U.S. Department of Labor

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

BRB No. 18-0057 BLA

RUBY J. SIZEMORE (Widow of JUNIOR SIZEMORE)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 10/30/2018
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, 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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2016-BLA-05850) of Administrative Law Judge Alice M. Craft, 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 April 29, 2015.

The administrative law judge credited the miner with twenty-eight years of coal mine employment, but found that only ten years were in underground mines or in conditions substantially similar to those in an underground mine. Thus, she found that claimant could not invoke 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).[2] Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge also found that claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2012).[3] Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(3) or Section 411(c)(4) presumptions, the administrative law judge found that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205, and she denied benefits accordingly.

[1] Claimant is the widow of the miner, who died on March 20, 2013. The miner filed two prior claims for benefits that were denied. Because the miner was not "determined to be eligible to receive benefits" at the time of his death, claimant is not entitled to automatic receipt of survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

[2] 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 he worked fifteen or more years in underground coal mine employment, or in surface 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); 20 C.F.R. §718.305.

[3] 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).

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds in support of the denial of benefits.

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. *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 findings if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

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.

The Section 411(c)(4) Presumption

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or at surface mines in conditions "substantially similar" to conditions in underground mines. 30 U.S.C. §921(c)(4). Conditions at a surface mine will be considered substantially similar to those in an underground mine if the miner was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). The administrative law judge found that the miner had ten years of underground coal mine employment and eighteen years of surface coal mine employment.[5] Decision and Order at 3. She found, however, that there is

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Hearing Transcript at 8.

[5] Although a claimant need not establish that the dust conditions were substantially similar if the miner's above-ground work was at the site of an underground mine, *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011), the record supports the administrative law judge's finding that claimant's above-ground work was not carried out at an underground mine site. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Claimant testified that the miner worked "underground, 10 years" and "around the surface mine," approximately "20 or 25 years." Hearing Transcript at 10. The miner's employment history form in the current claim references "underground"

"insufficient evidence in the record regarding the dust conditions where the [m]iner worked at surface mines to establish that he worked in similar conditions to those in underground mines." *Id*. at 4. She therefore found that claimant failed to establish that the miner was regularly exposed to coal mine dust during his employment at surface mines, and thus did not establish at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

As an initial matter, the administrative law judge erred in finding that claimant did not establish that the miner was regularly exposed to coal mine dust in his surface mine employment. Claimant testified that the miner worked as a bulldozer and high lift operator with open cabs, and that he was "so dirty" when he got home that he would have to take a bath. Hearing Transcript at 10. The miner's employment history forms also indicate that he had been exposed to "dust, gases, or fumes" in all of his surface coal mine work as a bulldozer and high lift operator. Director's Exhibits 3; 25 at 47. In summarily finding that claimant did not establish that the miner was regularly exposed to coal mine dust in his surface employment, the administrative law judge erred by failing to explain why claimant's testimony and the miner's employment history forms do not establish that the conditions of his employment were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014) (evidence that conditions on the surface were "very dusty" and the miner, who worked in an open cab, was covered in dust at the end of the day, is sufficient to establish regular exposure pursuant to Section 411(c)(4)).

The administrative law judge's failure to properly evaluate this evidence does not require remand, however, as claimant did not establish the second requirement for invoking the Section 411(c)(4) presumption: the existence of a totally disabling respiratory or pulmonary impairment at the time of the miner's death. 20 C.F.R. §§718.204(b), 718.305(b)(iii). Although the parties did not specifically designate any pulmonary function studies, blood gas studies, or medical opinions pursuant to 20 C.F.R. §725.414(a), the record contains an opinion dated January 28, 1992 by Dr. Wicker and an opinion dated January 8, 2010 by Dr. Baker, both of whom examined the miner on behalf of the Department of Labor as part of his prior claims. Director's Exhibits 24, 25. Each physician

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employment only with respect to his approximately nine and a half years of work at Shamrock Coal Co. between 1963 and 1972. Director's Exhibit 3. While the miner listed "underground" employment with both Shamrock Coal Co. and Finley Coal Co. as part of his 1992 claim, his Social Security Administration Earnings Records reflect, at most, a total of thirty-five quarters (8.75 years) of employment with those companies. Director's Exhibits 24 at 23; 25 at 25-26.

performed pulmonary function studies and blood gas studies that were non-qualifying[6] for total disability, and opined that the miner had the respiratory capacity to perform his usual coal mine work. Additionally, the record contains no evidence establishing that the miner had cor pulmonale with right-sided congestive heart failure. Director's Exhibits 24 at 17; 25 at 4. Therefore, this evidence does not assist claimant in establishing that the miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2)(i)-(iv).

Further, the administrative law judge considered the medical records relating to the miner's treatment with Drs. Cornett and Srinivas from July 2011 to February 2013. Director's Exhibits 11, 13. As the administrative law judge found, neither physician identified the miner as having any respiratory problems or symptoms, with the exception of Dr. Cornett's July 2012 notation that the miner had a history of "dyspnea with exertion," which predated several reports in which Dr. Cornett and Dr. Srinivas either reported "no respiratory problems," "negative for cough, dyspnea and wheezing," or that the miner's "lungs were clear."[7] Decision and Order at 6-7; Director's Exhibits 11, 13. Therefore, these records do not assist claimant in establishing that the miner was totally disabled. *See* 20 C.F.R. §718.204(b)(2)(iv); Director's Exhibits 11, 13.

Because claimant cannot establish that the miner had a totally disabling respiratory or pulmonary impairment at the time of his death, we affirm the administrative law judge's finding that claimant is unable to invoke the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4).

Cause of Death

Because the Section 411(c)(3) and Section 411(c)(4) statutory presumptions do not apply, claimant must establish by a preponderance of the evidence that the miner's death

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and 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)(i), (ii).

[7] The administrative law judge also noted that records from the miner's in-patient hospice care for dementia reported "diminished breath sounds." Decision and Order at 7, *citing* Director's Exhibits 10, 12. No physician opined, however, that claimant's symptoms of diminished breath and dyspnea while in hospice care constituted a totally disabling impairment that rendered him unable to perform his usual coal mine work from a respiratory or pulmonary standpoint. 20 C.F.R. §718.204(b)(1).

was due to pneumoconiosis arising out of coal mine employment. *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, 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). Pneumoconiosis may be found to have hastened the miner's death only if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). Failure to establish any one of the required elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

At 20 C.F.R. §718.205(b), the administrative law judge considered the death certificate signed by Dr. Whisman, who listed the causes of the miner's death as end stage dementia and Parkinson's disease. Decision and Order at 7, 11; Director's Exhibit 7. The administrative law judge also correctly noted that there are no treatment records or medical opinions of record addressing the cause of the miner's death. Decision and Order at 6-7, 11. Because there is no evidence of record establishing that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, 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 does 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.[8] *Trumbo*, 17 BLR at 1-87-88.

[8] Because we have affirmed the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis, we need not address whether the administrative law judge erred in finding that the miner did not have pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge