U.S. Department of Labor

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

BRB Nos. 18-0167 BLA
and 18-0168 BLA

DONNA C. THOMAS (o/b/o and Widow of JERRY THOMAS) Claimant-Respondent v. CRAGER FORK MINING and EMPLOYERS INSURANCE OF WAUSAU Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/12/2019 DECISION and ORDER

Appeals of the Decisions and Orders of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

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

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decisions and Orders (2015-BLA-05555, 2015-BLA-05556) of Administrative Law Judge Joseph E. Kane, awarding benefits on claims 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 miner's claim filed on May 2, 2014 and a survivor's claim filed on March 3, 2015.[1]

In the miner's claim,[2] the administrative law judge initially designated employer the responsible operator. He further found the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge found that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and awarded benefits. In a separate Decision and Order issued on the same day, he found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 422(*l*) of the Act,[3] 30 U.S.C. §932(*l*) (2012), and awarded benefits in the survivor's claim.

On appeal, employer contends that the administrative law judge erred in finding it the responsible operator and in invoking the irrebuttable presumption of total disability due

[1] Employer's appeal in the miner's claim was assigned BRB No. 18-0167 BLA, and its appeal in the survivor's claim was assigned 18-0168 BLA. By Order dated February 12, 2018, the Board consolidated these appeals for purposes of decision only.

[2] The miner died on December 14, 2014, while his claim was pending before the district director. Director's Exhibit 35. Claimant, the widow of the miner, is pursuing the miner's claim. Director's Exhibit 17.

[3] Under Section 422(*l*) of the Act, 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*) (2012).

to pneumoconiosis. Consequently, employer also argues that the administrative law judge erred in finding claimant entitled to derivative benefits pursuant to Section 422(*l*). Claimant responds in support of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with employer that the case must be remanded for further consideration of the responsible operator issue.

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.[4] 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).

The Miner's Claim

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The record contains relevant x-rays, medical opinions, and CT scans.[5] We affirm as unchallenged the administrative law judge's finding that the x-ray evidence established

[4] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. 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).

[5] The record contains no biopsy or autopsy evidence. Therefore the miner cannot establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).[6] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9. We also affirm as unchallenged the administrative law judge's finding that the medical opinion evidence supports a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[7] *Id*; Decision and Order at 11.

The administrative law judge also considered two interpretations of an August 18, 2014 CT scan at 20 C.F.R. §718.304(c). Dr. Crum opined that the CT scan revealed extensive emphysema, small nodules and pleural thickening consistent with pneumoconiosis, and large masses in the right lung "suggestive of neoplasm." Claimant's Exhibit 2. Dr. Koch interpreted the CT scan as demonstrating severe emphysema with a large mass that was "most likely" cancer. Employer's Exhibit 2.

The administrative law judge properly determined that CT scan interpretations are considered "other evidence" pursuant to 20 C.F.R. §718.107, which requires the party offering the evidence to establish "that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." Decision and Order at 9, *quoting* 20 C.F.R. §718.107(b); *see also Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132-33 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc). Because neither Dr. Crum nor Dr. Koch "discuss[ed] the quality of the scan or whether the scan [was] sufficient to address the existence of pneumoconiosis or complicated pneumoconiosis," the administrative law judge declined to consider it. Decision and Order at 10. Because this determination is unchallenged on appeal, it is affirmed.[8] *See Skrack*, 6 BLR at 1-711.

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[6] The x-ray evidence consists of four interpretations of a July 17, 2014 x-ray, three positive for either Category A or Category B/C large opacities, and one negative, all by physicians dually-qualified as Board-certified radiologists and B readers. Director's Exhibit 9; Claimant's Exhibits 1, 3; Employer's Exhibit 2.

[7] Dr. Alam examined the miner on July 17, 2014, and opined that the miner had complicated pneumoconiosis based upon his examination and Dr. Alexander's positive x-ray interpretation. Director's Exhibit 9. The administrative law judge found that Dr. Alam's opinion was well-reasoned and supported by the evidence of record. Decision and Order at 11.

[8] In light of this affirmance, we need not address employer's challenge to the administrative law judge's alternative finding that the "CT scan evidence does not confirm or deny the existence of complicated pneumoconiosis." Decision and Order at 10; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 4-5.

Because we have affirmed the administrative law judge's finding that the x-ray and medical opinion evidence supports a finding of complicated pneumoconiosis, as well as his determination that employer did not establish that the CT scan evidence was acceptable for determining the existence of complicated pneumoconiosis, we affirm the evidence as a whole establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Gray*, 176 F.3d at 388-89; *Melnick*, 16 BLR at 1-33. We therefore affirm the administrative law judge's finding that the miner invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Additionally, we affirm as unchallenged the administrative law judge's finding that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack*, 6 BLR at 1-711; Decision and 12. Consequently, we affirm the award of benefits in the miner's claim.

The Survivor's Claim

The administrative law judge found that claimant satisfied her burden to establish her entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Survivor's Claim Decision and Order at 3-4. Because we have affirmed the award of benefits in the miner's claim, we also affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[9] Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it

[9] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have included at least one day after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c). The regulations also provide that in any case in which the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d).

The district director issued a Notice of Claim on May 15, 2014, identifying employer, Crager Fork Mining (Crager Fork), as a "potentially liable operator." Director's Exhibit 10. By letter dated June 11, 2014, Crager Fork denied that it most recently employed the miner for a cumulative period of one year. Director's Exhibit 11.

On November 18, 2014, the district director issued a Schedule for the Submission of Additional Evidence, wherein he identified Crager Fork as the responsible operator. Director's Exhibit 14. The district director advised Crager Fork that it could submit additional documentary evidence relevant to its liability. *Id.* In response, Crager Fork noted its disagreement with the district director's determination that it was the responsible operator. Director's Exhibit 15.

In a Proposed Decision and Order dated March 13, 2015, the district director awarded benefits, and again designated Crager Fork as the responsible operator. Director's Exhibit 19. Although the district director found that the miner had subsequent coal mine employment of more than one year with one operator, Torrie Mining, the district director found that Torrie Mining was incapable of assuming financial liability. *Id.* The district director found that all of the other operators that employed the miner after he ceased employment with Crager Fork (Straight Fork Mining, Owl Mining, Shamrock Contracting, Sister Bear Mining and Eagle Ridge Mining) employed the miner for less than one year. *Id.* The district director therefore determined that none of these companies could be designated the responsible operator. *Id.* Having found that Crager Fork was the last operator to have employed the miner for at least one year, the district director designated it as the responsible operator. *Id.*

At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 20. During the August 18, 2016 hearing, employer's counsel asked claimant if she knew how long the miner worked for Dave's Branch Coal Company (Dave's Branch) after he left Crager Fork. Hearing Transcript at 17. Claimant indicated that she did not remember. *Id.*

In its post-hearing brief, Crager Fork argued that the district director "overlooked" the miner's employment with Dave's Branch in determining the identity of the responsible operator. Employer's Post-Hearing Brief at 11. Based on the miner's Social Security

Earnings Record, Crager Fork argued that the miner worked for Dave's Branch for more than a year after he ceased his employment with Crager Fork.[10] *Id.* In her post-hearing brief, the Director argued that the evidence did not establish that the miner worked at Dave's Branch for at least a year after ceasing his coal mine employment with Crager Fork.[11] Director's Post-Hearing Brief at 4-5.

In his December 20, 2017 Decision and Order, the administrative law judge found Crager Coal was the potentially liable operator that most recently employed the miner for a cumulative year. Decision and Order at 4-5. Although the administrative law judge noted Crager Fork's assertion that Dave's Branch should have been designated as the responsible operator, he noted it "presented no evidence on this issue besides citing to [S]ocial [S]ecurity records." *Id.* at 4. He further noted Crager Fork "presented no arguments or evidence, other than contesting the issue of responsible operator, at the [d]istrict [d]irector level." *Id.*

Crager Fork asserts the administrative law judge erred in not addressing its argument that the miner's statements regarding his "rate of pay" and his Social Security records establish that the miner's most recent coal mine employment of at least one year was with Dave's Branch. Employer's Brief at 3-4. Although the Director reasserts her belief that the evidence upon which Crager Fork relies does not establish a one-year employment relationship with Dave's Branch, she agrees with Crager Fork that the administrative law judge erred in summarily finding it the responsible operator without addressing its argument that Dave's Branch more recently employed the miner for at least one year. Director's Brief at 3. In view of the Director's concession, we vacate the administrative law judge's designation of Crager Fork as the responsible operator. On

[10] Crager Fork Mining (Crager Fork) noted that the miner worked for Dave's Branch Coal Company (Dave's Branch) from 1995 through 1997, earning a total of $15,567.00. Employer's Post Hearing Brief at 11. Crager Coal reasoned that the miner worked for more than 125 days for Dave's Branch given that the miner indicated that his highest rate of pay was $15.00 per hour, equating to $120.00 per shift ($15,567.00/$120.00 = 129.725 days). *Id.*

[11] The Director, Office of Workers' Compensation Programs, argued that dividing the miner's earnings by the average earnings of employees in coal mine employment results in only 0.83 of a year of coal mine employment with Dave's Branch. Director's Post-Hearing Brief at 4.

remand, the administrative law judge is instructed to reconsider whether Crager Fork met its burden to prove that Dave's Branch more recently employed the miner for one year. *See* 20 C.F.R. §725.495(c)(2).

Accordingly, the administrative law judge's Decisions and Orders awarding benefits are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge