U.S. Department of Labor

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

BRB No. 18-0010 BLA

THERESA C. KIRKPATRICK (Widow of WILLIAM G. KIRKPATRICK)	)	
Claimant-Respondent	)	
v.	)	
RUSHTON MINING COMPANY	)	DATE ISSUED: 11/15/2018
and	)	
PENNSYLVANIA POWER & LIGHT	)	
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Ralph J. Trofino, Johnstown, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-5670) of Administrative Law Judge Drew A. Swank, rendered 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 survivor's claim filed on May 12, 2015.[1]

The administrative law judge found that claimant did not establish complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of death due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). He further found, however, that the miner had over fifteen years of underground coal mine employment[2] and a totally disabling respiratory impairment. Thus, he determined 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).[3] He further found that employer did not rebut the presumption and awarded benefits accordingly.[4]

On appeal, employer argues that the administrative law judge erred in finding that the miner was totally disabled by a respiratory impairment, that claimant invoked the Section 411(c)(4) presumption, and that it failed to rebut the presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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[1] Claimant is the widow of the miner, who died on October 10, 2014. Director's Exhibit 5.

[2] The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibits 3, 4; Decision and Order at 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] The record does not reflect that the miner was awarded benefits. Thus, claimant is not eligible for automatic survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

[5] 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. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-13.

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).

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on 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 focused on whether the autopsy and medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv) :

> Doctor Qian, who performed the autopsy on the deceased miner on October 11, 2014, diagnosed the following pulmonary conditions: "pneumonic consolidation," "left plural adhesion," "severe pulmonary centrilobular emphysema," and "severe simple coal workers' pneumoconiosis with moderate to severe chronic interstitial pneumonitis with pulmonary fibrosis." He concluded by saying the miner died of "respiratory failure and congestive heart failure." Claimant's expert, Dr. Perper, concluded that the miner suffered from chronic obstructive pulmonary disease and emphysema. Even [the employer's] experts concluded the same. Doctor Swedarsky diagnosed the miner having "diffuse alveolar damage (DAD)," "[mild] to moderate emphysema," "simple coal workers' pneumoconiosis," "mild to moderate patchy interstitial pulmonary fibrosis," "pleural adhesions," and "pleural effusion." He related that the miner's immediate cause of death was "neutropenic pneumonia and sepis with the subsequent development of acute respiratory distress syndrome (ARDS)." Doctor Oesterling likewise diagnosed "moderate micronodular predominantly pleural based coal workers' pneumoconiosis," "minimal centrilobular pulmonary emphysema," "extensive diffuse alveolar damage with changes ranging from acute to fibrotic," and "interstitial fibrosis."

Decision and Order at 13-14, *quoting* Director's Exhibits 4, 5; Employer's Exhibits 1, 2. Without any further elaboration or analysis, the administrative law judge then concluded "that the miner was suffering from a totally disabling respiratory or pulmonary impairment prior to his death and therefore the rebuttable presumptions of disability and/or death due to coal workers' pneumoconiosis are invoked pursuant to 20 C.F.R. § 718.305." *Id*. at 14 (internal quotations omitted).

We agree with employer that the administrative law judge erred in finding total disability established. The administrative law judge did not adequately explain which medical evidence he credited to support his finding of a chronic respiratory or pulmonary impairment. Moreover, the administrative law judge failed to explain how the evidence supports an inference that the miner was totally disabled from his usual coal mine employment by that respiratory or pulmonary impairment.[6] Accordingly, the administrative law judge's total disability analysis does not comport with the Administrative Procedure Act.[7] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We must therefore vacate the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).[8]

On remand, the administrative law judge must reconsider the autopsy and medical opinion evidence and adequately explain his basis for finding that the miner was totally

[6] A physician need not phrase his or her opinion in terms of "total disability" in order to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990). Diagnoses regarding limits on a miner's activities due to a pulmonary condition may be relevant to a total disability determination, even if the records do not use the phrase "totally disabled" or specifically address the miner's ability to perform his prior coal mine job. A medical opinion may support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that a miner is or was unable to do his last coal mine job. *See Poole*, 897 F.2d at 894; *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). However, it is claimant's burden to establish the exertional requirements of the miner's usual coal mine employment in order to provide the administrative law judge with a basis of comparison from which to evaluate a medical assessment of disability, and reach a conclusion regarding total disability. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc). Moreover, the administrative law judge must adequately explain how the evidence establishes total disability. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[7] The Administrative Procedure Act 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), as incorporated into the Act by 30 U.S.C. §932(a).

[8] The parties did not designate any affirmative pulmonary function or arterial blood gas study evidence in this case pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii).

disabled by a chronic respiratory or pulmonary impairment.[9] The administrative law judge should also address whether the record establishes that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).[10] The administrative law judge should thereafter weigh the evidence supporting a finding of total disability against the contrary evidence and render a finding as to whether the evidence, when weighed together, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). *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).

Because we have vacated the administrative law judge's finding of total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption, and the award of benefits. 30 U.S.C. §921(c)(4). Further, we decline to address employer's challenge to the administrative law judge's determination that it failed to rebut the presumption. On remand, should the administrative law judge again find that claimant has invoked the Section 411(c)(4) presumption, employer may challenge the administrative law judge's findings on rebuttal in a future appellate proceeding.

We also vacate the administrative law judge's finding that claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 12. The administrative law judge noted that, in his pathology report, Dr. Perper diagnosed the miner with complicated pneumoconiosis, whereas Drs. Qian, Swedarsky, and Oesterling diagnosed only simple pneumoconiosis. Decision and Order at 9-11; Director's Exhibits

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[9] The administrative law judge should address employer's argument that Dr. Swedarsky opined that there was no "primary respiratory disability" and "no objective evidence of respiratory impairment" based on the normal pulmonary function studies conducted in May and June 2013 as reflected in the treatment records. Employer's Exhibit 1 at 44-45, 47; Employer's Brief at 9. Dr. Swedarsky also testified that the miner had no objective evidence of an "intrinsic pulmonary impairment" based on the mild degree of coal workers' pneumoconiosis seen by CT scan. Employer's Exhibit 3 at 42, 44.

[10] The record includes over fourteen-hundred pages of medical treatment records from Miner's Medical Center, Murtha Regional Cancer Center, and Conemaugh Valley Memorial Hospital, which the administrative law judge did not discuss. Director's Exhibit 4 (unpaginated). These records include numerous pulmonary function and arterial blood gas studies conducted in the course of the miner's medical treatment. *Id*. The records reflect treatment for pulmonary edema, coronary artery disease, chronic systolic congestive heart failure, nonischemic dilated cardiomyopathy, peripheral vascular disease, interstitial lung disease, coal workers' pneumoconiosis, lung empyema, and chronic obstructive pulmonary disease. *Id*. On remand, the administrative law judge should address whether the medical treatment records support a finding of total disability.

4 (unpaginated, internally at 38-42), 5; Employer's Exhibit 1-3; Claimant's Exhibit 1. Despite this summary of the evidence, the administrative law judge found that "there is no evidence that the miner had complicated pneumoconiosis," and thus claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 12. The administrative law judge, however, failed to adequately explain his bases for resolving the conflicting in the evidence as to the issue of complicated pneumoconiosis as required by the APA. *Wojtowicz*, 12 BLR at 1-165.

Therefore, the administrative law judge should reconsider whether the evidence establishes complicated pneumoconiosis under 20 C.F.R. §718.304.[11] The administrative law judge must evaluate the credibility of this evidence in light of the physicians' qualifications, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions, *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986), and adequately explain his bases for resolving the conflict in this evidence. *Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge finds that claimant is not entitled to invoke the Section 411(c)(3) or Section 411(c)(4) presumptions, he should then address whether claimant can establish by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

[11] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities (greater than one centimeter in diameter) that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. Rather, the administrative law judge must examine all of the evidence on the issue resolve any conflicts, and make a finding of fact. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286 (4th Cir. 2010); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order 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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge