U.S. Department of Labor

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

BRB No. 17-0293 BLA

GEORGIA ANN POLSON (Widow of LLOYD C. POLSON) Claimant-Respondent v. INTERNATIONAL TRUCK & ENGINE CORPORATION and NAVISTAR INTERNATIONAL Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/14/2018 DECISION and ORDER

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05578) of Administrative Law Judge Adele Higgins Odegard, rendered 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[1] filed on November 23, 2012.

The administrative law judge credited the miner with twenty-one years of underground coal mine employment,[2] as stipulated by the parties, and found that he had at the time of his death a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did not rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has 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 rational, supported by substantial evidence,

[1] Claimant is the widow of the miner, who died on October 14, 2012. Director's Exhibit 14.

[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction 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) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and had at the time of his death a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Because employer does not challenge the administrative law judge's finding of twenty-one years of underground coal mine employment, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

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).

I. Invocation of the Section 411(c)(4) Presumption—Total Disability

The administrative law judge found that the pulmonary function study evidence and the miner's medical treatment and hospitalization records established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[5] Decision and Order at 6-7, 10-11. She considered the only pulmonary function study of record, taken on March 21, 2008, and found it to be qualifying[6] for total disability based on its FEV1 and MVV values. Decision and Order at 6-7; Director's Exhibit 27 at 44. Because the study contained only "one trial for the MVV maneuver" however, the administrative law judge noted that it did not meet all of the Department of Labor quality standards. *Id*. Nevertheless, when she considered the March 21, 2008 pulmonary function study in conjunction with the miner's medical treatment and hospitalization records, she found that the study was "persuasive evidence" of total disability. Decision and Order at 10-11; Director's Exhibits 15-17, 27.

Specifically, the administrative law judge determined that the miner's medical treatment and hospitalization records support a finding that the miner was totally disabled by a respiratory or pulmonary impairment at the time of his death, and for a "significant period" before his death. Decision and Order at 12. She noted that the miner "was prescribed oxygen in 2007 on a permanent basis and had multiple hospitalizations for chronic and/or acute respiratory failure, particularly (though not exclusively) in the last year of his life." *Id*. at 11. She also noted that the hospitalization records for the period from October 6 to October 8, 2012, "clearly indicate [that the miner] was experiencing respiratory failure." *Id*., *citing* Director's Exhibits 16, 27. Further, she noted that the miner died at home on October 14, 2012, "less than a week after his last hospital discharge," and

[5] The administrative law judge found that the arterial blood gas study evidence did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) because the studies in the record were administered when the miner was acutely ill or hospitalized. Decision and Order at 7-8. Because there is no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge also found that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*. at 8. Further, neither of the two medical opinions of record, from Drs. Echeverria and Rosenberg, addressed whether the miner was totally disabled by a respiratory or pulmonary impairment. Decision and Order at 11; Director's Exhibit 27; Employer's Exhibit 1.

[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).

that "the cause of his death was listed as 'respiratory failure' on his death certificate." *Id*., *citing* Director's Exhibit 14. Finding "no other conclusion that is consistent with the record evidence," the administrative law judge determined that the miner's hospitalization and treatment records and the March 21, 2008 pulmonary function study established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

Although employer argues that the administrative law judge "erred in concluding that claimant . . . demonstrated [that] the miner had a totally disabling respiratory impairment," employer's brief raises no specific allegations of error with regard to the administrative law judge's basis for finding that claimant established total disability at 20 C.F.R. §718.204(b)(2). The Board must limit its review to contentions of error specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Therefore, we affirm the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2).[7] In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine

[7] Moreover, even if employer's brief could be read as having raised a specific argument, we would hold that substantial evidence supports the administrative law judge's finding of total disability. The March 21, 2008 pulmonary function study needed only to be in "substantial compliance" with the quality standards to constitute evidence of total disability. *See* 20 C.F.R. §718.101(b). Therefore, the administrative law judge did not err in considering the uncontradicted, qualifying pulmonary function study to be evidence of total disability, particularly when it was viewed in context with the other evidence of record. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990). In that regard, the administrative law judge reasonably considered that the miner's treatment records reflected that he needed oxygen since 2007, and that the miner was hospitalized multiple times for respiratory failure, especially in the last year of his life. Diagnoses, statements, and notes set forth in treatment records or other documents regarding limits on a miner's activities due to a pulmonary condition may be relevant to a total disability determination even if the records do not use the phrase "totally disabled" or specifically address the miner's ability to perform his usual coal mine job. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985) ("[i]t is not essential for a physician to state specifically that an individual is totally impaired . . . ."). In sum, substantial evidence supports the administrative law judge's finding that a preponderance of the evidence established that the miner was totally disabled at the time of his death pursuant to 20 C.F.R. §718.204(b)(2).

employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither clinical nor legal pneumoconiosis,[8] or that "no part of the miner's death was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii).

The administrative law judge found that the x-ray evidence failed to establish that the miner did not have clinical pneumoconiosis because the only x-ray of record that was classified under the ILO system, taken on October 17, 2007, was read as positive for the disease. Decision and Order at 14; Director's Exhibit 27 at 37. Additionally, she found that Dr. Rosenberg's medical opinion that the miner did not have clinical pneumoconiosis was not well-documented or reasoned and, therefore, was entitled to no weight.[9] Decision and Order at 16-15; Employer's Exhibit 1. Employer does not challenge these findings. They are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because there is no other evidence that the miner did not have clinical pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(B).[10]

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[8] 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). 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).

[9] The administrative law judge noted that Dr. Rosenberg based his conclusion on his review of two x-ray readings, one of which was not of record, and the other of which was not an ILO-classified reading. Decision and Order at 16. The administrative law judge further noted that Dr. Rosenberg did not consider the October 17, 2007 x-ray, which was read as positive for pneumoconiosis. *Id*.

[10] Because Dr. Echeverria's opinion diagnosing the miner with clinical pneumoconiosis does not support employer's rebuttal burden, we need not address employer's argument that the opinion was not well-reasoned. Employer's Brief at 3.

With respect to legal pneumoconiosis, the administrative law judge accurately noted that Dr. Rosenberg "declined to draw any conclusion as to whether the [miner] had" the disease.[11] Decision and Order at 16; Employer's Exhibit 1 at 2. Because no physician of record opined that the miner did not have legal pneumoconiosis, the administrative law judge found that employer failed to establish that the miner did not have the disease. Decision and Order at 16-17.

It is employer's burden to affirmatively establish that the miner did not have legal pneumoconiosis. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Dr. Rosenberg specifically stated that he lacked sufficient information to address whether the miner had legal pneumoconiosis. Employer's Exhibit 1. Therefore, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(A).

The administrative law judge next addressed whether employer could establish rebuttal by showing that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii). She rationally discounted Dr. Rosenberg's opinion, that the miner's death was unrelated to clinical pneumoconiosis, because Dr. Rosenberg did not diagnose clinical pneumoconiosis, which conflicted with her finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order at 18. Further, the

[11] Dr. Rosenberg reviewed the miner's medical records and stated that the miner "was said to have decompensated [chronic obstructive pulmonary disease (COPD)] and respiratory failure . . . ." Employer's Exhibit 1 at 1. He noted that an October 6, 2012 x-ray was positive for pulmonary emphysema with evidence of bronchitis and that the x-ray was consistent with COPD. *Id.* An October 5, 2007 x-ray was also read as positive for COPD. *Id*. Dr. Rosenberg noted that there was "no objective information in the file to state that [the miner] had legal [pneumoconiosis]," but also stated that legal pneumoconiosis "cannot be addressed without more objective information including pulmonary function tests." *Id*. at 2. Dr. Rosenberg stated further that there was "insufficient information in the file to address whether or not legal [pneumoconiosis] played any role in [the miner's] death." *Id.*

administrative law judge accurately found that Dr. Rosenberg was unable to opine that no part of the miner's death was caused by legal pneumoconiosis. Decision and Order at 18; Employer's Exhibit 1 at 2. We therefore affirm the administrative law judge's determination that employer failed to establish rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge