U.S. Department of Labor

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

BRB No. 16-0319 BLA

GWINDOLYN AKINS (Widow of BOBBY AKINS) Claimant-Petitioner v. DRUMMOND COMPANY, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/24/2017 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

K. Edward Sexton II (Gentle, Turner, Sexton & Harbison, LLC), Hoover, Alabama, for claimant.

Katherine A. Collier (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-05375) of Administrative Law Judge Adele H. Odegard, rendered on a survivor's subsequent claim filed on March 26, 2012,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309[2] by establishing that she is the surviving spouse of the deceased miner. The administrative law judge acknowledged employer's concession that the miner had at least fifteen years of underground coal mine employment, but found that the medical evidence was insufficient to establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis, set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that claimant did not establish that the miner had either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and did not establish that the

[1] Claimant is the widow of the deceased miner, Bobby Akins. Director's Exhibit 13. The miner suffered a heart attack on August 28, 1991, while he was at his coal mining job. *Id*. He was immediately hospitalized, and died in the hospital on September 13, 1991. *Id*. There is no indication that the miner filed a claim for federal black lung benefits during his lifetime. Claimant remarried in March of 1993. Director's Exhibit 10. Claimant filed her initial claim on December 17, 1997, which was denied because she was married to her second husband. Director's Exhibit 1. Claimant divorced in May of 2005. Director's Exhibit 12.

[2] In the Decision and Order issued on March 9, 2016, the administrative law judge cited 20 C.F.R. §725.309(d)(3) in support of her finding of that claimant established a change in an applicable condition of entitlement. Decision and Order at 4. This provision, which requires that the applicable conditions of entitlement in a subsequent survivor's claim include at least one condition unrelated to the miner's physical condition, was moved to 20 C.F.R. §725.309(c)(4) when the Department of Labor revised 20 C.F.R. §725.309, effective October 25, 2013.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis when it is established that the miner had 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that she failed to establish either invocation of the Section 411(c)(4) presumption, or death due to pneumoconiosis under 20 C.F.R. §718.205(b). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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 supported by substantial evidence, is rational, and is 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).

I. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTION – TOTAL DISABILITY

Pursuant to 20 C.F.R. §718.204(b)(1), "a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work." 20 C.F.R. §718.204(b)(1). The regulation at 20 C.F.R. §718.204(b)(2) provides, "[i]n the absence of contrary probative evidence, a miner's disability shall be established" by pulmonary function studies showing values equal to, or less than, those in Appendix B; arterial blood-gas tests showing values equal to, or less than, those set forth in Appendix C; evidence establishing cor pulmonale with right-sided congestive heart failure; or if a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge initially found that there were no pulmonary function studies to be considered at 20 C.F.R. §718.204(b)(2)(i), and that the arterial

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[4] We affirm, as unchallenged by claimant on appeal, the administrative law judge's finding that the irrebuttable presumption of pneumoconiosis set forth in 30 U.S.C. §921(c)(3) is not available in this case, as the record contains no evidence of complicated pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12.

[5] Because the miner's coal mine employment was in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (en banc).

blood-gas tests, administered during the miner's terminal hospitalization, were not accompanied by a physician's report attesting to a chronic respiratory condition, and thus were "unreliable and merit minimal probative weight" at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 6; *see* 20 C.F.R. §718.105(d). Relevant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge found that there was no evidence that the miner had cor pulmonale with right-sided congestive heart failure. Decision and Order at 6. The administrative law judge considered the medical opinions of Drs. DuBois and Hasson at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 8. She found that Dr. DuBois "did not opine on whether the [m]iner was totally disabled from a pulmonary perspective at the time of his death," while Dr. Hasson "concluded that the [m]iner was not totally disabled from a pulmonary perspective prior to [his] hospitalization." *Id*. Accordingly, the administrative law judge determined that the medical opinion evidence did not support a finding of total respiratory or pulmonary disability under 20 C.F.R. §718.204(b)(2)(iv). *Id*.

The administrative law judge further noted that the record contained hospitalization records, treatment records, and lay evidence in the form of a co-worker's affidavit, claimant's testimony at the hearing held in conjunction with her subsequent claim, and a letter from claimant dated February 25, 2015.[6] Decision and Order at 9, 14. The administrative law judge found that the miner's hospitalization and treatment records did not assist claimant in meeting her burden of proof because they did not contain explicit diagnoses of total respiratory or pulmonary disability. *Id*. at 14. The administrative law judge further determined that the lay evidence did not provide the basis for a finding of total disability because the miner's co-worker and claimant did not "explain whether . . . breathing problems prevented the [m]iner from performing his coal mine work." Decision and Order at 9. Upon weighing all of the relevant evidence together, the administrative law judge determined that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2), and therefore could not invoke the Section 411(c)(4) presumption.

[6] The miner's co-worker indicated that the miner's health deteriorated "in the last couple of years before his death," and that the miner "sure had a breathing problem." Director's Exhibit 5. Claimant testified that when the miner was hospitalized for treatment of the heart attack that caused his death, Dr. DuBois reported that "his lungs were real bad and his blood[-]gases were real bad." Hearing Transcript at 30. In the February 25, 2015 letter, claimant reported that the miner's friends had written letters sharing their observations of the miner's coughing and shortness of breath, and that Dr. DuBois told her that the miner's arterial blood-gas test results were "off the charts." Unmarked Post-Hearing Exhibit.

Claimant contends that the administrative law judge erred in concluding that the lay evidence, when considered with the evidence of record as a whole, was insufficient to establish total respiratory or pulmonary disability. Claimant specifically cites Dr. Hasson's medical opinion, claimant's testimony, and the affidavit submitted by the miner's co-worker as evidence establishing that the miner suffered from a totally disabling respiratory or pulmonary impairment.[7]

Claimant's allegations of error are without merit. The administrative law judge permissibly determined that Dr. Hasson's opinion did not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), as Dr. Hasson stated that he saw no evidence that the miner suffered from a chronic respiratory or pulmonary impairment. *See Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-374-75 (11th Cir. 1989); Decision and Order at 8; Employer's Exhibit 1. With respect to claimant's testimony and the other lay evidence of record, the regulation at 20 C.F.R. §718.305(b)(4) provides, "[i]n the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment *if no medical or other relevant evidence exists which addressed the miner's pulmonary or respiratory condition*." 20 C.F.R. §718.305(b)(4) (emphasis added). Because Dr. Hasson addressed the miner's respiratory or pulmonary condition in his medical opinion, the administrative law judge was precluded from relying on lay evidence to find that the miner suffered from a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(4); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1989).

In light of our rejection of claimant's allegation that the administrative law judge erred in finding that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2), we affirm this finding. *See Lollar v. Ala. By-Products Corp.*, 893 F.2d 1258, 1266, 13 BLR 2-277, 2-284 (11th Cir. 1990); *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-140 (1990). Based on our affirmance of the administrative law judge's determination that claimant did not establish total respiratory or pulmonary disability, we further affirm the administrative law judge's determination that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4).[8] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R.

[7] Because claimant does not challenge the administrative law judge's findings that she did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), they are affirmed. *See Skrack*, 6 BLR at 1-711.

[8] Claimant also makes contentions regarding the issue of total disability causation. Claimant's Brief at [9-10] (unpaginated). However, the cause of a miner's totally disabling respiratory or pulmonary impairment is addressed at 20 C.F.R. §718.204(c),

§718.305(b)(1)(iii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698 (4th Cir. 2015).

II. DEATH DUE TO PNEUMOCONIOSIS – 20 C.F.R. §718.205(b)

To establish entitlement in a survivor's claim without the benefit of a presumption, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (2), (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(b)(6); *see Bradberry v. Director, OWCP*, 117 F.3d 1361, 1365, 21 BLR 2-166, 2-176 (11th Cir. 1997).

The administrative law judge determined that claimant did not establish that the miner suffered from pneumoconiosis at 20 C.F.R. §718.202(a), or that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b). Decision and Order at 16. In finding that claimant did not prove that pneumoconiosis caused or contributed to the miner's death, the administrative law judge credited Dr. Hasson's opinion ruling out pneumoconiosis as a causal factor in the miner's demise, and determined that the remainder of the evidence "does not contain any reasoned medical opinion" that pneumoconiosis played a role in the miner's death. *Id*.

Claimant asserts that the administrative law judge's finding that she did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b) was erroneous, as employer did not present evidence contradicting the lay testimony of record or rebutting the presumption "of a qualifying disease that at the least, hastened the death of the [m]iner." Claimant's Brief at [10-11] (unpaginated). Claimant also contends that, contrary to the administrative law judge's finding, Dr. Hasson's opinion was not well-reasoned and well-documented because Dr. Hasson did not review the miner's chest x-rays or attempt to contact "the family or others who could have provided information pertinent to his opinion." *Id*. at [11].

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and is not relevant to invocation of the Section 411(c)(4) presumption of death due to pneumoconiosis, or consideration of whether claimant can establish entitlement in her survivor's claim without the benefit of the presumption. 20 C.F.R. §§718.204(c), 718.305(b)(1).

Claimant's arguments do not have merit. Because the regulation at 20 C.F.R. §718.205(b) requires that a claimant establish death due to pneumoconiosis by "competent medical evidence," lay testimony alone could not satisfy claimant's burden of proof on this issue. 20 C.F.R. §718.205(b); *see Salyers v. Director, OWCP*, 12 BLR 1-193 (1989). In addition, because we affirmed the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption, employer was not required to establish rebuttal of any presumed element of entitlement. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b)(1)(iii), (c)(2).

Finally, the administrative law judge rationally found that the medical opinion evidence was insufficient to satisfy claimant's burden under 20 C.F.R. §718.205(b). *See Bradberry*, 117 F.3d at 1365, 21 BLR at 2-176; Decision and Order at 16. Dr. DuBois, who treated the miner during his final hospitalization in 1991, declined to offer an opinion as to whether pneumoconiosis caused or contributed to the miner's death, stating "I have no recollection [of] and cannot attest to [the miner's] pulmonary condition." Director's Exhibit 15. With respect to Dr. Hasson's opinion that the miner's death was caused by an "acute cardiac event and the resultant complications," the administrative law judge acted within her discretion in crediting Dr. Hasson's conclusions as well-documented and well-reasoned. Employer's Exhibit 1; *see United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); Decision and Order at 16. The administrative law judge permissibly found that Dr. Hasson's opinion was supported by records of the miner's final hospitalization,[9] and that Dr. Hasson explained that the lack of evidence of pneumoconiosis led him to conclude that the miner's death was due to cardiac disease rather than pneumoconiosis. *See Jordan*, 876 F.2d at 1460, 12 BLR at 2-374-75; Decision and Order at 16; Director's Exhibit 14; Employer's Exhibit 1. We affirm therefore the administrative law judge's determination that there was no reasoned medical opinion identifying pneumoconiosis as a causal factor in the miner's death. *See Bradberry*, 117 F.3d at 1365, 21 BLR at 2-176; Decision and Order at 16.

[9] These records contain diagnoses of acute myocardial infarction, congestive heart failure, respiratory failure, pneumonia, pulmonary edema, acute renal failure, and a brainstem stroke. Director's Exhibit 14.

Because we have rejected claimant's arguments challenging the administrative law judge's finding that the evidence was insufficient to establish death due to pneumoconiosis at 20 C.F.R. §718.205(b), we affirm her finding. In light of our affirmance of the administrative law judge's determination that claimant did not prove that the miner's death was due to pneumoconiosis, an essential element of entitlement, we must also affirm the denial of benefits. 20 C.F.R. §718.205(b); *see Bradberry*, 117 F.3d at 1365, 21 BLR at 2-176.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge