BRB No. 12-0295 BLA

JOYCE L. GARRIS (Widow of DICK GARRIS)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 03/14/2013
SUGAR CREEK MINING COMPANY, c/o ARCH MINERALS COMPANY	)	
and	)	
LIBERTY MUTUAL INSURANCE GROUP	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joyce L. Garris, Greenville, Kentucky, *pro se*.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order (2007-BLA-5786) of Administrative Law Judge Joseph E. Kane denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a survivor's claim filed on July 11, 2006. In a Proposed Decision and Order, the district director denied benefits. Claimant requested a formal hearing before the Office of Administrative Law Judges, but later filed an unopposed motion waiving her right to a hearing and seeking a decision on the record. The administrative law judge issued orders granting claimant's motion, and admitting into evidence Director's Exhibits 1 through 38. Subsequently, the administrative law judge notified the parties of recent amendments to the Act, and provided them with the opportunity to submit additional evidence. Employer/carrier (employer), the only party to respond, submitted a supplemental medical report.

In a Decision and Order dated January 31, 2012, the administrative law judge initially considered the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[2] The administrative law judge found that claimant established that the miner worked for 21.25 years in surface coal mine employment,[3] but did not establish that the

[1] Claimant is the surviving spouse of the miner, who died on June 8, 2006. Director's Exhibits 2, 14. The miner filed a claim for federal black lung benefits on October 18, 1984, which was finally denied by the district director on August 29, 1985, because the miner did not establish any element of entitlement. LM-1 Claim (unstamped exhibit).

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstate Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, if a 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 impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). The recent amendments also revive 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 survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Because the miner was not determined to be eligible to receive benefits at the time of his death, claimant is not eligible to receive benefits under amended Section 932(*l*).

[3] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Therefore, 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 (1989) (en banc).

conditions of the miner's surface coal mine employment were substantially similar to those in an underground coal mine. Therefore, the administrative law judge found that claimant did not establish at least fifteen years of qualifying coal mine employment and, thus, could not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge further found that claimant did not establish that the miner suffered from pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of 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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). 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).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). We first address the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, because she did not establish that the conditions of the miner's surface coal mine employment were substantially similar to those in an underground mine. To establish that the miner's work conditions were substantially similar to those in an underground mine, claimant need establish only that the miner was exposed to sufficient coal mine dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011).

The administrative law judge found that claimant submitted no evidence of the miner's work conditions at the strip mines where he worked as a dozer operator, driller, and heavy equipment operator:

> Here, the record is devoid of any evidence regarding the dust conditions in the [m]iner's workplaces. Claimant has merely alleged that the [m]iner was exposed to dust at his coal mine employment. (DX 3). Claimant cannot

> prove substantial similarity "simply by showing that [the miner] was in or around a coal mine for at least 15 years, without any further discussion of his employment condition[s]. Such a scintilla of evidence would not discharge the claimant's burden of proof." Because [c]laimant has failed to proffer "sufficient evidence of the surface mining conditions in which [the miner] worked," I must find that [c]laimant has failed to meet her burden of proof on the issue of substantial similarity.

Decision and Order at 19 (citations omitted). Therefore, the administrative law judge found that claimant did not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

The record from the miner's claim contains evidence regarding the miner's dust exposure during his surface coal mine employment.[4] It is not clear whether the administrative law judge admitted, or intended to admit, the record from the closed living miner's claim[5] into evidence in the survivor's claim. This evidence, if admitted and considered by the administrative law judge, could be relevant to determining whether the conditions of the miner's surface coal mine employment were substantially similar to those in an underground mine. Because it is unclear whether the administrative law judge admitted or considered this evidence in determining that claimant did not establish substantial similarity, we are unable to determine whether substantial evidence supports the finding that claimant did not invoke the Section 411(c)(4) presumption. Therefore, we vacate the administrative law judge's finding pursuant to Section 411(c)(4), and remand this case to him for further consideration.

On remand, the administrative law judge must specifically address whether the record from the closed living miner's claim is admitted into evidence, or explain why it

[4] The Description of Coal Mine Work from the miner's claim indicated that the miner worked as a grader operator, drill helper, scraper operator, driller, truck driver, and heavy equipment operator. LM-1 at 276. In a medical report dated June 1, 1984, Dr. Calhoun discussed the miner's jobs operating a drill and other heavy equipment, and stated that the miner "was exposed to high concentrations of dust" and "heavy concentrations of coal and rock dust." LM-1 at 204. In a medical report dated July 10, 1984, Dr. Clarke noted that the miner was employed as a driller and a heavy equipment operator "in a dusty environment" and was "exposed to coal, rock and sand dust." *Id.* at 187.

[5] The closed living miner's claim exhibit, which is paginated and labeled LM-1, was forwarded with the record in the survivor's claim, pursuant to claimant's appeal.

was not admitted.[6] *See* 20 C.F.R. §§725.421, 725.456, 725.461. If the administrative law judge admits the closed living miner's claim, he must determine whether the relevant evidence contained in the record establishes that the conditions of the miner's surface coal mine employment were substantially similar to those in an underground mine, and determine whether the miner had at least fifteen years of qualifying coal mine employment for purposes of Section 411(c)(4). *See Leachman*, 855 F.2d at 512.

If, on remand, the administrative law judge finds that the evidence establishes at least fifteen years of qualifying coal mine employment, he must determine whether the miner suffered from a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2).[7] If the administrative law judge finds that the evidence

[6] In *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2006) (en banc), the Board held that medical evidence from the prior living miner's claim must be designated as evidence by one of the parties in order for it to be considered in the survivor's claim, in light of the evidentiary limitations at 20 C.F.R. §725.414. We note, however, that a description of the miner's working conditions is not medical evidence that is limited by 20 C.F.R. §725.414. Further, in view of the administrative law judge's discretion to handle evidentiary matters, any such description that is contained in a medical report could be considered in isolation from the rest of the report. In sum, in the circumstances of this case, *Keener* does not bar the administrative law judge's consideration of information regarding the miner's surface coal mine employment that is contained in the miner's claim record.

[7] Review of the survivor's claim record discloses a pulmonary function study dated November 28, 1995, which was qualifying, pre-bronchodilator, under the table values set forth at 20 C.F.R. Part 718, Appendix B, and which may also be qualifying post-bronchodilator, depending on the administrative law judge's determination of the height to be used to assess the study values, as the miner's recorded height falls between the listed table heights. Director's Exhibit 17 at 6-10; *see Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 n.6, 19 BLR 2-70, 2-84-85 n.6 (4th Cir. 1995)(noting the Department of Labor's procedure of using the closest greater height when a miner's actual height falls between two listed heights). The record reflects that the administering physician noted good patient effort, cooperation, and comprehension, and that the pulmonary function study indicated "a moderate degree of both restrictive and obstructive airway disease." *Id.* at 6. Review of the record further discloses two blood gas studies, which were non-qualifying for total disability. Further, the record contains the medical opinions of Drs. Tuteur and Jarboe. Director's Exhibits 19, 20; Employer's Exhibit 1. Dr. Tuteur opined that the November 28, 1995 pulmonary function study was valid, and revealed "a moderately severe obstructive abnormality" that improved with the administration of a bronchodilator. Director's Exhibit 20. Dr. Jarboe opined that the November 28, 1995 study did not confirm a disabling pulmonary impairment, noting that

establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will be entitled to invoke the rebuttable presumption of death due to pneumoconiosis under Section 411(c)(4). In order to rebut the Section 411(c)(4) presumption, employer must establish either that the miner did not have pneumoconiosis, or that the miner's death did not arise, in whole or in part, out of dust exposure in his coal mine employment. *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89-90 (2012); *see also* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305).

In the interest of judicial economy, we will address the administrative law judge's additional finding that claimant did not establish directly that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). To establish entitlement to survivor's benefits without the aid of the Section 411(c)(4) presumption, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-638 (6th Cir. 2003); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accurately found that the record contains no x-rays read as positive for pneumoconiosis. Decision and Order at 11-16, 21; Director's Exhibits 17, 18. We therefore affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Further, because there is no biopsy or autopsy evidence, the administrative law judge found, correctly, that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 21-22. Moreover, claimant is not entitled to the presumptions set forth at 20 C.F.R. §§718.304, 718.306.[8] Therefore, she cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Finally, pursuant to 20 C.F.R. §718.202(a)(4), substantial evidence supports the administrative law judge's finding that claimant submitted no medical opinion diagnosing the miner with

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"the FEV1/FVC ratio was within normal limits" for the miner's age. Employer's Exhibit 1 at 3. If the issue of total disability is reached, on remand, the administrative law judge should consider Dr. Jarboe's opinion in light of the regulations, which provide that a pulmonary function study is qualifying for total disability if the miner has a qualifying FEV1 value, and *either* a qualifying MVV or FEV1/FVC ratio. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C).

[8] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. Since this survivor's claim was not filed prior to June 30, 1982, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

pneumoconiosis. *Id.* at 24-25; *see* 20 C.F.R. §718.201; Director's Exhibits 19, 20; Employer's Exhibit 1. Therefore, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of the above, we affirm the administrative law judge's determination that claimant did not affirmatively establish pneumoconiosis in her survivor's claim pursuant to 20 C.F.R. §718.202(a). Therefore, we affirm the administrative law judge's determination that claimant did not establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, without the benefit of the Section 411(c)(4) presumption. *See Trumbo*, 17 BLR at 1-87.

In sum, on remand, the administrative law judge must specifically address whether the record from the living miner's claim is admitted into evidence and, if so, whether claimant is entitled to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. Should the administrative law judge find invocation established, he must determine whether employer has rebutted the presumption.[9] *See Copley*, 25 BLR at 1-89. If the administrative law judge finds that claimant cannot invoke the presumption, or that employer has rebutted the presumption, he must deny benefits.

[9] We note that employer cannot rely upon the administrative law judge's finding that claimant did not carry her burden to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) to relieve it of its burden to rebut the Section 411(c)(4) presumption with affirmative evidence. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge