U.S. Department of Labor

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

BRB Nos. 17-0646 BLA
and 17-0683 BLA

SYLVIA MARIE STEPHENS (o/b/o/ and Widow of DONALD E. STEPHENS)	)	
Claimant-Petitioner	)	
v.	)	
SHAMROCK COAL COMPANY, INCORPORATED, c/o SUNCOKE ENERGY	)	DATE ISSUED: 10/30/2018
self-insured through SUN COAL COMPANY, INCORPORATED, c/o HEALTHSMART CCS	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Eugene E. Siler, III, Williamsburg, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-BLA-05047, 2016-BLA-05555) of Administrative Law Judge Larry A. Temin, rendered on claims 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 miner's subsequent claim[1] filed on November 17, 2014, and a survivor's claim filed on February 22, 2016.[2] The Board has consolidated these appeals for purposes of decision only.

In the miner's claim, the administrative law judge credited the miner with 8.77 years of coal mine employment.[3] Because the miner had less than fifteen years of coal mine employment, the administrative law judge found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] He therefore considered whether claimant could establish entitlement in the miner's claim pursuant to 20 C.F.R. Part 718 without the benefit of the Section 411(c)(4) presumption.

The administrative law judge found that the new evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant established a change in an applicable

[1] The miner filed two prior claims for benefits, each of which was finally denied. Miner's Claim (MC) Director's Exhibits 1-2. The most recent prior claim, filed on March 23, 1998, was denied by the district director on July 16, 1998, because the evidence did not establish any element of entitlement. MC Director's Exhibit 2.

[2] The miner died on February 8, 2016. Survivor's Claim (SC) Director's Exhibit 8. Claimant, the widow of the miner, is pursuing the miner's claim on behalf of his estate. Decision and Order at 1.

[3] The miner's coal mine employment was in Kentucky. Decision and Order at 25; MC Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Section 411(c)(4) provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis and 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 suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

condition of entitlement at 20 C.F.R. §725.309(c). Considering the claim on its merits, the administrative law judge found that the x-ray evidence established that the miner had clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),[5] but that the medical opinion evidence did not establish that he had legal pneumoconiosis[6] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant did not establish that the miner's clinical pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203(c). Accordingly, the administrative law judge denied benefits in the miner's claim.

In the survivor's claim, the administrative law judge found that, because the miner's claim was denied, claimant was not eligible to receive survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[7] Further, because no evidence of any additional coal mine employment was submitted in the survivor's claim, the administrative law judge again credited the miner with 8.77 years of coal mine employment. The administrative law judge therefore determined that claimant could not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. In addition, the administrative law judge found that the evidence did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). He also found that, assuming that claimant established that the miner had pneumoconiosis, the record contained no evidence that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a), or that his clinical pneumoconiosis arose out of coal mine employment at 20

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[5] The administrative law judge found that claimant failed to establish clinical pneumoconiosis based on the needle biopsy, CT scan, and medical opinion evidence at 20 C.F.R. §718.202(a)(2), (4). Decision and Order at 16-20.

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "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).

[7] Section 422(*l*) of the Act, 30 U.S.C. §932 (*l*) (2012), provides that the 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 survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis.

C.F.R. §§718.202(a), 718.203. Employer/carrier responds, urging affirmance of the denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.[8]

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).

I. Miner's Claim

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he was totally disabled, and that his total disability was caused by pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A. Legal Pneumoconiosis

To establish legal pneumoconiosis, claimant must demonstrate that the miner had a chronic dust disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b). Pursuant 20 C.F.R. §718.202(a)(4), the administrative law judge weighed Dr. Rasmussen's medical opinion.[9] Decision and Order at 20-22. Dr. Rasmussen diagnosed the miner with interstitial lung disease as evidenced by a marked reduction in lung function. Miner's Claim (MC) Director's Exhibit 12 at 1-2, 47-53. He stated that the miner's objective testing revealed a reduction in diffusing capacity and a gas exchange impairment. *Id*. He noted that the miner's risk factors for these impairments included a cigarette smoking history of fifty-three pack-years, a coal mine employment history of thirteen years, and a non-coal mine occupational exposure history as a mechanic doing body shop work for nine to ten years, which exposed the miner to abrasive dust, smoke, and fumes. *Id*. He concluded that

[8] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had 8.77 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[9] The administrative law judge also considered that Drs. Rosenberg and Vuskovich opined that the miner did not have legal pneumoconiosis and, thus, noted that their opinions did not assist claimant in establishing that the miner had the disease. Decision and Order at 20-22.

cigarette smoking and non-coal mine occupational abrasive dust exposure caused the impairment in lung function, but that coal mine dust exposure was a "contributing factor" in the development of the lung disease.[10] *Id*. at 53. Thus, Dr. Rasmussen diagnosed legal pneumoconiosis. *Id*.

In a supplemental report, Dr. Rasmussen opined that his opinion would not change even if the miner had less than ten years of coal mine employment. MC Director's Exhibit 12 at 1-2. He noted that the effects of abrasive dust are indistinguishable from the effects of coal mine dust, and that the effects can be additive. *Id*. He also noted that coal mine dust can aggravate an impairment caused by abrasive dust. *Id*. He opined that the miner's reduced diffusing capacity and impaired gas exchange "frequently occur in impaired coal miners." *Id*.

The administrative law judge found that Dr. Rasmussen's opinion was "too conclusory and speculative to support a diagnosis of legal pneumoconiosis." Decision and Order at 21. The administrative law judge explained that "there is nothing in Dr. Rasmussen's report that substantiates his opinion that the [m]iner's reduction in diffusion capacity and gas exchange impairment were caused by exposure to coal mine dust during his coal mine employment."[11] *Id*.

Claimant argues that the administrative law judge erred in discrediting Dr. Rasmussen's opinion. Claimant's Brief at 15-20. Claimant contends that Dr. Rasmussen provided a well-reasoned and documented opinion diagnosing legal pneumoconiosis. *Id*.

Claimant's argument lacks specificity with regard to any alleged error by the administrative law judge in weighing Dr. Rasmussen's opinion and is a request to reweigh the evidence, which the Board is not authorized to do. *Anderson*, 12 BLR at 1-113. The Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it and must limit its review to contentions of error that are specifically raised

[10] Initially, Dr. Rasmussen stated that coal mine dust exposure was a "minimal contributing cause of [the miner's] disabling lung disease." Director's Exhibit 12 at 49. Later in his report, Dr. Rasmussen opined that the miner had legal pneumoconiosis because his impairment in gas exchange was "caused at least in part" by his coal mine dust exposure. *Id*. at 53.

[11] The administrative law judge also found that Dr. Rasmussen "equivocates that the conditions [he diagnosed] 'could be' the consequence of smoking," occupational "exposures to dust, smoke and fumes," or "exposure to abrasive dusts." Decision and Order at 20-21, *quoting* MC Director's Exhibit 12. The administrative law judge noted that Dr. Rasmussen "does not support his opinion that the [m]iner's condition was contributed to by his coal mine dust exposure." *Id*.

by the parties.[12] *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Thus, we affirm the administrative law judge's finding that claimant failed to establish that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

B. Clinical Pneumoconiosis Arising Out of Coal Mine Employment

The administrative law judge found that claimant established clinical pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.202(a)(1), but failed to establish clinical pneumoconiosis based on the biopsy, CT scan, and medical opinion evidence at 20 C.F.R. §718.202(a)(2), (4). Decision and Order at 16-20. Further, "[w]eighing all the evidence in the record," the administrative law judge found that claimant did not establish clinical pneumoconiosis, even though clinical pneumoconiosis would be established based on the x-ray evidence in isolation.[13] *Id*. at 19-20.

[12] Moreover, even if claimant's brief could be read as having raised a specific argument, we would hold that substantial evidence supports the administrative law judge's credibility findings. Specifically, the administrative law judge permissibly found that Dr. Rasmussen's opinion was "too conclusory and speculative to support a diagnosis of legal pneumoconiosis" because "there is nothing in Dr. Rasmussen's report that substantiates his opinion that the [m]iner's reduction in diffusion capacity and gas exchange impairment were caused by exposure to coal mine dust during his coal mine employment." Decision and Order at 21; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

[13] In rendering findings of fact in the miner's claim, the administrative law judge initially determined that, weighing all the evidence in the record, claimant established clinical pneumoconiosis based on the x-ray evidence, but went on to state that the record, including evidence from prior claims, fails to support a finding of clinical pneumoconiosis as defined in the regulations. Decision and Order at 19-20. In subsequent discussion, the administrative law judge indicated that claimant did not establish clinical pneumoconiosis. *Id*. at 24. ("I have found that the preponderant weight of the medical evidence does not establish that the [m]iner had clinical and legal pneumoconiosis as those conditions are described in the regulations"). Further, based on an identical record submitted in the survivor's claim, the administrative law judge concluded that claimant failed to establish clinical pneumoconiosis in the survivor's claim. *Id*. at 27 ("I find that [claimant] has not established that the [m]iner had clinical pneumoconiosis as that term is defined in the regulations"). In her brief to the Board, claimant argues that, to the extent the administrative law judge found that she did not establish clinical pneumoconiosis, he rendered inconsistent findings which were consequently irrational, capricious and arbitrary

The administrative law judge next noted that, because claimant established less than ten years of coal mine employment, she was required to establish with "competent evidence" that the miner's pneumoconiosis arose in part out of coal mine employment.[14] 20 C.F.R. §718.203(c); *see Southard v. Director, OWCP*, 732 F.2d 66, 70 (6th Cir. 1984); *Daniels Co. v. Mitchell*, 479 F.3d 321, 339 (4th Cir. 2007); Decision and Order at 22. The administrative law judge noted that Dr. Rasmussen addressed this issue in his written opinions.[15] Decision and Order at 22; MC Director's Exhibit 12.

Dr. Rasmussen opined that the miner's x-ray was consistent with clinical pneumoconiosis. Director's Exhibit 12 at 47-48. He opined that coal mine dust exposure is "likely a contributing cause of" the miner's pneumoconiosis. *Id*. at 49. In his supplemental report, Dr. Rasmussen opined that the miner was exposed to other substances, "including abrasives" in the course of his employment as a mechanic working for nine to ten years in a body shop. *Id*. at 1-2, 48. He noted that abrasives "contain a variety of toxic substances, which are capable of causing radiographic changes of pneumoconiosis and

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and did not adequately explain how he weighed the relevant evidence. Claimant's Brief at 8-10. We consider any error by the administrative law judge in addressing whether the evidence established clinical pneumoconiosis to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As discussed below, we affirm the administrative law judge's alternative finding that claimant was unable to establish that the miner's clinical pneumoconiosis arose at least in part out of coal mine employment at 20 C.F.R. §718.203(c). Further, as will be discussed, in the survivor's claim we affirm the administrative law judge's alternative finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205.

[14] The applicable regulation provides that "[i]f a miner who is suffering . . . from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship." 20 C.F.R. §718.203(c).

[15] The administrative law judge also considered that Dr. Seaman interpreted a January 21, 2015 x-ray and identified changes in the miner's lungs consistent with coal workers' pneumoconiosis. Decision and Order at 22; Claimant's Exhibit 2. The administrative law judge discredited this x-ray reading because he found that "there is no indication in the record that [Dr. Seaman] had any knowledge of the [m]iner's personal, medical, or employment history, and she did not provide any reasons to support her assertion." Decision and Order at 22. The administrative law judge also found that the miner's treatment records do not contain any x-ray reading attributing pneumoconiosis to coal mine dust exposure. *Id*. at 16-17. Because claimant does not challenge these findings, they are affirmed. *See Skrack*, 6 BLR at 1-711.

possibly lung function changes as well." *Id*. He further noted that the changes caused by abrasives "are indistinguishable from those caused by coal mine dust exposure" and that the effects of both "may be combined and additive as well." *Id*. Dr. Rasmussen reiterated his finding that the miner had clinical coal workers' pneumoconiosis. *Id*.

The administrative law judge discounted Dr. Rasmussen's opinion, finding it "equivocal and speculative regarding the cause of the changes in the [m]iner's lungs." Decision and Order at 22. The administrative law judge found that Dr. Rasmussen "did not explain his reasons or identify any specific findings that would support his conclusion that any of the changes he identified were in fact caused by the [m]iner's coal mine dust exposure as opposed to the other risk factors he identified."[16] *Id*. at 18. He found that "Dr. Rasmussen's opinion is comprised of general statements regarding the effects of the [m]iner's various exposures that Dr. Rasmussen felt may have caused or contributed to changes seen in the [m]iner's lungs via x-ray." *Id*. The administrative law judge concluded that Dr. Rasmussen "did not explain how he determined if the combined or additive effects" of abrasives "he mentioned were applicable to the [m]iner's case." *Id*.

Claimant argues that the administrative law judge erred in discrediting Dr. Rasmussen's opinion. Claimant's Brief at 15-20. Claimant generally argues that Dr. Rasmussen adequately explained the bases for his conclusions. *Id*. Claimant, however, does not allege any specific error in the administrative law judge's reasons for discrediting Dr. Rasmussen's opinion on the etiology of the miner's clinical pneumoconiosis. *See* 20 C.F.R. §§802.211, 802.301; *Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21. The assertion that Dr. Rasmussen's opinion is sufficiently well-reasoned to establish that the miner's clinical pneumoconiosis arose in part out of coal mine employment is essentially a request that the Board reweigh the evidence, which it is not authorized to do.[17] *Anderson*, 12 BLR

[16] The administrative law judge also noted that, while Dr. Rasmussen stated that interstitial fibrosis could be caused by smoking and coal mine dust exposure, "he did not cite to any medical literature to support these assertions." Decision and Order at 18.

[17] Even if claimant's brief could be read as having raised a specific argument, we would hold that substantial evidence supports the administrative law judge's credibility finding. The administrative law judge permissibly found that Dr. Rasmussen's opinion was "equivocal and speculative regarding the cause of the changes in the [m]iner's lungs" because Dr. Rasmussen "did not explain his reasons or identify any specific findings that would support his conclusion that any of the changes he identified were in fact caused by the [m]iner's coal mine dust exposure as opposed to the other risk factors he identified." Decision and Order at 22; *see Groves*, 277 F.3d at 836; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

at 1-113. Thus, we affirm the administrative law judge's finding that claimant failed to meet her burden under 20 C.F.R. §718.203(c).

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if the evidence does not establish a requisite element of entitlement.[18] *See Anderson,* 12 BLR at 1-112; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). As claimant did not establish that the miner had legal pneumoconiosis or that his clinical pneumoconiosis arose out of coal mine employment, both necessary elements of entitlement, we affirm the denial of benefits in the miner's claim.[19] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

II. Survivor's Claim

In a survivor's claim,[20] where no statutory presumption applies, 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. §§718.1, 718.202, 718.203, 718.205; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817 (6th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). Failure to establish any one of the requisite elements precludes an award of benefits. *See Trumbo*, 17 BLR at 1-87-88.

A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that 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).

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[18] Claimant argues that because the Act is remedial in nature, any doubts should be resolved in favor of claimant. Claimant's Brief at 5, 12-13. To the extent claimant argues that the administrative law judge should have applied the "true doubt" rule in weighing the evidence in this case, claimant's argument has no merit. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994).

[19] Claimant argues that the administrative law judge erroneously required that the evidence establish that the miner had both clinical and legal pneumoconiosis in order to establish pneumoconiosis at 20 C.F.R. §718.202(a). Claimant's Brief at 3 n. 3. Contrary to claimant's argument, the administrative law judge denied benefits because claimant failed to establish either that the miner's clinical pneumoconiosis arose out of coal mine employment, or that the miner had legal pneumoconiosis. Decision and Order at 15-22.

[20] Because we affirm the administrative law judge's finding that the miner was not determined to be eligible to receive benefits at the time of his death, we affirm his finding that claimant is not eligible for benefits pursuant to 30 U.S.C. §932(*l*).

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).

Pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that claimant failed to establish that the miner had clinical or legal pneumoconiosis. Decision and Order at 27-28. Pursuant to 20 C.F.R. §718.205(b), the administrative law judge found that, even if claimant had established that the miner had pneumoconiosis, claimant was unable to establish that the miner's death was due to pneumoconiosis because "there is no evidence in the record to show that pneumoconiosis was a cause of the [m]iner's death." *Id.*

Claimant does not challenge the finding that there is no evidence in the record to establish that the miner's death was due to pneumoconiosis 20 C.F.R. §718.205(b). Therefore, that finding is affirmed.[21] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We thus affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Because claimant failed to establish this essential element of entitlement, we affirm the denial of benefits in the survivor's claim. *Brown*, 996 F.2d at 817; *Trumbo*, 17 BLR at 1-87.

[21] Even if claimant alleged error in the administrative law judge's finding, we would hold that the administrative law judge permissibly found that there is no evidence of record establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge