U.S. Department of Labor

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

BRB No. 16-0411 BLA

NORMA D. FORTNER (Widow of LUTHER FORTNER)	)	
Claimant-Respondent	)	
v.	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 05/30/2017
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2011-BLA-05873) of Administrative Law Judge Daniel F. Solomon, rendered on a survivor's claim filed on July 21, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (2012) (the Act).[1] Based on his determinations that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in determining that the miner was totally disabled and, thus, erred in concluding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in weighing the evidence and finding it insufficient to establish rebuttal of that presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[3]

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 into the

[1] Claimant is the widow of the miner, who died on March 23, 2010. Director's Exhibit 12. Section 422(*l*) of the Act provides that 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. 30 U.S.C. §932(*l*) (2012). The record reflects that the miner filed three claims for benefits during his lifetime, of which one was withdrawn and two were denied by the district director, with no further actions taken by the miner. Director's Exhibits 1-3. Because the miner was not determined eligible to receive benefits on any of his claims, claimant is not entitled to survivor's benefits pursuant to Section 422(*l*).

[2] Under Section 411(c)(4) of the Act, a miner's death is presumed to be due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had at least fifteen years of qualifying coal mine employment, necessary for invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Because the miner's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Invocation of the Presumption – Total Disability

The regulations provide that 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 and gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: (i) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R. Part 718; or (ii) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or (iii) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or (iv) where total disability cannot be established by the preceding methods, a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

In this case, the administrative law judge did not render any specific findings under the individual subsections at 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge first summarized claimant's testimony at the hearing regarding the miner's respiratory condition:

> Q So from the time he ceased work until he passed away, what was his condition like as far as his breathing?
> A Well, he -- he had breathing problems real bad. He was on inhalers. And there at the last, you know, he was on Hospice, taking care of him, and they brought him the oxygen. I had oxygen in my house for quite a while.
> Q So the last few years, he was on oxygen 24 hours?
> A Oxygen, um-hum.
> Q Did his condition, breathing condition get worse as time passed?
> A As time passed. And then, that's when he had the heart attack, you know.
> Q The last five or six years, was he able to do anything around the house?
> A No -- well, just little, just maybe keep the lawn mowed or something like that. But it wasn't nothing, you know.

See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

Hearing Transcript at 14-15; *see* Decision and Order at 5.

The administrative law judge noted that claimant "did not designate any expert testimony as to total respiratory disability" but that she relied on the original report of autopsy by Dr. McCarthy and an autopsy slide review by Dr. Cinco. Decision and Order at 7. The administrative law judge concluded, however, that none of the pathology evidence had "any probative significance on whether the [m]iner was totally disabled during his lifetime."[5] *Id.*

The administrative law judge found that employer designated the medical opinions of Drs. Tuteur and Zaldivar as relevant to the issue of total disability.[6] Decision and Order at 7. Dr. Tuteur opined that the miner suffered from a mild impairment due to obstructive lung disease, which was not totally disabling. Employer's Exhibit 2. However, Dr. Tuteur also described that the miner had "peribronchiolar edema resulting in the physiologic manifestations of airflow obstruction, in this case moderate," caused by congestive heart failure. *Id.* Dr. Zaldivar opined that the miner did not have any form of lung disease but suffered from shortness of breath from severe cardiac disease. Employer's Exhibits 2, 7.

Considering the records from Oak Hill Hospital, the administrative law judge described that the miner's "last two hospitalizations [were] for shortness of breath" and that the miner was discharged on March 11, 2010, with a diagnosis of "advanced [chronic obstructive pulmonary disease (COPD)]." Decision and Order at 7, *citing* Director's Exhibit 16. The administrative law judge also noted that the miner was "bedridden in part due to a respiratory condition after March 11, 2010, and died on March 23, 2010." *Id.*

[5] The administrative law judge did not summarize the reports from Drs. McCarthy and Cinco. Although neither physician stated whether the miner had been totally disabled, Dr. McCarthy indicated that the miner had cor pulmonale with right-sided congestive heart failure, which diagnosis, if credited, is sufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[6] The administrative law judge also noted that employer relied on the report of Dr. Oesterling, who reviewed the autopsy slides. Employer's Exhibit 3. Dr. Oesterling indicated that the amount of simple pneumoconiosis present on the slides was insufficient to cause respiratory disability. *Id.* The administrative law judge rejected Dr. Oesterling's opinion because Dr. Oesterling "was not designated [by employer] as a medical expert on total respiratory disability." *Id.*

The administrative law judge found the opinions of Drs. Tuteur and Zaldivar were "conflicting and confusing" as to whether the miner had an obstructive respiratory impairment or COPD. Decision and Order at 8. The administrative law judge found that: Neither Dr. Tuteur nor Dr. Zaldivar "directly account for the diagnosis and treatment of severe COPD in the Oak Hill Hospital records;" they do not address whether the miner's shortness of breath would have precluded the miner from his usual coal mine work; and they "do not address the fact that the miner was bedridden." Decision and Order at 8, *citing* Director's Exhibit 16, Employer's Exhibits 1, 2 7, 8.

Additionally, the administrative law judge noted that Dr. Tuteur qualified his opinion by focusing on whether the miner had a "primary pulmonary process"[7] and did not address whether the miner's shortness of breath would have precluded the miner from performing his usual coal mine work. Decision and Order at 8. Citing 20 C.F.R. §718.204(a),[8] the administrative law judge indicated that Dr. Zaldivar did not address whether the miner's cardiac disease caused a disabling respiratory or pulmonary impairment. *Id*.

The administrative law judge next stated:

> I find that there is no expert opinion evidence that addresses whether the [m]iner's cardiac impairments, which were severe by all accounts, manifested themselves in breathing problems. References made to the spirometry and arterial blood gas studies in this record are historical and I find that in his last days the [miner] became weaker. Pneumoconiosis is progressive. [Claimant] testified that [the miner] needed oxygen all day, every day. In reviewing the treatment record, the [m]iner was diagnosed with severe COPD shortly before his demise. The discharge instructions placed him on bed rest.

[7] Dr. Tuteur reviewed the treatment and hospital records and noted that the miner's "dominant clinical issue was coronary artery disease" and that the records show "little to no physician concern for the presence or absence of a primary pulmonary process." Employer's Exhibit 2.

[8] Pursuant to 20 C.F.R. §718.204(a), "if . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled . . . ." 20 C.F.R. §718.204(a).

Decision and Order at 9, *citing* Director's Exhibit 16. After noting that claimant was a credible witness, the administrative law judge concluded that the miner was totally disabled by a respiratory or pulmonary impairment and that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 9.

Employer argues that the administrative law judge improperly relied on claimant's testimony over the medical opinions of Drs. Tuteur and Zalidivar. Employer contends that the administrative law judge credited claimant's testimony as supporting a finding that the miner was totally disabled, without adequately considering information in the hospital and treatment records that may contradict claimant's statements at the hearing. Employer also argues that the administrative law judge erred in relying on "bald assertions of severe COPD in the treatment records when those records themselves contain no support for such a diagnosis or assessment." Employer's Brief at 12. Employer's arguments have merit.

With regard to the weight accorded claimant's hearing testimony, the regulation pertaining to invocation of the Section 411(c)(4) presumption states that, in the case of a deceased miner:

> [A]ffidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

20 C.F.R. §718.305(b)(4).

In this case, there is medical evidence addressing the miner's pulmonary or respiratory condition. Therefore, the administrative law judge is precluded from relying on claimant's testimony to find total disability, unless it is corroborated by medical evidence. Although the administrative law judge credited claimant's testimony as establishing that the miner "needed oxygen all day, every day" for a respiratory condition, the administrative law judge failed to identify what portion of the hospital or treatment records, if any, corroborates claimant's testimony on this issue.[9] *See McCune*

[9] Employer contends that the hospital records "only show that [the miner] was on oxygen following surgery and during end of life care when he was suffering from severe dysphagia and malnutrition." Employer's Brief at 4.

v. Central Appalachian Coal Co., 6 BLR 1-996, 1-998 (1984) (when an administrative law judge does not make the necessary findings of fact, the proper course is to remand the case, as the Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's opinion).

Furthermore, the administrative law judge did not address whether claimant's testimony describing that the miner was bedridden due to respiratory problems, is corroborated by medical evidence in the record. *See McCune*, 6 BLR at 1-998. Employer correctly notes that records from Oak Hill Hospital indicate that on February 20, 2010, the miner was unable to walk due to an injury to his right knee and foot and that he was "bed bound due to debilitated state," but those records do not state that the miner was bedridden due to a respiratory or pulmonary impairment. Director's Exhibits 14-16.

With regard to the administrative law judge's crediting of the medical evidence, we agree with employer that the administrative law judge erred in failing to address whether the descriptions of "end-stage COPD" and "severe COPD" in the Oak Hill Hospital records were credible, prior to giving those descriptions determinative weight in finding that the miner was totally disabled. Director's Exhibit 16; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). As such, we are unable to affirm the administrative law judge's decision to give little weight to the opinions of Drs. Tuteur and Zaldivar for not addressing the descriptions of "end-stage COPD" and "severe COPD." Director's Exhibit 16. Further, in deciding that the autopsy evidence had no relevance to the issue of total disability, the administrative law judge did not properly address whether the autopsy evidence confirmed the presence of COPD and, if so, the extent of the disease. Accordingly, because the administrative law judge did not properly discuss all of the relevant evidence and resolve potential conflicts between claimant's testimony and the record evidence, the administrative law judge's Decision and Order does not satisfy the Administrative Procedure Act (APA),[10] 30 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[10] The Administrative Procedure Act, 5 U.S.C. §§500-596, as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A).

For these reasons, we vacate the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2), and we also vacate his determination that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. On remand, the administrative law judge must reweigh the medical evidence and render specific findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the miner's respiratory or pulmonary impairment precluded the miner from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1)(i), (2)(iv). The etiology of the miner's pulmonary impairment relates to the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer is able to successfully rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(b), (d); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015).

On remand, the administrative law judge should properly address whether the record evidence is sufficient to establish that the miner was disabled due to a chronic respiratory or pulmonary impairment, regardless of whether the origin of his respiratory or pulmonary impairment is a cardiac condition.[11] *See* 20 CFR 718.204(a). The administrative law judge must reconsider claimant's testimony, taking into consideration any contrary evidence regarding the length of time the miner was on oxygen. The administrative law judge must also reconsider whether the record establishes that the miner was bedridden due to a disabling respiratory or pulmonary impairment.

If the administrative law judge finds that claimant established total disability under any of the subsections at 20 C.F.R. §718.204(b)(2)(i)-(v),[12] the administrative law judge must also consider whether claimant satisfied her burden of proving that the miner was totally disabled, taking into consideration all of the contrary probative evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

[11] The administrative law judge stated that "there is no expert opinion evidence" addressing whether the miner's cardiac condition manifested itself in breathing problems. Decision and Order at 9. However, employer correctly points out that Drs. Tuteur and Zaldivar "address the very nature of the cardiac disease and condition and its impact on the lungs." Employer's Brief at 12 n.6.; *see* Employer's Exhibits 7 at 15-16; 8 at 14-15.

[12] The administrative law judge did not identify the dates of the "historical" pulmonary function tests he referenced in his decision. Decision and Order at 9. The administrative law judge did not discuss the arterial blood gas study evidence and he did not explain how he resolved the conflict in the pathology evidence regarding whether the miner has cor pulmonale. Director's Exhibits 16, 17; Employer's Exhibit 4

If the administrative law judge finds that the evidence is sufficient to establish that the miner was totally disabled by a respiratory or pulmonary impairment, he may reinstate his finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4). However, if the administrative law judge determines that the evidence is insufficient to establish that the miner was totally disabled, he must consider whether claimant can affirmatively establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

II. Rebuttal of the Presumption – Death Causation

In the interest of judicial economy, we also address employer's arguments challenging the administrative law judge's finding that it did not establish rebuttal of the Section 411(c)(4) presumption. In order to rebut the presumption that the miner's death was due to pneumoconiosis under at Section 411(c)(4), employer must affirmatively establish that the miner has neither legal[13] nor clinical pneumoconiosis,[14] or that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i),(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

The administrative law judge found that because the parties stipulated to the existence of simple, clinical pneumoconiosis, rebuttal under 20 C.F.R. §718.305(d)(2)(i) was precluded, and employer's only method of rebuttal was to establish that no part of the miner's death was caused by legal or clinical pneumoconiosis under 20 C.F.R. §718.305(d)(2)(ii). Decision and Order at 11. The administrative law judge determined that the opinions of Drs. Tuteur and Zaldivar were not credible to disprove that the

[13] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. The phrase "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[14] 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).

miner's death was due to pneumoconiosis because they did not address the "diagnosis and treatment of severe COPD set forth by [claimant's] testimony and the records contained in [Director's Exhibit] 16." *Id*. Further, the administrative law judge gave less weight to Dr. Oesterling's opinion for failing to "acknowledge that the [m]iner may have had legal pneumoconiosis," based on the diagnoses of COPD in the hospital records. Decision and Order at 11; Director's Exhibit 16.

As discussed *supra*, the administrative law judge did not consider whether the references to "severe" or "end-stage" COPD in the hospital records were credible. As such, the administrative law judge erred in rejecting the opinions of Drs. Tuteur, Zaldivar, and Oesterling for failing to consider those references. Decision and Order at 8; Director's Exhibit 16. Employer also correctly asserts that the administrative law judge's rebuttal analysis is flawed because he did not address whether the miner's COPD, regardless of its severity, constitutes legal pneumoconiosis, as defined at 20 C.F.R. §718.201. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

Additionally, the administrative law judge found that Dr. Oesterling's opinion was not credible to disprove that the miner's death was due to pneumoconiosis because "Dr. Oesterling did not acknowledge that [the miner] may have had legal pneumoconiosis." Decision and Order at 11. This finding was in error as the administrative law judge failed to first address whether employer had rebutted the presumed fact of legal pneumoconiosis. *Minich*, 25 BLR at 1-154-56. We also agree with employer that the administrative law judge erred in stating that Drs. Oesterling and Swedarsky "limit their discussion to attacking the McCarthy opinion." *Id*. Contrary to the administrative law judge's finding, Drs. Oesterling and Swedarsky each explain how the autopsy evidence supports their conclusion that the miner's death was not due to pneumoconiosis, independent of their criticisms of Dr. McCarthy's pathological findings. The administrative law judge's summary rejection of the opinions of Drs. Oesterling and Swedarsky fails to satisfy the requirements of the APA. *See Wojtowicz*, 12 BLR at 1-165.

For these reasons, we vacate the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(ii). On remand, if the administrative law judge determines that claimant has invoked the Section 411(c)(4) presumption, he must reconsider whether employer has satisfied its burden to establish rebuttal of that presumption. *Copley*, 25 BLR at 1-89. The administrative law judge should first consider whether employer is able to disprove that the miner had legal pneumoconiosis, regardless of his finding that rebuttal was precluded under 20 C.F.R. §718.305(d)(2)(i), the first rebuttal prong, because the parties stipulated that the miner had clinical pneumoconiosis. Performing the full rebuttal

analysis, in the order set forth in the regulation, satisfies the statutory mandate to consider all relevant evidence and provides a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(2)(ii), the second rebuttal prong. *See Minich*, 25 BLR at 1-154-56. Once the administrative law judge renders his findings on the issue of legal pneumoconiosis, he must consider whether employer has rebutted the presumed fact of death causation at 20 C.F.R. §718.305(d)(2)(ii) by proving that no part of the miner's death was caused by clinical or legal pneumoconiosis. *See Copley*, 25 BLR at 1-89. In rendering all of his findings on remand, the administrative law judge must comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge