U.S. Department of Labor

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

BRB No. 13-0232 BLA

KATHRYN BERNARD (Widow of LEO BERNARD)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 05/29/2015
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2007-BLA-6086) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a survivor's claim[1] filed on December 22, 2006 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is on appeal to the Board for the third time.

[1] Claimant is the widow of the miner, who died on November 15, 2006. Director's Exhibit 8.

In a Decision and Order dated October 2, 2008, the administrative law judge credited the miner with thirty-six years of coal mine employment, and found that the evidence established that the miner had clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's findings regarding the length of coal mine employment, and his finding of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203, as unchallenged on appeal. The Board, however, vacated the award of benefits and remanded the case for the administrative law judge to address the evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and to reconsider the evidence relevant to the cause of the miner's death pursuant to 20 C.F.R. §718.205(c). *K.B.* [*Bernard*] *v. Consolidation Coal Co.*, BRB No. 09-0135 BLA (Oct. 26, 2009)(unpub.).

On remand, in a Decision and Order dated September 14, 2010, the administrative law judge found that the evidence was sufficient to establish that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), but insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Nonetheless, the administrative law judge awarded benefits on the claim, finding that claimant was entitled to the presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as she established that the miner was totally disabled at the time of his death; that the miner had at least fifteen years of qualifying coal mine employment; and that employer failed to establish rebuttal of the presumption.[2] *See* 30 U.S.C. §921(c)(4). Pursuant to employer's appeal, the Board vacated the award of benefits, and remanded the case for the administrative law judge to reopen the record in light of the reinstatement of the Section 411(c)(4) presumption, and to allow additional

[2] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this survivor's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment at the time of his death, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his death was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

evidence to be submitted, consistent with the evidentiary limitations. *Bernard v. Consolidation Coal Co.*, BRB No. 11-0107 BLA (Aug. 25, 2011)(unpub.).

In his Decision and Order dated February 6, 2013, the administrative law judge admitted additional evidence into the record, and found that claimant established total respiratory disability pursuant to Section 718.204(b), and was entitled to invocation of the rebuttable presumption of death due to pneumoconiosis pursuant to amended Section 411(c)(4). Finding that employer failed to establish rebuttal of the presumption, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's finding of total respiratory disability at Section 718.204(b), arguing that the administrative law judge erred in his consideration of the pulmonary function studies and medical opinions of record. Asserting that this case has reached administrative gridlock, employer urges the Board to vacate the award of benefits and direct that this case be assigned to a different administrative law judge on remand. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

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.[3] 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).

Employer contends that the administrative law judge erred in finding that the evidence establishes total respiratory disability and that claimant is entitled to invocation of the amended Section 411(c)(4) presumption. In this regard, employer asserts that the administrative law judge selectively analyzed the qualifications of the physicians and the evidence regarding the validity of the December 19, 2002 and the October 1, 2003 pulmonary function studies, and failed to adequately consider whether the miner's age affected the qualifying nature of the studies.[4] Employer's Brief at 6-30.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[4] A "qualifying" pulmonary function or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the weight of the evidence sufficient to establish total respiratory disability at Section 718.204(b), the administrative law judge determined that the single blood gas study of record yielded non-qualifying results pursuant to Section 718.204(b)(2)(ii), and that there is no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(b)(2)(iii). Decision and Order on Second Remand at 12. Pursuant to Section 718.204(b)(2)(i), the administrative law judge considered the pulmonary function studies of record, as well as notations by the administering technicians and various physicians' opinions regarding the validity and the qualifying nature of the studies. The administrative law judge properly determined that the tests conducted prior to December 19, 2002 were non-qualifying and did not support a finding of total respiratory disability.[5] Decision and Order on Second Remand at 3, 8; Claimant's Exhibit 3. The administrative law judge further found that the pre-bronchodilator test conducted for Dr. Fino on December 19, 2002 was invalid and entitled to no weight, based on the administering technician's notations and Dr. Fino's opinion that the miner did not give maximum effort, but that he gave better effort following bronchodilation. Decision and Order on Second Remand at 9; Employer's Exhibit 2. The administrative law judge determined that, despite Dr. Fino's invalidation of the test, the miner's final test, conducted on October 1, 2003 for Dr. Celko, was valid for interpretation, based on the administering technician's notation that the miner gave "maximal effort and cooperation," and the testimony of Dr. Celko that the test was reproducible and showed good effort. Decision and Order on Second Remand at 9; Claimant's Exhibit 1, 3; Employer's Exhibit 13. While employer contends that the administrative law judge should have found that the test conducted on October 1, 2003 was invalid, based upon Dr. Fino's opinion that the miner's effort was submaximal, the administrative law judge acted within his discretion in crediting Dr. Celko's opinion that the miner's expiratory effort lasted 8 seconds and the tracings and test are "reproducible and show good effort,"[6] as supported by the administering

[5] The qualifying values in Appendix B are based on gender, height, and age, with 71 being the maximum age for which figures are reported. *See* 20 C.F.R. Part 718, Appendix B. Because the miner was 71 years old at the time the first study was conducted on January 28, 1987, the administrative law judge permissibly applied the table values listed for a 71-year-old to each of the subsequent studies. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40 (2008).

[6] When asked whether the October 1, 2003 pulmonary function study was done with maximal effort, Dr. Celko replied,

technician's notations.[7] Decision and Order on Second Remand at 9; Claimant's Exhibits 1, 3; Employer's Exhibit 12 at 30-31; *see* 20 C.F.R. Part 718, Appendix B; *Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). After finding the post-bronchodilator portion of the December 19, 2002 study and the October 1, 2003 study to be valid, the administrative law judge considered the testimony of Drs. Fino and Farney, who are Board-certified in pulmonary diseases, that the pulmonary function values are actually normal considering the miner's advanced age of 87 and 88, respectively, at the time the studies were conducted. Decision and Order on Second Remand at 10; Claimant's Exhibit 1; Employer's Exhibit 2. While acknowledging that Dr. Celko "is only Board eligible in pulmonary medicine," the administrative law judge credited Dr. Celko's "extensive experience with pulmonary medicine and occupational disease" and his opinion that the miner was totally disabled from a pulmonary standpoint, taking into consideration the miner's age. Decision and Order on Second Remand at 10; Claimant's Exhibits 3; 12. Contrary to employer's argument, the administrative law judge permissibly determined that the opinions of Drs. Fino and Farney were unpersuasive, as they were based on documentation not in evidence and in conflict with the standards for disability accepted by the Department of Labor. *See Clark*, 12 BLR at 1-155. The administrative law judge concluded that, while the pulmonary function evidence as a whole did not establish total disability, Dr. Celko's opinion, based on his pulmonary function study, was entitled to determinative weight. The administrative law judge noted

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> I believe that it was. When I looked at the tracing, it was over six seconds. Actually, it had gone on eight seconds, and the tracing seemed to be reproducible.

Employer's Exhibit 12 at 22. When asked about the impact if the miner had "blown out further" than the roughly 8 seconds that he did, Dr. Celko responded,

> He could have either plateaued, meaning the number stayed the same, or could have gotten worse, if he hadn't plateaued.

Employer's Exhibit 12 at 31.

[7] Appendix B to 20 C.F.R. Part 718, governing the technical quality standards for the administration of pulmonary function studies, provides, in pertinent part, that inspiration and expiration effort "shall be judged unacceptable when the patient: … (C) Has not continued the expiration for at least 7 sec. or until an obvious plateau for at least 2 sec. in the volume-time curve has occurred . . . ." 20 C.F.R. Part 718, Appendix B.

that Drs. Gretz[8] and Celko opined that the miner lacked the respiratory capacity to perform his usual coal mine employment, whereas Drs. Fino and Farney found no disabling respiratory or pulmonary impairment. Decision and Order on Second Remand at 13. The administrative law judge permissibly accorded greater probative weight to the opinion of Dr. Celko based on his status as the miner's treating physician, because he had been treating the miner at the chronic respiratory disease program on a regular basis over a period exceeding fifteen years, and the administrative law judge found that his opinion was well-reasoned and demonstrated a thorough understanding of the miner's history and ongoing condition. Decision and Order at 10-11, 13. As the administrative law judge found that Dr. Celko's opinion was credible in light of its reasoning and documentation, and the record as a whole, we find no error in the administrative law judge's reliance on the opinion of Dr. Celko. *See* 20 C.F.R. §718.104(d); *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the medical evidence of record establishes total disability at 20 C.F.R. §718.204(b). Thus, we affirm the administrative law judge's finding that claimant is entitled to invocation of the amended Section 411(c)(4) presumption.

Because employer does not challenge the administrative law judge's determination that the evidence is insufficient to establish rebuttal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), we affirm the administrative law judge's findings that employer failed to rebut the presumption at amended Section 411(c)(4), and that claimant is entitled to benefits.

[8] The administrative law judge accorded little weight to Dr. Gretz's opinion, as it was unclear whether he diagnosed total respiratory disability. Decision and Order at 13; Director's Exhibit 9; Employer's Exhibit 8.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge