U.S. Department of Labor

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

BRB No. 17-0102 BLA

JOYCE SHARON SHORT (Widow of GARY SHORT)	)	
Claimant-Petitioner	)	
v.	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 11/27/2017
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Steven Berlin, Administrative Law Judge, United States Department of Labor.

Joyce Sharon Short, Mayking, Kentucky.

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

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (2012-BLA-05649) of Administrative Law Judge Steven Berlin denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

[1] Claimant is the widow of the miner, who died on September 14, 2010. Director's Exhibit 10.

U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on August 25, 2011.

After crediting the miner with more than fifteen years of underground coal mine employment,[2] the administrative law judge found that the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that the miner was totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge also found that the Section 718.304 presumption is inapplicable.[4] 20 C.F.R. §718.304.

Turning to whether claimant could affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the evidence did not establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

---

[2] The miner's most recent coal mine employment was in Virginia. Hearing Transcript at 12-13. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth 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's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Claimant cannot benefit from this provision, as the miner did not file a claim for benefits during his lifetime. Director's Exhibit 2.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are 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).

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

The administrative law judge accurately noted that the record contains no evidence of complicated pneumoconiosis. Decision and Order at 23. We, therefore, affirm the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

The Section 411(c)(4) Presumption

Under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and its implementing regulation, 20 C.F.R. §718.305, there is a rebuttable presumption that a miner's death was due to pneumoconiosis if the claimant establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. In considering whether the evidence established the existence of a totally disabling respiratory impairment, the administrative law judge accurately found that all the pulmonary function studies of record are non-qualifying.[5] Decision and Order at 21. We, therefore, affirm the administrative law judge's findings that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge also considered the results of six arterial blood gas conducted on April 29, 2008, April 30, 2008,[6] June 30, 2008, August 25, 2008, and June 28, 2010. Director's Exhibit 12. The administrative law judge noted that all of the blood gas studies were performed while the miner was on oxygen or hospitalized. Decision and Order at 21. Although the administrative law judge noted that one of blood gas studies, a

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

[6] The miner performed two separate blood gas studies on April 30, 2008. Employer's Exhibit 12 at 198, 200.

study conducted on April 30, 2008 produced qualifying values,[7] he noted that a second blood gas study conducted on that same date produced non-qualifying values. *Id.* The administrative law judge found that the other four blood gas studies, taken before and after April 30, 2008, also produced non-qualifying values. *Id.* The administrative law judge therefore found that the blood gas study evidence did not establish total disability. *Id.* Because it is based on substantial evidence, we affirm the administrative law judge's finding that the blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Schetroma v. Director, OWCP*, 18 BLR 1-17, 1-22 (1993).

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), a claimant may establish that a miner was totally disabled by offering medical evidence establishing that the miner suffered from cor pulmonale with right-sided congestive heart failure. On a form dated October 31, 2011, Dr. Alam, the miner's treating physician, opined that the miner suffered from cor pulmonale. Director's Exhibit 14. However, because Dr. Alam did not diagnose cor pulmonale *with right-sided congestive heart failure*, his opinion is insufficient to demonstrate total disability under 20 C.F.R. §718.204(b)(2)(iii).[8] *See Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). Because there is no evidence in the record that the miner suffered from cor pulmonale with right-sided congestive heart failure, we affirm the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 21.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Alam's opinion. Although Dr. Alam diagnosed severe emphysema, chronic bronchitis with shortness of breath, and hypoxia, the doctor did not offer an opinion on whether the miner's respiratory condition prevented him from returning to his previous coal mine employment. Decision and Order at 22; Director's Exhibit 14. The administrative law judge noted that Dr. Rosenberg opined that the miner's ventilatory status was normal, with no air flow obstruction, and that Dr. Zaldivar opined that the miner was not disabled from a pulmonary standpoint.[9] Decision and Order at 21-22;

[7] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 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)(ii).

[8] The administrative law judge also found that there was nothing in Dr. Alam's treatment notes to support his diagnosis of cor pulmonale. Decision and Order at 21.

[9] Although Dr. Rosenberg diagnosed gas exchange abnormalities and related hypoxia, he did not opine that these conditions were disabling. Employer's Exhibit 8 at Employer's Exhibit 8 at 13, 19. Dr. Zaldivar opined that the miner's death was due to

Employer's Exhibit 8 at 19; Employer's Exhibit 9 at 24, 28. Because the administrative law judge properly found that the record contains no credible medical opinion evidence supportive of a finding of a totally disabling respiratory or pulmonary impairment, his finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

Because claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant is unable to invoke the presumption of death due to pneumoconiosis pursuant to Section 411(c)(4). Consequently, we address the administrative law judge's finding of whether claimant is entitled to benefits pursuant to 20 C.F.R. Part 718.

Part 718 Entitlement

Where the Section 411(c)(3) and 411(c)(4) statutory presumptions do not apply, claimant must affirmatively establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Before any finding of entitlement can be made in a survivor's claim, however, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

The administrative law judge initially addressed whether the evidence established that the miner suffered from pneumoconiosis. The administrative law judge accurately noted that there are no positive x-ray interpretations in the record.[10] Decision and Order at 23. We therefore affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

In considering the pathological evidence, the administrative law judge accurately noted that a biopsy conducted on March 9, 2004 did not reveal the existence of

---

"multiorgan failure triggered by liver failure with excessive fluid retention in the lungs causing internal drowning of the lungs and shortness of breath." Employer's Exhibit 4. Dr. Zaldivar, however, did not opine that the miner suffered from a totally disabling respiratory or pulmonary impairment during his lifetime.

[10] The administrative law judge noted that Dr. Shipley, a B reader and Board-certified radiologist, interpreted the miner's February 3, 2009 and September 16, 2009 x-rays as negative for pneumoconiosis. Decision and Order at 23; Employer's Exhibits 1, 2.

pneumoconiosis.[11] Decision and Order at 23. The administrative law judge also noted that there is no autopsy evidence. *Id.* We therefore affirm the administrative law judge's finding that evidence did not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).[12]

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical opinions of Drs. Alam, Rosenberg, and Zaldivar.[13] While Dr. Alam diagnosed coal workers' pneumoconiosis, Director's Exhibit 24, Drs. Rosenberg and Zaldivar opined that the miner did not suffer from the disease. Employer's Exhibits 3-4, 8-9. In weighing the conflicting medical opinion evidence, the administrative law judge permissibly credited the opinions of Drs. Rosenberg and Zaldivar over Dr. Alam's contrary opinion because he found that they were better reasoned and consistent with the x-ray evidence.[14] *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 23-25. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

---

[11] Dr. Alam conducted a bronchoscopy on March 9, 2004, and noted evidence of "minimal anthrasilicotic deposition." Director's Exhibit 12 at 216-217. Dr. Ricardo reviewed the washings and brushings from the bronchoscopy, and noted that they were negative for malignant cells. *Id*. at 218.

[12] Because there was no evidence of complicated pneumoconiosis and claimant did not invoke the Section 411(c)(4) presumption, the administrative law judge properly found that claimant could not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 23.

[13] The administrative law judge noted that Dr. Bielecki's treatment records included a history of coal workers' pneumoconiosis. Decision and Order at 24; Director's Exhibit 12 at 12. The administrative law judge, however found that Dr. Bielecki did not provide a basis for that history, or independently diagnose the disease. *Id.*

[14] Although Dr. Alam indicated that his diagnosis of clinical pneumoconiosis was based upon his treatment of the miner and x-ray findings, he did not identify any findings on physical examination or any x-ray interpretations that supported his diagnosis. Director's Exhibit 14.

The administrative law judge also permissibly accorded less weight to Dr. Alam's opinion that the miner suffered from a respiratory condition substantially aggravated by his coal mine dust exposure because he found that it was not well reasoned.[15] *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; Decision and Order at 24; Director's Exhibit 14. Because there is no other medical opinion evidence supportive of a finding of legal pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits in this survivor's claim under 20 C.F.R. Part 718. *Trumbo*, 17 BLR at 1-87-88.

[15] The administrative law judge noted that Dr. Alam provided no explanation for his opinion that the miner's pulmonary condition was substantially aggravated by his coal mine dust exposure. Decision and Order at 24.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge