BRB No. 14-0018 BLA

NELLIE LESTER (Widow of SHELAH E. LESTER, JR.)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 06/25/2014
HAMDEN COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Nellie Lester, Verner, West Virginia, *pro se.*

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.[1]

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.[2]

[1] After filing a response brief, employer's counsel, by letter dated April 28, 2014, advised the Board "of its withdrawal as counsel of record."

[2] By letter dated June 4, 2014, the Director, Office of Workers' Compensation Programs, notified the Board that the Black Lung Disability Trust Fund "accepts responsibility for defense of [this] claim."

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[3] appeals, without the assistance of counsel, the Decision and Order (12-BLA-5221) of Administrative Law Judge Richard A. Morgan denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on May 28, 2010. In a Proposed Decision and Order dated February 14, 2011, the district director denied benefits. Claimant thereafter requested modification, which the district director denied on September 12, 2011. Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

After crediting the miner with at least thirty years of coal mine employment,[4] the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Considering amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[5] the administrative law judge found that the evidence did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and, therefore, determined that claimant failed to invoke the Section 411(c)(4) presumption.[6] Turning to whether claimant could

[3] Claimant is the surviving spouse of the miner, who died on June 25, 2007. Director's Exhibit 9.

[4] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which 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).

[6] The amendments also revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's

affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge determined that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[7] Consequently, the administrative law judge found that there was no mistake in fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

We initially note that the administrative law judge was not required to consider whether the evidence was sufficient to establish modification of the district director's denial of claimant's survivor's claim. The Board has held that an administrative law judge is not required to make a preliminary determination regarding whether a claimant has established a basis for modification of the district director's denial of benefits before reaching the merits of entitlement. Rather, the Board has recognized that such a determination is subsumed into the administrative law judge's decision on the merits. The Board has held that an administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of the district director's decision is sought. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v.*

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benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Claimant cannot benefit from this provision, as there is no evidence in the record that the miner filed a claim for federal black lung benefits during his lifetime.

[7] After the administrative law judge issued his decision, the Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The provisions that were applied by the administrative law judge at 20 C.F.R. §718.205(c) are now set forth at 20 C.F.R. §718.205(b). 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.205(b)).

Director, OWCP¸ 17 BLR 1-9 (1992). The administrative law judge, therefore, was authorized to address the merits of claimant's survivor's claim without first addressing whether the evidence was sufficient to establish modification of the district director's denial of the claim.

Death Due to Pneumoconiosis

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable, or the presumption set forth at 20 C.F.R. §718.305 is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6).

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

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner was suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining*

Corp., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc).

Dr. Dennis, the autopsy prosector, opined that the autopsy evidence supported a diagnosis of progressive massive fibrosis. Director's Exhibit 10. The administrative law judge, however, properly required claimant to establish that the progressive massive fibrosis seen on autopsy would appear as a greater than one-centimeter opacity on x-ray. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61; *see also Gollie*, 22 BLR at 1-311. Because Dr. Dennis did not provide any measurements or otherwise provide support for his diagnosis of progressive massive fibrosis, the administrative law judge properly found that an equivalency determination could not be made. *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384-85 (4th Cir. 2006); Decision and Order at 9, 19. The administrative law judge, therefore, correctly held that Dr. Dennis's diagnosis of progressive massive fibrosis seen on autopsy was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Decision and Order at 19. Because there is no other evidence supportive of a finding of complicated pneumoconiosis,[8] we affirm the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

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, 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 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 considering whether the evidence established the existence of a totally disabling respiratory impairment, the administrative law judge accurately found that there are no pulmonary function studies or arterial blood gas studies in the record. Decision and Order at 20. The administrative law judge also accurately found that there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. *Id.* Claimant, therefore, cannot establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

[8] The administrative law judge accurately noted that two pathologists, Drs. Oesterling and Swedarsky, reviewed the miner's autopsy slides and opined that there was no evidence of progressive massive fibrosis. Decision and Order at 19; Employer's Exhibits 1-3. Additionally, Drs. Castle and Tuteur each reviewed the medical evidence, and opined that the miner did not suffer from progressive massive fibrosis. Employer's Exhibits 6, 7.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Drs. Dennis, Oesterling, and Swedarsky "reached no conclusions regarding whether the miner had been totally disabled from a respiratory or pulmonary [condition]."[9] Decision and Order at 21. The administrative law judge, therefore, correctly determined that the opinions of Drs. Dennis, Oesterling, and Swedarsky did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge also considered the medical opinions of Drs. Castle and Tuteur. Although Dr. Castle opined that the miner's complications from pancreatitis would have caused some respiratory or pulmonary impairment "right before he died," the doctor opined that there was no evidence that the miner suffered from any respiratory impairment prior to the development of these complications. Employer's Exhibit 8 at 29. Similarly, although Dr. Tuteur acknowledged that the miner suffered from a disabling lung condition from complications of pancreatitis during "his final terminal disease process," the doctor stated that there was no evidence to indicate that the miner had a disabling lung condition "when he was not hospitalized in the acute phase of his disease." Employer's Exhibit 9 at 39. The administrative law judge observed that the opinions of Drs. Castle and Tuteur supported a finding that the miner suffered from a respiratory impairment immediately prior to his death, but that neither physician diagnosed the miner with a "chronic" respiratory or pulmonary impairment. Decision and Order at 21. As the administrative law judge properly found that neither Dr. Castle nor Dr. Tuteur diagnosed a "*chronic* respiratory or pulmonary impairment," we affirm his finding that their opinions did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See* 20 C.F.R. §718.204(a). Because there is no other medical opinion evidence supportive of a finding of total disability, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

[9] Dr. Dennis did not address whether the miner suffered from a disabling respiratory impairment during his lifetime. Director's Exhibit 10. Although the opinions of Drs. Oesterling and Swedarsky do not support a finding of total disability, the doctors did address the miner's pulmonary capacity, contrary to the administrative law judge's characterization. Dr. Oesterling found "evidence of very minimal micronodular change with anthracotic cuffing of the airways," but opined that this was "not sufficient to produce alterations in pulmonary function," and "would have produced no lifetime disability." Employer's Exhibit 2. Dr. Swedarsky opined that the miner's very mild coal workers' pneumoconiosis did not cause any "lifetime pulmonary impairment." Employer's Exhibit 3 at 28.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). In light of our affirmance of this finding, we also affirm the administrative law judge's finding that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); Decision and Order at 18.

Pneumoconiosis as a Substantially Contributing Cause of Death

Where the Section 411(c)(3) and 411(c)(4) presumptions do not apply, claimant must affirmatively establish that pneumoconiosis was the cause or was a substantially contributing cause of the miner's death. *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).

After listing his final anatomical diagnoses in his autopsy report, Dr. Dennis completed a section entitled "Summary and Discussion," stating that:

> This patient died a death secondary to extra-hepatic obstruction and a primary lesion of the bile collection system, specifically cholangiocarcinoma with fibrosis and cirrhosis and chronic obstructive changes of the extra-hepatic system. In addition the patient had severe coronary artery disease with evidence of remote myocardial infarction, calcification in vessel walls was noted as well. The patient essentially died a septic death secondary to the above listed diagnoses.

Director's Exhibit 10.

Although Dr. Dennis included a diagnosis of simple coal workers' pneumoconiosis among his final anatomic diagnoses, the administrative law judge found that Dr. Dennis's report was "at best . . . ambiguous concerning the contribution of [coal workers' pneumoconiosis], if any, to the miner's death." Decision and Order at 23 n.23. The administrative law judge permissibly found that, to the extent Dr. Dennis's opinion supported a finding that the miner's coal workers' pneumoconiosis contributed to his death, it was inadequately explained and, therefore, was not sufficiently reasoned. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Drs. Oesterling, Swedarsky, Castle, and Tuteur, the only other physicians of record to address the cause of the miner's death, opined that the miner's mild coal

workers' pneumoconiosis did not cause, contribute to, or hasten his death.[10] Employer's Exhibits 1-3, 6-9. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis. 20C.F.R.§718.205(b).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[10] Dr. Dumm completed the miner's death certificate. Dr. Dumm attributed the miner's death to a gastric ulcer due to bronchiectasis, anemia, and an abdominal abscess. Director's Exhibit 9. Consequently, the miner's death certificate does not support a finding that the miner's death was due to pneumoconiosis.