BRB No. 12-0291 BLA

| | | |
|---|---|---|
| BARBARA A. FUGATE<br>(Widow of SHELBY FUGATE)<br><br>Claimant-Petitioner<br><br>v.<br><br>HERITAGE COAL COMPANY, LLC<br><br>Employer-Respondent<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 03/28/2013<br><br>DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Thomas E. Springer, III (Springer Law Firm, PLLC), Madisonville, Kentucky, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2009-BLA-5767) of Administrative Law Judge Alice M. Craft rendered on a survivor's claim filed on October 21, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

[1] Claimant is the widow of the miner, who died on September 25, 2008. Director's Exhibit 8.

U.S.C. §§901-944 (Supp. 2011)(the Act). Applying Section 411(c)(4),[2] the administrative law judge found that the miner worked for at least twenty-six years in underground coal mine employment. However, the administrative law judge found that the medical evidence did not establish that the miner had a totally disabling respiratory impairment. Consequently, the administrative law judge found that claimant failed to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). Turning to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to carry her burden of establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[3] Accordingly, the administrative law judge denied benefits.

---

[2] Section 411(c)(4), as revived by Section 1556 of Public Law No. 111-148, states that, if a survivor 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 that he had a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. *Id*.

Section 1556 of Public Law No. 111-148 also revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), providing that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's 1971 and 1983 claims for benefits were finally denied. Decision and Order at 2; Administrative Law Judge's Exhibit 1.

[3] To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate 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(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). 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, or the presumption under Section 411(c)(4) of the Act is invoked and has not been rebutted. 20 C.F.R. §718.205(c)(1)-(3), Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(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(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

On appeal, claimant challenges the administrative law judge's finding that the qualifying pulmonary function study and the opinions of Drs. Dodds and Popescu did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b).[4] Claimant contends, therefore, that the administrative law judge erred in not invoking the presumption at Section 411(c)(4). Claimant also contends that the administrative law judge erred in failing to accord proper weight to the opinions of Drs. Dodds and Popescu, the miner's treating physicians. Further, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[5] In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. 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, and in accordance with applicable law.[6] 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).

Claimant initially contends that the administrative law judge erred in not invoking the Section 411(c)(4) presumption in this case. Specifically, claimant contends that the results of Dr. Gallo's April 29, 2008 pulmonary function study showed a severe obstruction and resulted in qualifying values under 20 C.F.R. §718.204(b)(2)(i). Claimant contends, therefore, that the administrative law judge erred in finding that the pulmonary function study did not establish a totally disabling respiratory impairment sufficient to invoke the Section 411(c)(4) presumption. Claimant also contends that the administrative law judge erred in finding that the opinions of Drs. Dodds and Popescu,

---

[4] The administrative law judge's finding that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(ii) and (iii) is affirmed, as unchallenged on appeal. *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[5] The administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3) is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[6] We will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 3, 4.

the miner's treating physicians, did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Addressing the evidence relevant to total respiratory disability, the administrative law judge found that the medical evidence, as a whole, did not establish a totally disabling respiratory impairment pursuant to Section 718.204(b). Contrary to claimant's contention, the submission of a single qualifying objective test is not sufficient to invoke the Section 411(c)(4) presumption. Rather, claimant must establish total respiratory disability by a preponderance of the evidence. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(en banc); Decision and Order at 9-13, 15. Further, contrary to claimant's contention, the administrative law judge found that the opinions of Drs. Dodds and Popescu were insufficient to establish total respiratory disability, as neither of the physicians addressed whether the miner was totally disabled from a respiratory standpoint.[7] 20 C.F.R. §718.204(b); *Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 15; Director's Exhibit 19; Claimant's Exhibit 1. The administrative law judge, therefore, properly found that the single qualifying pulmonary function study and the opinions of Drs. Dodds and Popescu were insufficient to support a finding that the miner had a total respiratory disability pursuant to Section 718.204(b). In light of our affirmance of the administrative law judge's finding that the evidence did not establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm her finding that claimant was not entitled to invocation of the Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Turning to entitlement under 20 C.F.R. Part 718, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

---

[7] Contrary to claimant's contention, the fact that Dr. Dodds diagnosed a chronic lung disease caused by coal mine employment and Dr. Popescu diagnosed emphysema/respiratory failure aggravated by coal dust exposure is insufficient to support a finding of a totally disabling respiratory or pulmonary impairment. *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see generally Heaton v. Director, OWCP*, 6 BLR 1-1222 (1984)(holding that, without further evidence, a diagnosis of carcinoma of the larynx will not establish the existence of a totally disabling respiratory impairment). Similarly, Dr. Popescu's statement, that the miner reported shortness of breath, does not support a finding of a totally disabling respiratory or pulmonary impairment. *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4, 1-6 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245, 1-247 (1985); Director's Exhibit 19; Claimant's Exhibit 1.

Claimant contends that the administrative law judge should have accorded greater weight to the opinions of Dr. Dodds and Dr. Popescu,[8] based upon their status as the miner's treating physicians.

An administrative law judge is not required to accord greater weight to the opinion of a treating physician, based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002).

In this case, the administrative law judge found that neither Dr. Dodds nor Dr. Popescu provided an adequate explanation for attributing the miner's chronic obstructive pulmonary disease to his coal mine dust exposure.[9] The administrative law judge, therefore, properly found that their diagnoses were not sufficiently reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Lucostic v. United*

[8] Dr. Dodds, in response to a questionnaire provided by claimant, opined that the miner had clinical pneumoconiosis, but did not diagnose the presence of legal pneumoconiosis. Dr. Dodds stated that this diagnosis was based on his treatment of the miner. Director's Exhibit 19. Dr. Dodds additionally opined that the miner's chronic lung disease was causally related, in whole or in part, to the miner's inhalation of coal dust, but did not provide a further explanation or rationale for this conclusion. *Id*. Dr. Popescu, in response to a similar questionnaire provided by claimant, opined that the miner had an occupational lung disease cause by the miner's coal mine employment, stating that the condition was diagnosed years ago and that recent x-rays are consistent with pneumoconiosis. Director's Exhibit 19. Dr. Popescu also opined that the miner had emphysema/respiratory failure, aggravated by coal dust exposure. *Id*. Additionally, Dr. Popescu stated that the miner's chronic lung disease was 70% attributable to coal dust exposure. *Id*. Dr. Popescu reiterated these conclusions in a letter dated June 27, 2010, noting that the diagnosed abnormalities were consistent with coal workers' pneumoconiosis due to the miner's forty years in coal mining employment. Claimant's Exhibit 1. Lastly, Dr. Popescu certified the miner's death certificate, stating that the miner's death was due to emphysema, which was due to smoking. Director's Exhibit 8.

[9] Because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, we need not consider claimant's general contention that the opinions of Drs. Dodd and Popescu also establish that the miner's death was due to pneumoconiosis. *Trumbo*, 17 BLR at 1-87-88; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

*States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 19. Consequently, we reject claimant's contention that the administrative law judge was required to accord either of the opinions greater weight, based upon their status as the miner's treating physicians.[10] *Williams*, 338 F.3d at 513, 22 BLR at 647. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[10] Specifically, regarding Dr. Dodds's opinion, the administrative law judge noted that his treatment notes did not support a finding of pneumoconiosis. Decision and Order at 17; Director's Exhibits 10, 19. Regarding Dr. Popescu's opinion, the administrative law judge found that Dr. Popescu's treatment notes were not in the record and, therefore, she was not able to determine whether Dr. Popescu's diagnosis was supported by his treatment history. Decision and Order at 17.