U.S. Department of Labor

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

BRB No. 18-0205 BLA

BILLY G. MEADE (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEYENNE ELKHORN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 03/22/2019
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Reconsideration of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe, Williams, & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters PLLC), Pikeville, Kentucky, for employer/carrier.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry Joyner, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order and Order on Reconsideration (2015-BLA-05096) of Administrative Law Judge Steven D. Bell, awarding benefits 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 subsequent claim filed on May 23, 2013.[1]

In a Proposed Decision and Order dated September 3, 2014, the district director awarded benefits. Director's Exhibit 63. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 64. Because employer declined to make payments, the Black Lung Disability Trust Fund (Trust Fund) initiated the payment of interim benefits. Director's Exhibit 66; *see* 20 C.F.R. §725.522.

The miner died on February 13, 2016, before a formal hearing could be held. On March 7, 2016, his surviving spouse, Carolyn Meade, submitted a "Continuation of Claim Status" form, indicating her intent to pursue the miner's claim. The administrative law judge scheduled a formal hearing for March 15, 2017. On December 5, 2016, Mrs. Meade moved to withdraw the miner's claim, however, citing her belief that proceeding would "cause unnecessary burden and expense." Mrs. Meade's Motion to Withdraw Claim at 1. The administrative law judge granted her motion on December 6, 2016.

On December 23, 2016, the Director, Office of Workers' Compensation Programs (the Director), requested reconsideration of the administrative law judge's Order granting the withdrawal. Because the Trust Fund had paid over $15,000.00 in interim benefits, the Director asserted that the claim could not be withdrawn without her permission. *See* 20 C.F.R. §725.306(a)(3). By Order dated January 31, 2017, the administrative law judge

[1] The miner's prior claim, filed on December 2, 2002, was finally denied by the district director on August 19, 2003 because he did not establish any element of entitlement. Director's Exhibit 1.

agreed and vacated the order. The administrative law judge also noted the parties' agreement to waive the hearing and have the case decided on the record.

In a Decision and Order dated October 24, 2017, the administrative law judge found that the miner had twenty years of underground coal mine employment[2] and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) and invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

Employer moved for reconsideration, asserting the case was not justiciable because "no individual had come forth to act on behalf of the [miner]," and because Mrs. Meade "does not desire to continue [the miner's] claim nor receive any benefits." Employer's Motion for Reconsideration at 2. Mrs. Meade responded, indicating her desire to pursue the miner's claim. She explained that her review of the claim had demonstrated that she would not be "unfairly affected by the award." Mrs. Meade's Motion in Opposition at 1. The Director urged that employer's motion be denied, citing the Trust Fund's interest in determining employer's liability for the payment of benefits.

In an Order on Reconsideration dated January 11, 2018, the administrative law judge found the claim "properly initiated," and that employer "waived any defect" by allowing the proceeding to continue in the miner's name for nearly two years after his death. Order Denying Motion for Reconsideration at 3. He therefore denied reconsideration.

On appeal, employer argues that the administrative law judge erred by not withdrawing the miner's claim and not remanding the case to the district director for the substitution of parties after the miner's death. Employer further argues that the administrative law judge erred in finding the miner totally disabled and invoking the Section 411(c)(4) presumption. Mrs. Meade responds in support of the award of benefits.

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[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 1 at 143. 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) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

The Director has filed a limited response, urging the Board to reject employer's contentions that the Order withdrawing the claim should be reinstated, or that the case must be remanded to the district director for the substitution of parties.[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, 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).

Justiciability of the Claim

The administrative law judge did not err in vacating the Order withdrawing the claim. The Trust Fund paid interim benefits in this case when employer declined to do so. 20 C.F.R. §725.522(a). If the award of benefits is upheld, employer will be obligated to reimburse the Trust Fund for all payments made. 20 C.F.R. §725.602(a). As a result, the Director has a financial interest in the outcome of this case. Thus, even had the miner's widow decided against pursuing the claim after his death, a justiciable controversy remains between employer and the Trust Fund. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 538 n.4 (7th Cir. 2002); *accord E. Assoc. Coal Co. v. Director, OWCP* [*Vest*], 578 F. App'x 165, 166 n.1 (4th Cir. 2014); *Ispat/Inland, Inc. v. Director, OWCP* [*Lentz*], 422 F. App'x 153, 154 n.1 (3d Cir. 2011); 30 U.S.C. §934(b).

Employer contends that the administrative law judge erred in continuing to adjudicate this case after the miner's death. Employer's Brief at 7-8. Employer asserts the case should have been remanded to the district director for a determination as to who has the authority to act on the deceased miner's behalf. *Id.* We disagree. As the administrative law judge accurately noted, employer participated in the adjudication of the miner's claim for twenty months after the miner's death. Order on Reconsideration at 2. He further noted that it was only after he issued a decision awarding benefits that employer "first assert[ed] that there was a jurisdictional or procedural defect that should prevent [him] from issuing a Decision and Order." *Id.* Under these circumstances, the administrative law judge permissibly found that employer "waived any defect in this proceeding" which may have arisen as a result of the claim proceeding in the miner's name.[5] *Id.* at 3; *see U.S. v. L. A.*

[4] Because employer does not challenge the finding that the miner had twenty years of underground coal mine employment, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Although employer argues on appeal that the administrative law judge was aware of the miner's death, Employer's Brief at 7, employer does not contest his finding that it

Tucker Truck Lines, 344 U.S. 33, 37 (1952) ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction . . . ."); *Stern v. Marshall*, 564 U.S. 462, 481-82 (2011) (discouraging the practice of "sandbagging the court – remaining silent about [an] objection and belatedly raising the error only if the case does not conclude in [one's] favor"). Moreover, as noted by the administrative law judge, employer has not asserted that it has been prejudiced because the proceedings continued in the miner's name after his death.[6] *Id*.

Invocation of the Section 411(c)(4) Presumption – Total Disability

Turning to the merits of the claim, employer argues that the administrative law judge erred in finding the miner totally disabled. A miner is considered totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Total disability can be established by 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).

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failed to object to the justiciability of this claim on that basis until after he rendered his Decision and Order awarding benefits.

[6] Employer's additional contention that Mrs. Meade abandoned the claim has no merit. Since January 2017, she has actively participated in the litigation of the claim, responding to Orders, participating in phone conferences before the administrative law judge, and filing fee petitions. As the miner's surviving spouse, she has a financial interest in this case because she is entitled to any underpayment of benefits payable to the miner, 20 C.F.R. §725.545(c)(1), and an award of benefits in the miner's claim may entitle her to derivative survivor's benefits. 30 U.S.C. §932(*l*) (2012). Further, Section 725.360(b) provides that "[a] widow . . . who makes a showing in writing that . . . her rights with respect to benefits may be prejudiced by a decision of an adjudication officer, may be made a party." 20 C.F.R. §725.360(b). We agree with the Director that Mrs. Meade's December 7, 2017 letter to the administrative law judge, indicating that it was in her "best interests" to pursue the claim, satisfies Section 725.360(b).

In considering whether the medical opinions established total disability,[7] the administrative law judge weighed the opinions of Drs. Wooten, Jarboe, and Dahhan. Drs. Wooten and Jarboe opined that the miner was totally disabled from a pulmonary standpoint; Dr. Dahhan opined that he had a non-disabling obstructive ventilatory defect. Director's Exhibits 12, 14, 16, 59.

The administrative law judge found Dr. Jarboe's opinion well-reasoned, supported by objective evidence, and corroborated by Dr. Wooten's opinion, and thus entitled to significant weight. Decision and Order at 15-16. He accorded less weight to Dr. Dahhan's contrary opinion because he did not review more recent objective evidence considered by Dr. Jarboe. *Id.* He therefore found the medical opinion evidence establishes total disability.

Employer argues that the administrative law judge erred in finding Dr. Jarboe's opinion well-reasoned. Dr. Jarboe, one of employer's experts, examined the miner on December 26, 2013, reviewed the medical evidence, and concluded that the miner did not retain the respiratory capacity to perform the work of an underground miner. He specifically opined that the miner suffered from both "a moderate ventilatory impairment" and "a moderate impairment of gas exchange." Director's Exhibit 16 at 25. Contrary to employer's contention that Dr. Jarboe's opinion is not supported by the evidence, the administrative law judge found his assessment was based on three factors: (1) the FEV1/FVC ratio from the miner's December 26, 2013 pulmonary function study was qualifying,[8] i.e., below the federal limits for disability; (2) the miner's resting values from the December 26, 2013 arterial blood gas study were "marginal for qualification under the federal guidelines;" and (3) the exercise arterial blood gas study Dr. Wooten conducted on July 31, 2013 revealed "impaired gas exchange." Decision and Order at 16; Director's Exhibit 16 at 25. Because the administrative law judge set forth the evidence that Dr. Jarboe relied upon in reaching his opinion, we affirm his finding that the doctor's opinion

[7] The administrative law judge found that the pulmonary function studies and blood gas studies do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 15. Because there is no evidence the miner suffered from cor pulmonale with right-sided congestive heart failure, total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

is well-reasoned.[9] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

We also reject employer's contention that Dr. Dahhan's opinion should have been credited, and Dr. Jarboe's opinion discredited, because the pulmonary function study and arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Total disability can be established with reasoned medical opinions, even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). Thus, a doctor can offer a reasoned medical opinion diagnosing total disability, even though the underlying objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000).

As employer does not allege any additional error,[10] we affirm the administrative law judge's determinations that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2) and the Section 411(c)(4) presumption was invoked.[11] We further affirm his finding that employer failed to rebut the presumption as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[9] Employer asserts that the results from an exercise arterial blood gas study are a "better indicator of one's ability to perform work" than a resting arterial blood gas study. Employer's Brief at 9. Because Dr. Jarboe's December 26, 2013 exercise blood gas study did not produce qualifying values employer argues that his opinion should have been accorded less weight. *Id.* Employer, however, ignores that Dr. Jarboe also relied on the miner's pulmonary function study values and the qualifying values from Dr. Wooten's July 31, 2013 exercise arterial blood gas study to support his assessment of the miner's pulmonary impairment. Director's Exhibits 12, 16.

[10] Because we have affirmed the administrative law judge's crediting of Dr. Jarboe's opinion over that of Dr. Dahhan, we need not address employer's contentions of error regarding the administrative law judge's weighing of Dr. Wooten's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] In light of our affirmance of the administrative law judge's finding that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), we also affirm his determination that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309.

Accordingly, we affirm the administrative law judge's Decision and Order and Order on Reconsideration awarding benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge