U.S. Department of Labor

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

BRB Nos. 18-0176 BLA
and 18-0195 BLA

KATHY SUE HELTON (Widow of and o/b/o DRUBLE HELTON) Claimant-Petitioner v. ANR COAL COMPANY and A & G CASUALTY COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/12/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2015-BLA-05888, 2016-BLA-05511) of Administrative Law Judge Christopher Larsen, rendered 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 October 3, 2014, and a survivor's claim[1] filed on February 4, 2016. The Board consolidated the appeals for purposes of decision only.

In the miner's claim, the administrative law judge credited the miner with 7.75 years of coal mine employment.[2] Because the miner had less than fifteen years of coal mine employment, the administrative law judge found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] He also found that the evidence did not establish the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and therefore claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). He therefore considered whether claimant could establish entitlement in the miner's claim pursuant to 20 C.F.R. Part 718 without the benefit of the presumptions.

The administrative law judge found that the x-ray evidence and medical opinion evidence established that the miner had clinical pneumoconiosis that arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1),(4), 718.203(c), but that the medical

[1] The miner died on February 28, 2013. Survivor's Claim (SC) Director's Exhibits 4, 7. Claimant, the widow of the miner, is pursuing the miner's claim on behalf of his estate.

[2] The miner's coal mine employment was in Kentucky. Miner's Claim (MC) Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis if claimant establishes the miner worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

opinion evidence did not establish he had legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found the evidence did not establish the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, he denied benefits.

In the survivor's claim, in light of his denial of the miner's claim, the administrative law judge found that claimant was not entitled to receive benefits under the automatic entitlement provisions of Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[5] Because no medical evidence was submitted in the survivor's claim, the administrative law judge determined that the claim should be remanded for the district director to determine whether claimant could establish entitlement to survivor's benefits by proving that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a), or a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.[6]

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,

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[4] "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 dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] 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 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).

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had 7.75 years of coal mine employment and the evidence did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7.

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. The Miner's Claim

To be entitled to benefits under the Act, claimant must establish that the miner had pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he had a totally disabling respiratory or pulmonary impairment, and his totally disabling impairment was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A. Legal Pneumoconiosis

To prove that the miner had legal pneumoconiosis, claimant must establish that he had a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that none of the physicians who provided medical opinions, Drs. Alam, Broudy, Westerfield, and Rosenberg, diagnosed legal pneumoconiosis. Decision and Order at 9. Further, he noted that the miner's medical treatment notes indicate that the miner underwent "treatment for chronic airway obstruction, but include no discussion of the etiology of the diagnosed condition." *Id*. Thus, he found that the evidence did not establish legal pneumoconiosis. *Id*.

Initially, we reject claimant's argument that Dr. Alam's opinion supports a finding of legal pneumoconiosis. Claimant's Brief at 11. As the administrative law judge correctly noted, Dr. Alam diagnosed clinical pneumoconiosis, but opined that the miner did "not have any legal pneumoconiosis." Miner's Claim (MC) Director's Exhibit 13; Decision and Order at 9. He opined that the miner had emphysema and chronic bronchitis related to twenty-eight years of cigarette smoking. *Id.*

Further, we reject claimant's argument that the miner's treatment notes support a finding of legal pneumoconiosis. Claimant's Brief at 10-11. Although claimant concedes that the miner's treatment notes do not indicate the etiology of the diagnosed obstructive respiratory impairment, she argues that the "symptoms" identified by the physicians in those notes "suggest" a diagnosis of legal pneumoconiosis. *Id*. General symptoms, however, are insufficient to support claimant's burden of establishing that the miner had a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.202(a). Because it is supported by substantial evidence, we affirm the

administrative law judge's finding that the evidence does not establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

B. Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Claimant argues that the administrative law judge erred in finding that the pulmonary function studies and medical opinions did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iv).[7] Claimant's arguments have no merit.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered four pulmonary function studies conducted on December 18, 2013, April 15, 2014, February 5, 2015, and August 31, 2015. Decision and Order at 11-12; MC Director's Exhibits 13-15; Claimant's Exhibits 6-7; Employer's Exhibit 1. Before determining whether the studies were qualifying[8] for total disability, he noted a discrepancy in the measurements of the miner's height, which ranged from sixty-five and one-half to sixty-seven inches.[9] Decision and Order at 11. The administrative law judge resolved the

[7] As it is unchallenged, we affirm the administrative law judge's determination that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii). *Skrack*, 6 BLR at 1-711; Decision and Order at 12-13.

[8] A "qualifying" pulmonary function study yields values for a miner's applicable height and age that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i).

[9] The miner's height was measured as sixty-five and one-half inches for the April 15, 2014 pulmonary function study, sixty-six inches for the August 31, 2015 study, and sixty-seven inches for the December 18, 2013, and February 5, 2015 studies. Director's Exhibits 13-15; Claimant's Exhibits 6-7; Employer's Exhibit 1

evidentiary conflict by averaging the various heights, finding that the miner's correct height was 66.4 inches.[10] *Id*.

Based on the miner's height, and his age at the time of each study, the administrative law judge found that the December 18, 2013 and February 5, 2015 pulmonary function studies produced qualifying values for total disability before and after the administration of a bronchodilator, and that the May 15, 2014 study produced qualifying values pre-bronchodilator, but non-qualifying values after the administration of a bronchodilator. Decision and Order at 11-12. He found that the most recent pulmonary function study, conducted on August 31, 2015, produced non-qualifying values both before and after the administration of a bronchodilator.[11] *Id*.

In weighing the conflicting evidence, the administrative law judge found that the December 18, 2013, April 15, 2014, and February 5, 2015 pulmonary function studies were invalid based on the miner's lack of effort. Decision and Order at 12. He assigned the greatest weight to the August 31, 2015 non-qualifying pulmonary function study because it was the most recent study. *Id*. Thus he found that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*.

Claimant argues that the administrative law judge erred in his consideration of the February 5, 2015 pulmonary function study.[12] Claimant's Brief at 12-15. In evaluating this study, the administrative law judge recognized that Dr. Gaziano reviewed its tracings and "stated the ventilatory test was acceptable." Decision and Order at 11; *see* MC

[10] The administrative law judge applied the closest height listed in the table at 20 C.F.R. Part 718, Appendix B, which he noted was 66.5 inches. Decision and Order at 11.

[11] Claimant argues that Dr. Westerfield opined that the August 31, 2015 pulmonary function study does not evidence total disability when one uses the "Crapo predicted values" for total disability. Claimant's Brief at 12. Thus, claimant asserts the administrative law judge should have rejected this study. To the extent claimant argues the administrative law judge failed to utilize the values set forth in the table at 20 C.F.R. Part 718, Appendix B, to assess whether this study was qualifying for total disability, claimant's argument has no merit. The administrative law judge correctly found that this study produced values that exceeded the applicable values for the miner's age and height as specified in the table at 20 C.F.R. Part 718, Appendix B. Decision and Order at 11-12. Thus, he correctly found it a non-qualifying study.

[12] Because it is unchallenged, we affirm the administrative law judge's finding that the December 18, 2013 and April 15, 2014 pulmonary function studies are invalid. *Skrack*, 6 BLR at 1-711; Decision and Order at 11-12.

Director's Exhibit 13. The administrative law judge noted, however, that this study was done as part of Dr. Alam's examination of the miner. Decision and Order at 7; MC Director's Exhibit 13. In his report, Dr. Alam stated that the pulmonary function testing was "limited because of [the miner's] variable effort, so we suggest that [pulmonary function testing] has to be repeated to see what the true FEV1 is." MC Director's Exhibit 13. Further, Dr. Broudy reviewed this study and noted that it was performed with suboptimal effort. Employer's Exhibit 1. He opined that it was invalid "after inspection of the tracings." *Id*. The administrative law judge found that this study was invalid based on Dr. Alam's "comments that [the miner's] effort was variable or suboptimal," and on the invalidation by Dr. Broudy. Decision and Order at 12.

Claimant's brief raises no specific allegations of error with regard to the administrative law judge's basis for finding that the February 5, 2015 pulmonary function study is invalid. 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 (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 the February 5, 2015 pulmonary function study is invalid.

Claimant further asserts that the administrative law judge erred in crediting the August 31, 2015 non-qualifying pulmonary function study, as claimant argues it was not in substantial compliance with the quality standards set forth in 20 C.F.R. §718.103.[13] Claimant's Brief at 12-15. There is no indication in the record that claimant raised the reliability of this study when the case was before the administrative law judge. *See* Hearing Transcript; Claimant's Post-Hearing Brief. Assertions that objective studies do not meet the quality standards under the 20 C.F.R. Part 718 regulations must be raised below, and such challenges will not be considered for the first time on appeal to the Board. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987). Further, contrary to claimant's argument, the administrative law judge permissibly credited this study because it is the most recent pulmonary function study and more reflective of a claimant's current condition.[14] *See Cooley v. Island Creek Coal*

[13] Further, even if claimant's argument with respect to the August 31, 2015 pulmonary function study had merit, claimant would still be unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) because there are no valid qualifying pulmonary function studies in the record.

[14] The administrative law judge found that, in contrast, the three earlier studies "were either invalid due to less than optimal effort or demonstrated an acute problem rather than a chronic condition." Decision and Order at 12.

Co., 845 F.2d 622, 624 (6th Cir. 1988); Decision and Order at 11-12. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 11-12.

With regard to the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that Dr. Alam is the only physician to conclude that the miner was totally disabled, while Drs. Broudy, Westerfield, and Rosenberg opined that the miner did not have a totally disabling respiratory or pulmonary impairment Decision and Order at 7-8, 13.[15] The administrative law judge assigned diminished weight to Dr. Alam's opinion because it was not supported by the weight of the pulmonary function testing. *Id*. He assigned the greatest weight to Dr. Westerfield's opinion because it was supported by the most recent and credible pulmonary function testing. *Id*.

We reject claimant's argument that the administrative law judge erred in weighing Dr. Alam's opinion. Claimant's Brief at 16-18. The administrative law judge correctly noted that Dr. Alam based his total disability opinion on the reduced FEV1 value seen on the February 5, 2015[16] pulmonary function study and the mild hypoxemia evidenced by the February 5, 2015 arterial blood gas study. Decision and Order at 13; MC Director's Exhibit 13. Because we have affirmed the administrative law judge's determination that

[15] Dr. Alam stated that the miner was "disabled from [a pulmonary stand point]. His FEV1 [met] the disability criteria." Director's Exhibit 13. He further stated, however, that the miner's pulmonary function testing was "also limited because of his variable effort, so we suggest that [pulmonary function testing] has to be repeated to see what the true FEV1 is. At the current workup [the miner] qualifies for pulmonary disability," but he "is required to have repeat [pulmonary function testing]." *Id*. He explained that if the pulmonary function testing is qualifying, "then [the miner] will be disabled from pulmonary standpoint of view." *Id*. Dr. Alam also stated that "[c]linical pneumoconiosis [is] causing partial pulmonary disability of 15%. [The miner] does not have any legal pneumoconiosis. He has significant emphysema with chronic bronchitis related to 28 years of smoking." *Id*.

[16] Although Dr. Alam indicated that the February 5, 2015 pulmonary function study was of "limited value," he nonetheless opined that the miner was totally disabled because the FEV1 value on this study met the Department of Labor disability criteria. MC Director's Exhibit 13. However, as discussed above, Dr. Alam recommended a repeat pulmonary function study. *Id*. We further note that Dr. Alam described the disability due to clinical pneumoconioisis as a "partial pulmonary disability of 15%" and diagnosed "no legal pneumoconiosis " DX 13.

the February 5, 2015 pulmonary function study is not reliable, we affirm his finding that Dr. Alam's opinion is not sufficiently documented on the issue of total disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 13. Because there are no other medical opinion supporting claimant's burden of proof, we affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[17]

Because claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's determination that claimant did not establish entitlement under 20 C.F.R. Part 718 in the miner's claim. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

II. The Survivor's Claim

Having denied benefits in the miner's claim, the administrative law judge correctly determined that claimant did not meet the prerequisites for derivative entitlement to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). Decision and Order at 13-14. Further, a review of the record in the survivor's claim reveals no evidence, or findings by the district director, addressing whether the miner had pneumoconiosis arising out of coal mine employment or whether his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202, 718.203, 718.205; Survivor's Claim Director's Exhibit 8. Therefore, the administrative law judge correctly determined that the survivor's claim must be remanded to the district director for claimant to be provided with the opportunity to pursue her claim for survivor's benefits under 20 C.F.R. Part 718.

[17] Further, the administrative law judge permissibly found Dr. Westerfield's opinion entitled to the greatest weight because it is supported by the most recent, credible, August 31, 2015 non-qualifying pulmonary function study. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 13.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed, and the survivor's claim is remanded to the district director for further proceedings.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge