U.S. Department of Labor

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

BRB No. 15-0407 BLA

MARY C. FORREN (Widow of LUTHER H. FORREN) Claimant-Petitioner v. FLAT TOP COLLIERY CORPORATION and WEST VIRGINIA COALWORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/30/2016 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in a Survivor's Claim of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Robert W. Williams (Maroney, Williams, Weaver & Pancake PLLC), Charleston, West Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits in a Survivor's Claim (2012-BLA-05079) of Administrative Law Judge Lystra A. Harris, rendered on a survivor's claim filed on February 9, 2011, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited the miner[2] with thirty-two years of underground coal mine employment, but determined that claimant was not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act because claimant did not establish that the miner had a totally disabling respiratory or pulmonary impairment.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge then determined that claimant did not prove that the miner had pneumoconiosis under 20 C.F.R. §718.202(a), and did not establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits.

Claimant argues on appeal that the evidence she submitted was sufficient to establish that the miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. Claimant also asserts that Dr. Keffer's opinion should have been given considerable weight because he was the miner's treating physician. Employer/carrier responds, urging affirmance of the denial of benefits. The

[1] Claimant is the widow of the miner, Luther H. Forren, who died on January 7, 2011. Director's Exhibit 13; Claimant's Exhibit 5. Claimant is also deceased, having died on May 17, 2014, while the survivor's claim was pending before the Office of Administrative Law Judges. Claimant's Petition for Review at [1] (unpaginated). Her sister, Naomi Reed, was named executrix and is pursuing this claim on behalf of claimant's estate. *Id*. at [2].

[2] The miner filed three claims for benefits during his lifetime, all of which were denied by the district director. Closed Miner's Claims. Because the miner was not found to be entitled to benefits, claimant is not derivatively entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

[3] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or 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), as implemented by 20 C.F.R. §718.305.

Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[4]

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.[5] 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).

In a survivor's claim, where the Section 411(c)(3)[6] and 411(c)(4) statutory presumptions do not apply, claimant must affirmatively establish, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish that the miner had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) and, therefore, did not invoke the rebuttable presumption at Section 411(c)(4), and her determination that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibits 3-9. 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, 1-202 (1989) (en banc).

[6] 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 due to pneumoconiosis if the miner suffers 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, based on the administrative law judge's rational decision to discredit the only diagnosis of complicated pneumoconiosis. *See infra* at 7.

complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (2). 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); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). Failure to establish any one of the required elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge weighed Dr. Manu Patel's positive reading of the September 21, 1994 x-ray against Dr. Bellotte's negative reading of an x-ray dated November 19, 2010. Decision and Order 14; Claimant's Exhibit 3; Employer's Exhibit 5. The administrative law judge accorded "lesser probative value" to the September 21, 1994 x-ray, based on "its temporal remoteness and the lesser qualifications of the interpreting physician."[7] Decision and Order at 14. Regarding the treatment record x-ray readings by Dr. Manu Patel and Dr. Bharat Patel, the administrative law judge found that they were not of sufficient quality to establish the presence or absence of pneumoconiosis.[8] *Id*. at 7, 14; Claimant's Exhibit 1, 2. The administrative law judge found that the remaining treatment record x-ray interpretations were insufficient to establish the presence or absence of pneumoconiosis because the quality of the x-rays was poor, or undetermined,[9] or because the readings did not mention coal workers' pneumoconiosis. *Id*. at 14; Director's Exhibit 14; Employer's Exhibits 1-2. She concluded, therefore, that the "preponderant chest x-ray evidence [is] insufficient to establish the presence of pneumoconiosis." Decision and Order at 14.

In challenging the administrative law judge's determination that the existence of pneumoconiosis was not established by the x-ray evidence, claimant states, "[t]he evidence in this case from Dr. Manu Patel [and] Dr. Bharat Patel . . . clearly demonstrate[s] that the miner suffered from occupational pneumoconiosis." Claimant's

[7] The record reflects that Dr. Bellotte is a B reader and a Board-certified pulmonologist, while Dr. Manu Patel is a Board-certified radiologist and an A reader. Director's Exhibit 20; Employer's Exhibit 5.

[8] Dr. Manu Patel's reading of the film dated October 17, 2003, appears in claimant's treatment records, and does not reflect application of the ILO system. Claimant's Exhibit 1. Dr. Manu Patel reported that the x-ray showed "classifiable pneumoconiosis." *Id*. Dr. Bharat Patel's interpretation of the x-ray dated October 28, 2003, also appears in the treatment records and consists of a notation that he observed "chronic parenchymal lung changes due to pneumoconiosis." Claimant's Exhibit 2.

[9] Dr. Manu Patel commented that "[t]he examination is technically limited; the views are underexposed." Claimant's Exhibit 1. Dr. Bharat Patel did not comment on the quality of the chest x-ray he reviewed. Claimant's Exhibit 2.

Petition for Review at [2-3] (unpaginated). To properly invoke the Board's review authority, however, claimant must raise specific errors with regard to the administrative law judge's credibility findings or the weight accorded to the conflicting evidence. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 120-21 (1987). Claimant's general contention that the x-ray readings by Drs. Manu and Bharat Patel "clearly demonstrate" that the miner had pneumoconiosis is no more than a request that the Board reweigh the evidence of record, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because claimant has not identified any error in the administrative law judge's weighing of the x-ray evidence, we affirm her finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). *See Sarf*, 10 BLR at 1-120-21; *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Keffer and Bellotte. Dr. Keffer treated the miner from 2002 until the miner's death in 2011. Hearing Transcript at 13; Claimant's Exhibit 4. He opined that the miner's thirty-two year history of coal mine employment was sufficient to support a diagnosis of pneumoconiosis. Claimant's Exhibit 4. Dr. Keffer further indicated that the results of the miner's x-rays and CT scans were consistent with a diagnosis of pneumoconiosis, perhaps even complicated pneumoconiosis. *Id*. Dr. Keffer also completed the miner's death certificate, identifying pneumoconiosis and end-stage chronic obstructive pulmonary disease (COPD) as the causes of the miner's death. Director's Exhibit 13. Dr. Bellotte reviewed the miner's medical records and stated that he did not suffer from either legal or clinical pneumoconiosis.[10] Employer's Exhibit 5. Dr. Bellotte diagnosed bullous emphysema, based on the radiological evidence, and maintained that cigarette smoking was the sole cause. *Id*.

The administrative law judge noted Dr. Keffer's status as the miner's treating physician, but determined that his opinion was not entitled to controlling weight on that basis under 20 C.F.R. §718.104(d).[11] In support of her finding, the administrative law

[10] 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201 (a)(1). 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).

[11] The regulation at 20 C.F.R. §718.104(d) provides:

judge observed that the record established the duration of Dr. Keffer's treatment of the miner but did not establish his qualifications, or the frequency, nature, and extent of his treatment of the miner. Decision and Order at 17. The administrative law judge also determined that Dr. Keffer's opinion on the existence of pneumoconiosis was not well-reasoned or well-documented. *Id*. at 17-18. With respect to Dr. Bellotte's opinion, the administrative law judge found that it was entitled to "little weight as it contradicts the preamble to the [Department of Labor] regulations which cites medical literature supporting the theory that (1) dust-related emphysema and smoke-induced emphysema occur through similar mechanisms and (2) the risks of smoking and coal dust are additive." *Id*. at 18. The administrative law judge concluded that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) because "there is no well-reasoned physician's opinion of record on the presence or absence of pneumoconiosis." *Id*. at 19. Upon weighing together all of the evidence relevant to the existence of pneumoconiosis, the administrative law judge found that claimant failed to satisfy her burden of proof under 20 C.F.R. §718.202(a). *Id*.

Claimant alleges that the administrative law judge erred in failing to give "considerable weight" to Dr. Keffer's opinion, "in accordance with §718.104(d)." Claimant's Brief at [3]. We disagree. The administrative law judge's determination that the frequency, nature, and extent of Dr. Keffer's treatment of the miner cannot be ascertained from the record is rational and supported by substantial evidence.[12] *See*

> In weighing the medical evidence of record relevant to whether the miner . . . is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician: (1) nature of relationship . . . ; (2) duration of relationship . . . ; (3) frequency of treatment . . . ; and (4) extent of treatment[.]

20 C.F.R. §718.104(d)(1)-(4).

[12] Dr. Keffer's opinion appears in a letter dated June 7, 2011. Claimant's Exhibit 4. Dr. Keffer reported that he treated the miner at the Fayette Nursing and Rehabilitation Center from January 2002 to May 2003, and again from June 2004 until the miner's death in January 2011. *Id*. He further stated that the miner's "biggest problems during his stays in the nursing home were recurrent pulmonary infections, chronic shortness of breath and inability to perform his [activities of daily living] due to dyspnea," but he did not describe how often he saw the miner or the type of treatment he provided. *Id*. Any

Underwood v. Elkay Mining, Inc., 105 F.3d 946, 951, 21 BLR 2-23, 2-31 (4th Cir. 1997); Claimant's Exhibit 4. In addition, the administrative law judge acted within her discretion in discrediting Dr. Keffer's diagnoses of simple and complicated pneumoconiosis as not well-reasoned or documented, in part because "Dr. Keffer does not specify the [m]iner's records upon which he relied in providing his opinion." Decision and Order at 17; *see E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); Claimant's Exhibit 4. The administrative law judge also reasonably determined that Dr. Keffer's identification of end-stage COPD and coal workers' pneumoconiosis on the death certificate was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), in the absence of underlying documentation. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); Director's Exhibit 13; Claimant's Exhibit 5.

Thus, the administrative law judge rationally concluded that, despite his status as a treating physician, Dr. Keffer's opinion did not contain a credible diagnosis of pneumoconiosis in any form, "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-8, 22 BLR 2-564, 2-571 (4th Cir. 2002); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326. We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis by the medical opinion evidence under 20 C.F.R. §718.202(a)(4). *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012).

Because we have affirmed the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-

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references made by Dr. Keffer to pneumoconiosis occur in the context of his description of the miner's medical history. *Id*.

(4), an essential element of entitlement, we must also affirm the denial of benefits.[13] *See Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[13] In light of our affirmance of the administrative law judge's finding that claimant did not establish that the miner had pneumoconiosis, we decline to address claimant's arguments regarding invocation of the presumption that the miner's pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b) and death due to pneumoconiosis under 20 C.F.R. §718.205(b).