U.S. Department of Labor

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

BRB No. 17-0481 BLA

ROSE M. TAYLOR (Widow of GARY L. TAYLOR) Claimant-Petitioner v. THACKER COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/27/2018 DECISION and ORDER

Appeal of the Decision and Order of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (2015-BLA-05328) of Administrative Law Judge Morris D. Davis denying benefits on a claim filed pursuant to 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 August 19, 2013.

Because the administrative law judge credited the miner with only 1.86 years of coal mine employment,[2] he found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Turning to whether claimant could establish entitlement under 20 C.F.R. Part 718, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judge's finding regarding the length of the miner's coal mine employment. Claimant also argues that the administrative law judge erred in finding that the evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer/carrier 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.

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,

[1] Claimant is the widow of the miner, who died on May 27, 2013. Director's Exhibit 21.

[2] The miner's last coal mine employment was in Kentucky. Hearing Transcript at 35-36. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

and 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).

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, 1-86 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause of the miner's death. 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). Before any finding of entitlement can be made in a survivor's claim, however, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

Claimant initially contends that the administrative law judge erred in crediting the miner with only 1.86 years of coal mine employment. Claimant's Brief at 10-11. Claimant, however, alleges no specific error in regard to the administrative law judge's consideration of the evidence regarding the miner's coal mine employment or his calculation of the length of that employment.[4] *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to reweigh the evidence, or to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that the miner had 1.86 years of coal mine employment.[5]

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis[6] pursuant

[4] Although claimant accurately notes that Dr. Miller relied upon a coal mine employment history of twelve years, the doctor provided no basis for his calculation. Claimant's Brief at 11; Director's Exhibit 24.

[5] In her post-hearing brief, claimant asserted that the miner "worked approximately [ten] years in the coal mine industry." Claimant's Post-Hearing Brief at 18. Notably, claimant has not alleged that the miner had the fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[6] "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).

to 20 C.F.R. §718.202(a)(4).[7] Claimant's Brief at 11-19. To establish legal pneumoconiosis, claimant must demonstrate that he has a chronic dust disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b).

The administrative law judge considered the medical opinions of Drs. Miller, Rosenberg, and Tuteur. Dr. Miller diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 24. Although Drs. Rosenberg and Tuteur also diagnosed COPD/emphysema, they opined that it was due to cigarette smoking. Employer's Exhibits 1, 2. Drs. Rosenberg and Tuteur opined that the miner's COPD/emphysema was not due to coal mine dust exposure. *Id.* The administrative law judge found that all three medical reports were insufficiently reasoned. Decision and Order at 20-23. He therefore found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant contends that the administrative law judge erred in his consideration of Dr. Miller's opinion. Claimant's Brief at 15-16. We disagree. In a two-paragraph report, Dr. Miller opined that the miner "died as a result of severe emphysema and COPD as the result of long-term exposure to coal dust and tobacco use." Director's 24 at 1. Although the administrative law judge acknowledged Dr. Miller's status as the miner's treating physician, the administrative law judge found that she offered no explanation for attributing the miner's COPD/emphysema to his coal mine dust exposure. Decision and Order at 21; *see* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The administrative law judge therefore found that Dr. Miller's opinion was insufficiently reasoned to support a finding of legal pneumoconiosis. *Id.* Substantial evidence supports this finding.[8] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR

[7] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

[8] The administrative law judge also permissibly accorded less weight to Dr. Miller's diagnosis of legal pneumoconiosis, because he found that it was based upon an inaccurate coal mine employment history. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); Decision and Order at 21-22. The administrative law judge noted that while he credited the miner with 1.86 years of coal mine employment, Dr.

2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because there is no other medical opinion evidence supportive of a finding of legal pneumoconiosis,[9] we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 218 (6th Cir. 2012); *Trumbo*, 17 BLR at 1-87-88.

Miller relied upon a twelve year coal mine employment history. Decision and Order at 21-22; Director's Exhibit 24.

[9] The administrative law judge correctly found that the miner's treatment records do not assist claimant in establishing legal pneumoconiosis because the doctors who diagnosed COPD/emphysema did not attribute the disease to coal mine dust exposure. 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 23; Director's Exhibit 23. Although the miner's death certificate lists COPD as a cause of death, the certifying physician did not address the cause of the disease. Director's Exhibit 21.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge