U.S. Department of Labor

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

BRB Nos. 16-0069 BLA
and 16-0070 BLA

BETTY SUE HAYNES (Widow of and o/b/o the Estate of ALBERT L. HAYNES) Claimant-Petitioner v. GOOD COAL COMPANY, INCORPORATED and AMERICAN INTERNATIONAL SOUTH/CHARTIS Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/29/2016 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in Miner's Subsequent Claim and Denying Survivor's Benefits of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Incorporated), Barbourville, Kentucky, for claimant.

H. Brett Stonecipher and Cameron Blair (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Maia Fisher, 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 GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits in Miner's Subsequent Claim and Denying Survivor's Benefits (2012-BLA-05747, 2012-BLA-05843) of Administrative Law Judge Christine L. Kirby, rendered on a miner's claim and a survivor's claim filed pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).

In the miner's claim, the administrative law judge credited the miner with twenty-four years of underground coal mine employment, based on the parties' stipulation. The administrative law judge then determined that the miner was not totally disabled due to a respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Based on those findings and the filing date of the claim, the administrative law judge determined that claimant did not establish invocation of the rebuttable presumption set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b),[2] or establish a change in an applicable condition of entitlement at 20 C.F.R.

[1] Claimant, the widow of the miner, filed her claim for survivor's benefits on July 27, 2011, and is continuing to pursue the miner's claim on her husband's behalf. Director's Exhibit 19. The miner filed his initial claim for benefits on September 27, 2004, which was denied by the district director on April 20, 2005. Director's Exhibit 1. The district director found that, although the miner established pneumoconiosis arising out of coal mine employment, he did not establish total disability. *Id*. The miner took no further action until he filed the present subsequent claim on May 9, 2011. Director's Exhibit 3. The miner died on June 5, 2011, while his claim was pending. Director's Exhibits 9, 25.

[2] Under Section 411(c)(4) of the Act, a miner's total disability or death is presumed to be due to pneumoconiosis if the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions

§725.309. Consequently, the administrative law judge denied benefits in the miner's claim.

In the survivor's claim, the administrative law judge found that claimant was not entitled to invoke the rebuttable presumption at Section 411(c)(4) because total disability was not established in the miner's claim, and no additional evidence was submitted in the survivor's claim. The administrative law judge then determined that claimant did not establish that the miner had clinical or legal pneumoconiosis or that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant argues that in both claims, the administrative law judge erred in finding that the miner was not totally disabled due to a respiratory impairment and, therefore, erred in finding that the Section 411(c)(4) presumption could not be invoked. Employer responds, urging affirmance of the denial of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), contends that the Board should remand the case for reconsideration of whether the administrative law judge properly discredited Dr. Westerfield's opinion on total disability.[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 Act 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

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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(b).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had twenty-four years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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).

In this subsequent miner's claim, the issue of total respiratory or pulmonary disability under 20 C.F.R. §718.204(b)(2) is relevant to invoking the amended Section 411(c)(4) presumption, and establishing a change in an applicable condition of entitlement under 20 C.F.R. §725.309.[5] Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge determined that the newly submitted pulmonary function study, dated February 23, 2010, was non-qualifying and non-conforming under the quality standards at 20 C.F.R. Part 718, Appendix B.[6] Decision and Order at 8; Director's Exhibit 11; Claimant's Exhibit 4.[7] The administrative law judge also found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) or (iii), as no new blood gas studies were submitted in conjunction with the miner's subsequent claim and the record did not contain evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 8-9. We affirm these findings as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Lee, Day, Broudy, and Westerfield, and the

[5] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because claimant's prior claim was denied for failure to establish a totally disabling respiratory or pulmonary impairment, claimant must establish, based on the newly submitted evidence, that the miner was totally disabled due to a respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §725.309(d)(2), (3); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

[6] A "non-qualifying" pulmonary function study yields values that are in excess of the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "qualifying" study yields values that are equal to or less than those values. 20 C.F.R. §718.204(b)(2)(i).

[7] Claimant, employer, and the Director, Office of Workers' Compensation Programs, submitted the same exhibits, with the same exhibit numbers, in the miner's subsequent claim and the survivor's claim.

miner's treatment records.[8] Decision and Order 9-19. The administrative law judge gave little weight to the diagnoses of total disability by Drs. Lee and Day, the miner's treating physicians, because they did not explain their conclusions or identify supporting documentation. Decision and Order at 17-18; Director's Exhibit 10; Claimant's Exhibits 1-2, 5, 8-9. The administrative law judge accorded "little probative weight" to Dr. Broudy's opinion, as Dr. Broudy acknowledged that the miner developed lung cancer after retiring from coal mining, but did not address the extent of any respiratory or pulmonary impairment caused by the lung cancer. Decision and Order at 18; Employer's Exhibits 1, 9. The administrative law judge concluded that Dr. Westerfield's opinion that the miner suffered from a disabling impairment was entitled to little weight because it was equivocal. Decision and Order at 18; Employer's Exhibits 2, 10 at 19. Regarding the miner's treatment records, the administrative law judge stated that they "do not provide a functional evaluation of [the] Miner's condition." Decision and Order at 19; Director's Exhibits 12, 26-29. Weighing all of the newly submitted evidence together, the administrative law judge determined that it was insufficient to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Decision and Order at 19.

Claimant argues that the administrative law judge erred in discrediting the opinions of Drs. Lee and Day on the basis that they are unsupported by the treatment records, and in failing to give their opinions greater weight based on their status as treating physicians. Contrary to claimant's contention, the administrative law judge acted within her discretion in giving little weight to Dr. Lee's opinion that the miner "was categorically disabled due to pulmonary disease prior to his death in 2012," because Dr. Lee did not explain his conclusion or identify objective evidence supporting his diagnosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 17. Pursuant to 20 C.F.R. §718.204(d)(5), the weight given to the opinion of a treating physician "shall . . . be based on the credibility of the physician's opinion in light of its reasoning and documentation . . . ." 20 C.F.R. §718.104(d)(5); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003) ("the opinions of treating physicians get the deference they deserve based on their power to persuade.").

[8] The administrative law judge noted that she would not consider Dr. Baker's medical report, "as only medical data generated after denial of the prior claim may be considered in meeting the threshold standard of proving a change in an applicable condition of entitlement." Decision and Order at 17; Director's Exhibit 11; Claimant's Exhibit 7. The administrative law judge further explained that Dr. Baker's report was submitted and considered in the miner's prior claim. Decision and Order at 17.

Accordingly, we affirm the administrative law judge's discrediting of Dr. Lee's opinion and reject claimant's contention that Dr. Lee's opinion was entitled to additional weight, based on his status as a treating physician.

With respect to Dr. Day, we agree with claimant that the administrative law judge erred in finding that there is no support in the treatment records for his diagnosis of a totally disabling impairment. In evaluating Dr. Day's opinion, the administrative law judge did not address whether his recommendation of home oxygen use and his report that the miner complained of "smothering" and "shortness of breath" provided sufficient support for his opinion. Director's Exhibit 26. Accordingly, the administrative law judge did not comply with the Administrative Procedure Act (APA), which requires an administrative law judge to base her findings on a consideration of all relevant evidence. 5 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).

Regarding the opinions of Drs. Broudy and Westerfield, claimant maintains that the administrative law judge neglected their admission "that [the miner] was disabled by his respiratory or pulmonary condition prior to his death." Claimant's Brief in Support of Petition for Review at 6. In support of her position, claimant cites *Pyle v. Allegheny River Mining Co.*, 2 BLR 1-1143 (1981), in which the Board held that a totally disabling respiratory impairment caused by lung cancer is sufficient to invoke the rebuttable presumption of total disability or death due to pneumoconiosis. The Director challenges the administrative law judge's finding that Dr. Westerfield's opinion is equivocal on the issue of total disability.

Claimant correctly asserts that the administrative law judge erred in finding that Dr. Broudy did not discuss the degree of the miner's respiratory impairment. The administrative law judge omitted from consideration Dr. Broudy's statement that the miner "continue[d] working at some type of occupation until 2009, when he apparently became disabled due to his lung cancer." Employer's Exhibit 1. Dr. Broudy also testified that the miner "was disabled by lung cancer which involved his lungs and other parts of his body." Employer's Exhibit 9 at 16. Because the administrative law judge did not address the entirety of Dr. Broudy's opinion, she did not comply with the APA. *See Wojtowicz*, 12 BLR at 1-165. Accordingly, we vacate the administrative law judge's discrediting of Dr. Broudy's opinion.

In addition, we agree with the Director that the administrative law judge erred in finding that Dr. Westerfield's opinion is equivocal. The administrative law judge explained her determination as follows:

> While Dr. Westerfield initially states that the results of the February 23, 2010 [pulmonary function study] show that Miner would be disabled from performing the duties of his usual coal mine employment, he subsequently states that[,] based on the federal disability guidelines, the results of the [pulmonary function study] were above the disability standards and, therefore, Miner would not qualify as being disabled.

Decision and Order at 18, *see* Employer's Exhibits 2, 10 at 18-19. Contrary to the administrative law judge's finding, these two statements do not render Dr. Westerfield's opinion equivocal. The regulation at 20 C.F.R. §718.204(b)(2)(iv) explicitly provides that total disability can be established by a reasoned and documented medical opinion, "[w]here total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). Further, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that even a mild respiratory impairment may prevent a miner from performing his usual coal mine work, when considered in conjunction with the specific physical requirements of the miner's coal mine job. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). We vacate, therefore, the administrative law judge's decision to discredit Dr. Westerfield's opinion as equivocal on the issue of total disability.

Because we have vacated the administrative law judge's findings with respect to the opinions of Drs. Day, Broudy and Westerfield, we further vacate the administrative law judge's determination that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), or a change in an applicable condition of entitlement at 20 C.F.R. §725.309. We remand this case to the administrative law judge to reconsider the newly submitted medical opinion evidence. On remand, the administrative law judge must reconsider the opinions of Drs. Day, Broudy and Westerfield to determine whether they are sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). When weighing the medical opinions, the administrative law judge must address the credentials of the physicians, and the sophistication of, and bases for, their diagnoses. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26. If the administrative law judge credits Dr. Day's opinion on remand, she must also address whether it is entitled to greater weight pursuant to 20 C.F.R. §718.104(d), based on his status as a treating physician.[9]

[9] The regulation at 20 C.F.R. §718.104(d) requires the adjudication officer to take into consideration the following factors in weighing the opinion of the miner's treating physician: (1) nature of relationship; (2) duration of relationship; (3) frequency of treatment; and (4) extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation additionally provides that "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning

If the administrative law judge finds that the medical opinion evidence is sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv), she must determine whether the evidence supportive of a finding of total disability outweighs the contrary probative evidence. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). If total disability is established, claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) and satisfies her burden under 20 C.F.R. §725.309. The administrative law judge must then consider all of the evidence of record to determine whether employer has rebutted the Section 411(c)(4) presumption by disproving the existence of both legal and clinical pneumoconiosis, or by establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1); *see Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

If, however, the administrative law judge again finds that claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2), she may reinstate her finding that claimant failed to demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and the denial benefits.

II. The Survivor's Claim

In the survivor's claim, the administrative law judge determined that, because total disability was not established in the miner's claim, claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). Decision and Order at 20. The administrative law judge further found that claimant did not establish that the miner had clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a) or that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205. *Id*. at 22-30. Accordingly, she denied benefits.

Because claimant has not challenged the administrative law judge's finding that she did not establish entitlement to benefits without the Section 411(c)(4) presumption, that finding is affirmed. *See Skrack*, 6 BLR at 1-711. Accordingly, if the administrative law judge determines that claimant is not entitled to invocation of the Section 411(c)(4) presumption on remand, she may reinstate her denial of benefits in the survivor's claim.

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and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

However, if the administrative law judge awards benefits in the miner's claim, claimant is automatically entitled to survivor's benefits pursuant to 30 U.S.C. §932(*l*).[10]

In the alternative, if the administrative law judge denies benefits in the miner's claim, based on a finding that employer successfully rebutted the Section 411(c)(4) presumption of total disability due to pneumoconiosis, she must still evaluate whether employer has rebutted the Section 411(c)(4) presumption of death due to pneumoconiosis in the survivor's claim. Employer may establish rebuttal by affirmatively proving that the miner did not have legal or clinical pneumoconiosis, or by establishing that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2); *Minich*, 25 BLR at 1-159.

When rendering her findings on remand, the administrative law judge must weigh all relevant evidence and set forth her findings in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[10] Under Section 932(*l*), a survivor of a miner who was 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*); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010).

Accordingly, the administrative law judge's Decision and Order Denying Benefits in Miner's Subsequent Claim and Denying Survivor's Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge