, 2014. Director's Exhibit 7. The miner filed two claims during his lifetime, both of which were finally denied. Director's Exhibits 1, 2. Accordingly, claimant cannot establish entitlement to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012), which applies if the miner was determined to be eligible to receive benefits at the time of his death.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the miner had thirty years of underground coal mine employment. *Skrack v. Director. OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2 n.1, 12, 13, 18.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. Director's Exhibit 1 at 170; Decision and Order at 25.

Benefits are payable on survivors' claims when the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A miner's death is considered to be due to pneumoconiosis if, among other things, the Section 411(c)(4) presumption is invoked and not rebutted. 20 C.F.R. §718.205(b)(4).

Invocation of the Section 411(c)(4) Presumption - Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(iii). A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by: qualifying[4] pulmonary function studies or 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). The administrative law judge must weigh the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge considered four pulmonary function studies dated April 26, 2010, June 21, 2010, June 23, 2010, and January 27, 2011. Decision and Order at 14-15. The April 26, 2010, June 21, 2010, and June 23, 2010 studies produced non-qualifying values; the January 27, 2011 study produced qualifying values. *Id.* at 15. The administrative law judge gave no probative weight to the June 21, 2010 study based on Dr. Rosenberg's opinion that it showed incomplete efforts and included only one spirometric trial, but he determined that the remaining studies are reliable and entitled to probative weight. Decision and Order at 17; Director's Exhibits 11 at 27; 12 at 4. According the greatest weight to the January 27, 2011 pulmonary function study, the most recent of record, he found that the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i).

[4] A "qualifying" pulmonary function study or arterial 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 yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

We reject employer's contention the administrative law judge erred in giving greatest weigh to the January 27, 2011 study. An administrative law judge may, but need not, credit the more recent medical evidence. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993). Contrary to employer's contention, the administrative law judge did not mechanically credit the January 27, 2011 study because it is the most recent by approximately seven months, but appropriately considered the reliability of the studies.[5] Employer's Brief at 8-10. Having permissibly determined that the January 27, 2011 study is both valid and the best indicator of the miner's condition at the time of his death, he permissibly accorded it greatest weight. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); Decision and Order at 17. As employer makes no other allegations of error, we affirm the administrative law judge's finding that the pulmonary function study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge next considered the medical opinions of Drs. Rosenberg and Oesterling, together with the miner's treatment records[6] pursuant 20 C.F.R. §718.204(b)(2)(iv).[7] Dr. Rosenberg opined that the miner was not disabled from a pulmonary perspective and Dr. Oesterling opined that the miner's pleural fibrosis "would not have impeded function." Director's Exhibit 12; Employer's Exhibits 1, 2. The administrative law judge found neither opinion probative on the issue of disability. Decision and Order at 24.

Specifically, the administrative law judge permissibly discredited Dr. Rosenberg's opinion as based, in part, on his determination that the January 27, 2011 qualifying pulmonary function study is invalid, contrary to the administrative law judge's own finding that the study is a valid indicator of the miner's pulmonary function. *See Director, OWCP v. Rowe,* 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 24. Further, contrary to employer's argument, the administrative law judge did not ignore Dr. Oesterling's opinion. Employer's Brief at 9. Rather, he reasonably found it does not weigh

[5] As employer does not challenge the administrative law judge's findings that the January 27, 2011 pulmonary function study is valid and the June 21, 2010 pulmonary function study is invalid, those findings are affirmed. *Skrack*, 6 BLR at 1-711; Director's Exhibit 17; *see* Decision and Order at 15, 17.

[6] The administrative law judge found that none of the treating physicians offered an opinion as to whether the miner was totally disabled from a respiratory or pulmonary impairment. Decision and Order at 25.

[7] The administrative law judge found that the miner's last coal mine work as a dispatcher required very little manual labor. Decision and Order at 3, 19.

either for or against a finding of total disability because Dr. Oesterling stated only that the degree of the miner's fibrosis would not have impeded function; he did not address whether the miner had a disabling pulmonary impairment from any cause. Decision and Order at 24.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 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, 2-512 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge provided valid reasons for finding the opinions of Drs. Rosenberg and Oesterling not probative on the issue of total disability, we affirm his determination that the medical opinion evidence does not undermine the weight of the pulmonary function study evidence establishing disability. Decision and Order at 25.

We also affirm the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) overall.[8] *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198 (1986); Decision and Order at 25. We therefore affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 27.

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

Because claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[9] or that "no part of [his] death was caused by pneumoconiosis

[8] The administrative law judge properly found no evidence of cor pulmonale. Decision and Order at 18. While the sole blood gas study was non-qualifying, the administrative law judge permissibly noted that blood gas studies and pulmonary function studies measure different types of impairments. *Id.* at 25.

[9] "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

as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.

The administrative law judge properly found that, because employer conceded the existence of clinical pneumoconiosis, it cannot rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A), (B); Decision and Order at 26; Hearing Transcript at 7. Relevant to the second method of rebuttal, the administrative law judge considered the opinions of Drs. Rosenberg and Oesterling that the miner's clinical pneumoconiosis was too mild to have played a part in causing his death.[10] Decision and Order at 30-32; Director's Exhibit 12; Employer's Exhibits 1, 2. He discredited their opinions as inadequately explained, and thus found employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(ii).

Employer argues the administrative law judge applied an incorrect standard by requiring its medical experts to prove "the miner's totally disabling impairment did not arise out of, or in connection with, coal mine employment . . . ." Employer's Brief at 13. Contrary to employer's argument, the administrative law judge evaluated the opinions of Drs. Rosenberg and Oesterling under the correct legal standard, i.e., that employer must establish that pneumoconiosis played no role in the miner's death. Decision and Order at 30-32. He discredited both physicians' opinions as based on speculation because they relied on limited pathology material obtained from only one of the miner's lungs.[11] *See Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (administrative law judge may assign less weight to physician's opinion that reflects an incomplete picture of miner's health); Decision and Order at 31. The administrative law judge additionally discounted Dr. Rosenberg's opinion because he

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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).

[10] The administrative law judge also considered the medical opinion of Dr. Thomas and properly found that his opinion that pneumoconiosis contributed to the miner's death does not aid employer on rebuttal. Decision and Order at 31; Director's Exhibit 8.

[11] Dr. Oesterling based his opinion on his review of seven slides from the miner's right lung, prepared by the autopsy prosector, Dr. Colquitt, which he described as a "somewhat limited" portion of the miner's lung tissue. Employer's Exhibit 1 at 1, 5. Dr. Rosenberg based his opinion largely on the pathology reports prepared by Drs. Colquitt and Oesterling. Employer's Exhibit 2 at 4.

failed to explain why the miner's clinical pneumoconiosis was too minimal to have played any role in his death. *See Napier*, 301 F.3d at 713-714; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 31-32. As employer does not challenge these credibility determinations, we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to prove that "clinical . . . pneumoconiosis played no part in the miner's death." Decision and Order at 32; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005). Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201."[12] 20 C.F.R. §718.305(d)(2)(ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); Decision and Order at 32.

[12] Because we have affirmed the administrative law judge's determination that employer failed to disprove the existence of clinical pneumoconiosis, or establish that no part of the miner's death was caused by clinical pneumoconiosis, error, if any, in his determination that employer failed disprove the existence of legal pneumoconiosis, or establish that no part in the miner's death was due to legal pneumoconiosis, would be harmless. *See* 20 C.F.R. §718.305(d)(2)(i), (ii); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We, therefore, need not address employer's arguments pertaining to these issues.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge