U.S. Department of Labor

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

BRB No. 16-0515 BLA

SHARON R. KITCHEN (Widow of DANNIE D. KITCHEN) Claimant-Respondent v. CANNELTON INDUSTRIES, INCORPORATED and ACE AMERICAN INSURANCE COMPANY Employer/Carrier-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/05/2017 DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

Michael L. Haynie (Manier & Herod), Nashville, Tennessee, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5295) of Administrative Law Judge Richard A. Morgan 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 February 17, 2011.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[1] the administrative law judge credited the miner with twenty-nine years of underground coal mine employment, and found that the evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant[2] invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and was entitled to invocation of the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where a 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), provides that a survivor of a miner who was 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. 30 U.S.C. §932(*l*) (2012). Claimant cannot benefit from this provision, as the miner's claim for benefits, filed on March 7, 1983, was finally denied on December 21, 1989. Director's Exhibit 1.

[2] Claimant is the surviving spouse of the miner, who died on October 10, 2001. Director's Exhibit 10.

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

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

After finding that total disability was not established pursuant to 20 C.F.R. §718.202(b)(2)(i)-(iii), the administrative law judge considered the medical opinions of Drs. Sood, Noth, and Jelic pursuant to Section 718.204(b)(2)(iv), and determined that only Dr. Sood rendered a disability assessment.[5] In a report dated January 21, 2016, Dr. Sood opined that the miner had a totally disabling respiratory impairment. Claimant's Exhibit 4. The administrative law judge found that Dr. Sood's opinion was well-reasoned and well-documented, and that it established total disability. Decision and Order at 16.

Employer contends that the administrative law judge erred in relying on Dr. Sood's opinion to find total respiratory disability established pursuant to 20 C.F.R. §718.204(b) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. Employer notes that Dr. Sood conceded that the miner's 2006 and 2007 pulmonary function studies were non-qualifying[6] under the regulatory standards for establishing total disability, and reported that the test results showed only a mild obstruction. Arguing that "Dr. Sood does not cite a single test that meets the medical criteria set forth in the regulations," employer asserts that Dr. Sood's opinion cannot support a finding of total disability because it is conclusory and insufficiently reasoned and documented. Employer's Brief at 9-10. We disagree.

[4] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 2. 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).

[5] In a report dated January 25, 2016, Dr. Noth noted, "the question put forth to me is regarding [the miner's] proximate cause of death and if any of his pneumoconiosis contributed to his demise." Employer's Exhibit 1. Dr. Jelic performed an autopsy on October 11, 2001 and, like Dr. Noth, did not render an opinion as to whether the miner had a totally disabling respiratory or pulmonary impairment. Director's Exhibit 17.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Contrary to employer's argument, a finding of total respiratory or pulmonary disability may be based on the medical opinion evidence even though certain objective tests of record do not meet the regulatory criteria for establishing disability. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-123 (6th Cir. 2000)(a physician is entitled to base a reasoned opinion of total disability on non-qualifying test results). The pertinent regulation explicitly states that:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his or her usual coal mine] employment as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv). In this case, the administrative law judge determined that Dr. Sood reviewed the medical evidence of record and interpreted the miner's diffusing capacity measurement of 42% as showing a Class IV impairment of the whole person pursuant to the *AMA Guides to the Evaluation of Permanent Impairment*. Decision and Order at 9-10, 16; Claimant's Exhibit 4. Dr. Sood explained that a Class IV impairment indicates "moderate impairment with progressively lower levels of lung function," and he concluded that this impairment would prevent the miner from performing his last coal mine employment, which involved heavy labor.[7] *Id.* Dr. Sood also noted that although no blood gas studies were obtained while the miner was in a stable state, the presence of hypoxia requiring supplemental oxygen, as shown in the miner's treatment records, was

[7] The administrative law judge determined that the miner worked for employer as a shuttle car operator, a roof bolter, a cutting machine operator, a continuous miner operator, and a belt man, and that his last positions were as a shuttle car operator and belt line cleaner. Decision and Order at 12. Based on the miner's March 3, 1988 hearing testimony, the administrative law judge determined that cleaning the belt lines involved crawling and shoveling spillage back onto the belt, with each shovelful of coal weighing thirty-five to forty pounds. *Id.*; Claimant's Exhibit 19 at 30-32. The miner's job as a shuttle car operator involved running the car for approximately five hours per day, cleaning spilled coal, moving boxes of supplies weighing forty to one hundred pounds, and lifting timbers weighing fifty to one hundred pounds. Claimant's Exhibit 19 at 34-35.

consistent with total disability. *Id.*[8] Finding that Dr. Sood persuasively explained how the miner's objective testing showed that he was unable to perform his usual coal mine employment, the administrative law judge permissibly concluded that Dr. Sood's opinion was well-reasoned, well-documented, and sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(iv). Decision and Order at 22; *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). As substantial evidence supports the administrative law judge's credibility determinations, and as there is no showing that he failed to properly consider the medical opinion evidence in light of the pulmonary function test and blood gas study evidence, we affirm the administrative law judge's finding that claimant met her burden of proving total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his finding that claimant invoked the Section 411(c)(4) presumption.

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

Because claimant established invocation of the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither clinical nor legal pneumoconiosis,[9] or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge determined that employer failed to rebut the presumption by either method.

[8] Employer does not contest the validity of the testing cited by Dr. Sood, that the testing demonstrated the existence of a Class IV impairment, that the impairment was respiratory or pulmonary in nature, or that that impairment was a chronic impairment.

[9] 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 coal 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Employer does not challenge the administrative law judge's finding that it failed to disprove the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i), but contends that the administrative law judge erred in finding that Dr. Noth's opinion was insufficient to establish that no part of the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). Employer's Brief at 10-13. We disagree. The administrative law judge determined that Dr. Noth opined that the miner's death from acute pancreatitis was unavoidable and therefore unrelated to "coal mine exposure." Decision and Order at 22; Employer's Exhibit 1. Dr. Noth explained that the level of pancreatitis the miner experienced approached a risk of 100 percent mortality independent of his coal workers' pneumoconiosis, and stated that it was "not possible to say what the level of contribution of his underlying lung disease was to increasing his risk." *Id*. Because Dr. Noth did not address whether pneumoconiosis hastened the miner's death, the administrative law judge permissibly found that his opinion did not affirmatively prove that the miner's death was unrelated to pneumoconiosis.[10] Decision and Order at 22-23; *see Copley v. Buffalo Mining Co.*, 25 BLR 1-81 (2012). As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that employer failed to rebut the Section 411(c)(4) presumption and that claimant is entitled to benefits. 20 C.F.R. §718.305(d)(2)(i), (ii).

[10] Because employer bears the burden to prove that no part of the miner's death was due to pneumoconiosis, we need not address employer's arguments regarding the weight the administrative law judge accorded to Dr. Sood's opinion that pneumoconiosis was a contributing cause of the miner's death. *See* 20 C.F.R. §718.305(d)(2)(ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge