U.S. Department of Labor

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

BRB No. 16-0247 BLA

LINDA WAYNE (Widow of LARRY WAYNE) Claimant-Petitioner v. ONEIDA COAL COMPANY, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/26/2016 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Linda Wayne, Upper Glade, West Virginia, *pro se*.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2013-BLA-5495) of Administrative Law Judge Richard A. Morgan

[1] Claimant is the widow of the miner, who died on July 22, 2011. Director's Exhibit 14. The miner's first claim, filed on July 27, 1993, was finally denied by the district director on January 20, 1994, because the miner failed to establish any of the elements of entitlement. Director's Exhibit 1. The miner's second claim, filed on April 13, 2010, was finally denied by the district director on January 14, 2011, because the miner failed to establish disability and disability causation. Director's Exhibit 2.

(the administrative law judge), rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2]

The administrative law judge adjudicated this claim pursuant to the regulatory provisions at 20 C.F.R. Part 718. Based on his determination that the miner worked 13.75 years of coal mine employment, the administrative law judge found that claimant was unable to invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(4) presumption, the administrative law judge found that claimant established that the miner had clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b). However, the administrative law judge found that claimant did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b).[4] Accordingly, the administrative law judge denied benefits.

Accordingly, claimant is not entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §932(*l*). Claimant filed her survivor's claim on April 30, 2012. Director's Exhibit 4.

[2] By Order dated November 20, 2015, the administrative law judge determined that the survivor's claim would be decided on the record because claimant failed to attend two scheduled hearings. Decision and Order at 2.

[3] Relevant to this claim, 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 of an underground miner, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] The Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013). Thus, the provisions that were applied by the administrative law judge at 20 C.F.R. §718.205(c) are now set forth at 20 C.F.R. §718.205(b).

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer, nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed.

Length of Coal Mine Employment

Because the administrative law judge's determination of the miner's length of coal mine employment is relevant to whether claimant can invoke the Section 411(c)(4) presumption of death due to pneumoconiosis, we will review the administrative law judge's finding that the miner worked 13.75 years in underground coal mine employment.

In her letter to the Board, claimant asserts that the miner was employed from 1974 until 1991, when Oneida Coal Company (Oneida) closed. Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Because the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method or methods and is supported by substantial evidence in the record considered as a whole. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*,

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 19; Decision and Order at 2 n.3.

7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

Relevant to the length of the miner's coal mine employment, the record contains the miner's employment history form, his Social Security Administration (SSA) earnings records, and statements from the miner's employers setting forth his periods of employment.[6] The miner's employment history form indicates that he worked for Sewell Coal Company (Sewell) in 1974, Island Creek Coal Company (Island Creek) from 1974 to 1979, and Oneida from 1979 to 1990. Director's Exhibit 6. Similarly, the SSA earnings records indicate that the miner worked for Sewell from the fourth quarter in 1974 to the first quarter in 1975, that the miner worked for Island Creek from 1975 to 1980, and that the miner worked for Oneida from 1980 to 1989.[7] Director's Exhibit 10. With regard to the statements from employers, Rebecca Eisenman, an office manager for Sewell, stated that the miner worked for Sewell from September 18, 1974 to February 14, 1975. Director's Exhibit 9. Additionally, Marilyn Perrine, a human resources clerk for Island Creek, stated that the miner worked for Island Creek for various periods from February 25, 1975 to November 30, 1979.[8] Director's Exhibit 8. Lastly, Karen Free, a manager of compensation and benefits for Sun Coal Company, stated that the miner worked for Oneida from June 2, 1980 until May 10, 1988.[9] Director's Exhibit 7.

[6] Although the administrative law judge stated that he also considered "testimony" in determining the length of the miner's coal mine employment, the record reflects that no hearing or deposition testimony was given in the survivor's claim, or in any of the miner's claims. Decision and Order at 2.

[7] The Social Security Administration earnings records indicated that the miner worked for Oneida Coal Company (Oneida) in 1989, but only earned $960.00 from Oneida in that year. Director's Exhibit 10. This is consistent with the evidence of record which reflects that claimant's last date of employment with Oneida was January 14, 1989. Director's Exhibit 11.

[8] Specifically, the records from Island Creek indicate that the miner worked from February 25 1975 until December 3, 1976, when he was laid off. The miner returned to work on May 9, 1977, and worked until March 23, 1979, when he was again laid off. Finally, the miner returned to work on July 31, 1979, went on sick leave on August 10, 1979, and was laid off on November 30, 1979. Director's Exhibit 8.

[9] By letter dated September 16, 1993, Karen Free of Sun Coal Company indicated that the miner requested information regarding his employment record with Oneida. Director's Exhibit 7.

In determining the length of the miner's coal mine employment, the administrative law judge credited the miner with 365 days of employment for each year that his yearly earnings, as reflected in the SSA earnings records, exceeded the standard industry earnings for that year, as reported by the Bureau of Labor statistics, consistent with the formula set forth in 20 C.F.R. §725.101(a)(32)(iii).[10] Decision and Order at 4, *citing* Director's Exhibit 11. Using this method, the administrative law judge credited the miner with 13.75 years of coal mine employment.[11] Because the administrative law judge's finding that claimant did not establish at least 15 years of coal mine employment is supported by substantial evidence in the record, including the miner's employment history form, the SSA earnings records, and the statements from the miner's employers, we affirm his finding that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000).

[10] Section 725.101(a)(32) provides that to be credited with a year of coal mine employment, claimant must prove that the miner worked in or around a coal mine over a period of one calendar year (365 days), or partial periods totaling one year, during which he worked for at least 125 working days. 20 C.F.R. §725.101(a)(32). Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the finder-of-fact may, in his discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii).

[11] We note that the administrative law judge did not explain his reliance on the formula set forth at 20 C.F.R. §725.101(a)(32)(iii), in light of the fact that the record contains evidence from which the beginning and ending dates of the miner's coal mine employment could be ascertained. *See* 20 C.F.R. §725.101(a)(32)(iii); Director's Exhibits 7-9. Any error in the administrative law judge's reliance on this formula is harmless, however, in light of the fact that the statements from the miner's employers reflect cumulative periods of employment totaling less than fifteen years. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Death Causation

When, as in this case, the administrative law judge has determined that the Section 411(c)(3)[12] and Section 411(c)(4) statutory presumptions do not apply, claimant must establish by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment, and that his 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). Death is considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000), *citing Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992). Failure to establish any one of the required elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

At Section 718.205(b), the administrative law judge considered an autopsy report by Dr. Plata, a death certificate signed by Dr. Gordinho, and a medical report by Dr. Zaldivar, together with the miner's treatment records.[13] Decision and Order at 5-6, 11-12; Director's Exhibits 14, 16; Employer's Exhibit 1. Dr. Plata, the autopsy prosector, opined that "the cause of death is undeterminate [sic] due to the limitations of the autopsy," which was restricted to the lungs. Director's Exhibit 16. On the death certificate, Dr. Gordinho listed the sole cause of the miner's death as cardiac arrest due to an anoxic brain injury, with end stage renal disease as a significant contributing condition. Director's Exhibit 14. In his report, Dr. Zaldivar opined that the miner's clinical pneumoconiosis did not contribute to his death in any manner.[14] Employer's

[12] Because there is no evidence of record that the miner had complicated pneumoconiosis, the presumption at 20 C.F.R. §718.304 is not available in this case. Decision and Order at 9; 20 C.F.R. §§718.202(a)(3), 718.304.

[13] The administrative law judge noted that the treatment records reflect that the miner underwent coronary bypass surgery in 2003, was diagnosed with end-stage renal failure in 2009, and was examined and treated at Raleigh General Hospital from 2009 through 2011 for hypertension, arterial fibrillation, coronary bypass surgery, end-stage renal failure, diabetes, coronary artery disease, chronic obstructive pulmonary disease, and pneumonia. Decision and Order at 4-5; Director's Exhibit 17.

[14] Dr. Zaldivar opined that the miner's death was not due to any pulmonary disease or condition, but rather, was due to vascular disease and heart attacks, or possibly sepsis in the left leg. Employer's Exhibit 1.

Exhibit 1. Because the administrative law judge properly found that there is no evidence of record establishing that the miner's pneumoconiosis was a substantially contributing cause or factor leading to his death, *see Shuff*, 967 F.2d at 979-80, 16 BLR at 2-93, we affirm the administrative law judge's finding that claimant did not meet her burden to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b), an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of survivor's benefits under 20 C.F.R. Part 718. *Trumbo*, 17 BLR at 1-87-88.

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