U.S. Department of Labor

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

BRB No. 18-0528 BLA

MARY LOUISE BROTHERS (Widow of EARL BROTHERS)	)	
Claimant-Petitioner	)	
v.	)	
PITTSBURG & MIDWAY COAL MINING COMPANY	)	DATE ISSUED: 10/09/2019
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 on Fourth Remand Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

John C. Morton (Morton Law LLC), Henderson, Kentucky, for employer.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Fourth Remand Denying Benefits (2006-BLA-05678) of Administrative Law Judge Joseph E. Kane rendered pursuant to 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 June 13, 2005, and is before the Board for the fifth time.[2]

In the Board's most recent prior decision, it vacated the administrative law judge's finding that the blood gas study dated February 26, 2002 ("2002 blood gas study" or "2002 study") established total disability and remanded for reconsideration of the issue. The administrative law judge concluded on remand the 2002 blood gas study is not reliable and does not support a finding of total disability. Weighing the relevant evidence together, he found claimant failed to establish total disability at 20 C.F.R. §718.204(b) and could not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4).[3] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. He further determined claimant did not establish clinical or legal pneumoconiosis and denied benefits.

On appeal, claimant argues the administrative law judge erred in finding the 2002 blood gas study and the medical opinion evidence insufficient to establish total disability and invocation of the Section 411(c)(4) presumption. Claimant also contends she established the miner had legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. Claimant filed a reply brief, reiterating her contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

[1] Claimant is the surviving spouse of the miner who died on May 9, 2005. Director's Exhibit 1. The miner filed a claim for benefits during his lifetime but it was ultimately denied by reason of abandonment. 2018 Decision and Order on Fourth Remand at 2.

[2] The full procedural history of this case is set forth in the Board's decisions in *Brothers v. Pittsburg & Midway Coal Mining Co.*, BRB No. 16-0004 BLA (July 22, 2016) and *Brothers v. Pittsburg & Midway Coal Mining Co.*, BRB No. 13-0234 BLA (Feb. 20, 2014).

[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 or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

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).

Based on the prior decisions the Board and the administrative law judge rendered, the issues in this case have been narrowed to the reliability of the 2002 blood gas study to establish total disability and the weight accorded to the medical opinions on total disability and legal pneumoconiosis.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). At this juncture, claimant may establish total disability based on arterial blood gas studies or medical opinions.[5] 20 C.F.R. §718.204(b)(2)(ii), (iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *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).

Claimant challenges the administrative law judge's finding that the 2002 blood gas study is not reliable to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Although the record does not contain any blood gas studies obtained for the purposes of litigation, the miner's treatment records contain five resting blood gas studies dated December 24,

[4] The record reflects the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 12. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] Total disability cannot be established at 20 C.F.R. §718.204(b)(2)(i), as there are no pulmonary function studies in the record. Regarding 20 C.F.R. §718.204(b)(2)(iii), claimant states incorrectly the administrative law judge found total disability established based on Dr. Taylor's diagnosis of cor pulmonale with right-sided congestive heart failure. Claimant's Brief in Support of Petition for Review at 9. Instead, the administrative law judge found the evidence inconclusive as Dr. Taylor initially diagnosed the miner with the condition, but later testified at deposition that shortly before the miner's death there was no evidence he had cor pulmonale. 2013 Decision and Order on Remand at 18; Claimant's Exhibit 1 at 21-22. We affirm this finding as it is rational and supported by substantial evidence. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002).

1993, April 13, 1996, April 14, 1996,[6] and February 26, 2002. Director's Exhibit 26 (at 20, 29, 50). Only the 2002 study produced qualifying values.[7]

The reliability of the blood gas studies was not addressed until the administrative law judge issued his Decision and Order on Second Remand. He determined the April 13 and April 14, 1996 studies were unreliable because they were performed when the miner was in respiratory failure. 2013 Decision and Order on Second Remand at 17. In contrast, he credited the December 24, 1993 and February 26, 2002 studies, acknowledging they were performed when the miner was experiencing acute respiratory illness, but finding "the illnesses and the test results were not as extreme as in April 1996." *Id*. The administrative law judge then gave greater weight to the 2002 study as it was the most recent and the qualifying results were consistent with the progressive nature of pneumoconiosis. *Id*. He concluded claimant established total disability based on it, the treatment records, and the testimony of lay witnesses. *Id*. at 19. He further found claimant invoked the Section 411(c)(4) presumption and employer failed to rebut it. *Id*. at 20-25. He therefore awarded benefits. *Id*. at 25.

On appeal by employer, the Board vacated the administrative law judge's crediting of the 2002 study, determining he did not provide a valid rationale for his finding that the miner's acute bronchitis did not render the study unreliable and thereby improperly substituted his medical judgment for that of a medical expert.[8] *Brothers v. Pittsburg & Midway Coal Mining Co.*, BRB No. 13-0234 BLA, slip op. at 6 (Feb. 20, 2014). On remand, the administrative law judge concluded "there is no credible evidence finding the 2002 [blood gas study] unreliable and Dr. Taylor relied on this testing for his diagnosis of the [m]iner, I find it reliable and give it probative weight on the issue of total disability." 2015 Decision and Order on Third Remand at 7. In addition, the administrative law judge stated that Dr. Houser disregarded all of the blood gas studies in the record because they were performed while the miner was "seeking treatment," but "he never explained how and if he determined that the 2002 [blood gas study] was unreliable." *Id*. Nevertheless, he

[6] Two complete resting blood gas studies were performed on April 14, 1996. Director's Exhibit 26 at 29.

[7] A "qualifying" arterial blood-gas study yields values equal to or less than the applicable table values listed in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

[8] In the interest of judicial economy, the Board also affirmed the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. *Brothers*, BRB No. 13-0234 BLA, slip op. at 7-10.

did not credit any of the medical opinions relevant to total disability, but determined the totality of the evidence established the miner was totally disabled. He then found claimant invoked the Section 411(c)(4) presumption and employer did not rebut it. *Id*. at 7-9. He awarded benefits and employer appealed.

The Board again vacated the administrative law judge's crediting of the 2002 blood gas study as he did not "explain how he determined that the miner's *acute* respiratory illness did not render [it] unreliable" *Brothers v. Pittsburg & Midway Coal Mining Co.*, BRB No. 16-0004 BLA, slip op. at 6 (July 22, 2016). The Board further held the administrative law judge mischaracterized Dr. Houser's opinion, as "Dr. Houser explained that the results were unreliable because the miner was being treated in the emergency room for *acute* respiratory conditions." *Id*. The case was remanded to the administrative law judge for reconsideration of the 2002 blood gas study. *Id*.

The administrative law judge determined on remand the study was unreliable because it was performed when the miner was being treated for an exacerbation of his chronic obstructive pulmonary disease (COPD) and acute bronchitis.[9] 2018 Decision and Order on Fourth Remand at 7. Accordingly, the administrative law judge found claimant did not establish total disability and was precluded from invoking the Section 411(c)(4) presumption. He further determined claimant failed to establish the existence of pneumoconiosis and denied benefits. Claimant's current appeal followed.

Claimant initially argues that because the administrative law judge credited the 2002 study in two previous decisions and reviewed the same record in the current decision, he erred in reaching a different result. Claimant's Brief in Support of Petition for Review at 2, 4, 5, 8, 10; Claimant's Reply Brief at 1-2, 3, 6. This contention has no merit. Because the Board vacated the administrative law judge's previous findings crediting the 2002 study, they no longer had any substantive effect and were subject to de novo review on remand. *See Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985). The administrative law judge therefore acted properly in reconsidering the study and rendering a finding as to its reliability in his Decision and Order on Fourth Remand. *Id*.

Claimant further contends the administrative law judge erred in determining the study was unreliable without adequately addressing Dr. Taylor's role as the miner's treating physician in ordering the study and relying on it to diagnose chronic COPD and

[9] Dr. Taylor requested the 2002 study during a two-day hospitalization that began in the emergency room. Director's Exhibit 26 at 16. In a discharge summary, Dr. Taylor referred to the results and diagnosed "chronic obstructive pulmonary disease [(COPD)] with exacerbation," and "acute and chronic bronchitis." *Id*.

chronic bronchitis.[10] We disagree. Contrary to claimant's contention, the 2002 study was not reliable on its face based on Dr. Taylor's status as the treating physician having the study performed in a hospital setting. Claimant's Brief at 10; Claimant's Reply Brief at 5. The facts claimant cites perhaps support finding the study was performed correctly and produced accurate measurements of the miner's pO2 and pCO2, but they do not establish the study was reliable, i.e., that the miner's acute illness or the temporary exacerbation of his pre-existing condition did not skew the results. Similarly, Dr. Taylor's diagnoses of chronic bronchitis and COPD, in addition to acute bronchitis and an exacerbation of the miner's COPD, do not conclusively establish the study revealed a chronic impairment. Claimant's Brief in Support of Petition for Review at 3-4. Rather, the administrative law judge reasonably exercised his discretion as fact-finder in determining the acute conditions present when the 2002 study was performed may be the reason why the qualifying values were produced.[11] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002). We therefore affirm the administrative law judge's finding that the 2002 blood gas study was not a reliable indicator of total disability.

The remainder of claimant's allegations concern the relative weight given to the medical opinions of Drs. Houser and Taylor on total disability.[12] Claimant's Brief in

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[10] Claimant also erroneously suggests the administrative law judge erred in relying on Dr. Houser's opinion in deeming the 2002 blood gas study unreliable. Claimant's Brief in Support of Petition for Review at 2-3, 9, 11; Claimant's Reply Brief at 1-2, 3, 5; Employer's Exhibit 2. Rather than relying on Dr. Houser's opinion, the administrative law judge gave little weight to Dr. Houser's summary dismissal of the treatment record blood gas studies as he "never explained how and if he determined the 2002 [study] was unreliable." 2015 Decision and Order on Third Remand at 7; Employer's Exhibit 2.

[11] The administrative law judge also correctly observed that the 2002 blood gas study is contained in the miner's treatment records and, therefore, is not subject to the quality standard requiring arterial blood gas studies "shall not be performed during or soon after an acute respiratory or cardiac illness." 2018 Decision and Order on Fourth Remand at 6, *citing* 20 C.F.R. §718.101(b); Appendix C to 20 C.F.R. Part 718. He further correctly noted he was nevertheless required to determine whether the study can reliably establish total disability. 2018 Decision and Order on Fourth Remand at 6, *citing* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000) ("Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator must still be persuaded the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.")

[12] The record also contains the medical report of Dr. Selby, who opined the miner was "not permanently, totally or even partially disabled as a result of coal mine dust

Support of Petition for Review at 2-3, 9, 11; Claimant's Reply Brief at 1-2, 3, 5; Director's Exhibit 26 (at 16, 29); Claimant's Exhibit 1; Employer's Exhibit 2. Claimant argues the administrative law judge erred in relying on Dr. Houser's opinion to determine claimant did not establish total disability. Dr. Houser reviewed the miner's treatment records and determined there was not enough objective evidence to assess whether the miner had a totally disabling impairment. Employer's Exhibit 2. Nonetheless, Dr. Houser indicated the miner did not appear to be totally disabled at the end of his life because he was not on home oxygen. *Id*. Dr. Houser also indicated Dr. Taylor must have viewed the miner's condition as stable, as Dr. Taylor scheduled him for a follow-up visit six months after an examination on May 5, 2005, four days before the miner's death. *Id*. Contrary to claimant's allegation, the administrative law judge acted within his discretion giving Dr. Houser's opinion little weight, stating he has "no insight into Dr. Taylor's reasons for scheduling a follow[-]up visit, and a miner does not have to be on supplemental oxygen to have a totally disabling respiratory impairment." *See Napier*, 301 at 713-14; *Stephens*, 298 F.3d at 522; 2018 Decision and Order on Fourth Remand at 7; 2015 Decision and Order on Third Remand at 18.

Claimant also contends the administrative law judge erred in failing to find Dr. Taylor's opinion sufficient to establish total disability based on his status as claimant's treating physician. This argument is without merit. Dr. Taylor treated the miner from January 1980 until the miner's death in 2005. Director's Exhibit 22. In a questionnaire completed on June 13, 2005, he diagnosed COPD, asthma and bronchitis, and stated the asthma and COPD were caused by smoking and coal dust exposure. *Id*. Dr. Taylor reiterated his diagnoses at his deposition taken on August 22, 2006, stating the miner's lung conditions caused shortness of breath, coughing, wheezing and exercise intolerance. Claimant's Exhibit 1 at 8. He further indicated on cross-examination by employer's counsel that asthma and smoking can cause the lung conditions he diagnosed without a contribution from coal dust. *Id*. at 15. Treatment records document the miner's visits to Dr. Taylor for treatment of his COPD and asthma, and Dr. Taylor's presence at the miner's hospitalizations for respiratory failure, acute bronchitis and exacerbation of his COPD. Director's Exhibits 25, 26.

The administrative law judge acknowledged Dr. Taylor was the miner's treating pulmonologist and found his opinion entitled to determinative weight due to the nature and duration of his relationship with the miner, and the frequency and extent of his treatment

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exposure." Employer's Exhibit 1. The administrative law judge gave no weight to this opinion as it was unclear whether Dr. Selby believed the miner was not disabled, or that his disability was not due to coal dust exposure. 2015 Decision and Order on Third Remand at 7.

of the miner's COPD and chronic bronchitis. 20 C.F.R. §718.104(d)(1)-(4); 2010 Decision and Order on Remand at 5. However, he further found that although Dr. Taylor diagnosed "a breathing impairment" that worsened over time, he "never stated whether the [m]iner's impairment would have prevented him from performing his job as a coal miner."[13] 2013 Decision and Order on Second Remand at 18. Claimant has not identified any error in the administrative law judge's previous consideration of Dr. Taylor's opinion, which he incorporated by reference in his most recent decision. 2018 Decision and Order on Fourth Remand at 7. We therefore affirm his finding that Dr. Taylor's opinion is insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm the administrative law judge's conclusion, based on a weighing of the different categories of evidence together, that claimant did not establish total respiratory or pulmonary disability or invocation of the Section 411(c)(4) presumption.[14] 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(iii); 2018 Decision and Order on Fourth Remand at 7.

Establishing Entitlement to Benefits without the Presumption

In a survivor's claim where no statutory presumptions are invoked,[15] claimant must establish by a preponderance of the evidence the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements precludes entitlement. *See*

[13] The miner last worked as a driller in an underground coal mine. Director's Exhibit 12.

[14] Claimant also maintains the administrative law judge "has not considered [the miner's] physical limitations of not being able to function as described here." Claimant's Brief in Support of Petition for Review at 11. Claimant appears to be referring to her testimony that the miner could not climb steps, talk on the telephone or do household chores without becoming very short of breath. *Id.* at 7; *see* Hearing Transcript at 12-22. In light of the presence of medical evidence addressing the miner's pulmonary or respiratory condition, the administrative law judge could not rely solely on claimant's testimony to find total disability established, as she would be eligible for benefits if the claim were approved. 20 C.F.R. §718.304(b)(4).

[15] In the Board's first decision in this case, it affirmed the finding of Administrative Law Judge Thomas F. Phalen, Jr., that claimant was not entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304. *Brothers v. Pittsburg & Midway Mining Co.*, BRB No. 08-0702 BLA, slip op. at 4 n.6 (May 27, 2009).

Trumbo, 17 BLR at 1-87-88. Death is considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of death, or if pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003).

Incorporating findings from previous decisions, the administrative law judge denied benefits because claimant failed to establish either clinical or legal pneumoconiosis.[16] Decision and Order on Fourth Remand at 7. Claimant alleges the administrative law judge erred in failing to credit Dr. Taylor's opinion diagnosing legal pneumoconiosis over Dr. Houser's contrary opinion, and argues generally the evidence of record establishes legal pneumoconiosis. Claimant's Brief in Support of Petition for Review at 3, 5-7, 10-11. These contentions are without merit.

To establish legal pneumoconiosis, claimant was required to prove the miner suffered from a chronic lung disease or impairment and its sequelae significantly related to or substantially aggravated by dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2), (b). As the administrative law judge observed, Administrative Law Judge Thomas F. Phalen, Jr., who issued the first decision in this case, determined the opinion of Dr. Taylor, the only physician of record who diagnosed legal pneumoconiosis, was insufficient to establish the miner had the disease. 2018 Decision and Order on Fourth Remand at 7; 2008 Decision and Order at 13-14, 15. Judge Phalen acknowledged Dr. Taylor's status as the miner's treating physician, but discredited his opinion because he offered no explanation for attributing the miner's respiratory and pulmonary conditions to coal dust exposure, and did not specify the smoking history he relied on in rendering his opinion.[17] 2008 Decision and Order at 13-14.

[16] 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). 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). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[17] Judge Phalen stated:

Upon consideration of claimant's appeal, filed without the assistance of counsel, the Board affirmed Judge Phalen's weighing of Dr. Taylor's opinion and his finding claimant failed to establish the existence of legal pneumoconiosis. *Brothers v. Pittsburg & Midway Mining Co.*, BRB No. 08-0702 BLA, slip op. at 6 (May 27, 2009); 2008 Decision and Order at 14. The Board's previous affirmance of these findings constitutes the law of the case. Because claimant has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). In addition, we affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence is insufficient to establish the existence of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 2018 Decision and Order on Fourth Remand at 8; 2010 Decision and Order on Remand at 2-7. Because claimant failed to establish pneumoconiosis, an essential element of entitlement, we further affirm the denial of benefits. 20 C.F.R. §§718.202(a), 718.205(a)(1); *see Trumbo*, 17 BLR at 1-87-88.

> Dr. Taylor considered an accurate employment history, multiple physical examinations, Miner's smoking end date, and various tests associated with ongoing treatment. He diagnosed COPD, asthma, and bronchitis on many occasions. However, only in the questionnaire and at the deposition did he attribute these conditions to coal dust exposure. In addition, while he admitted that all of Miner's symptoms could be caused by asthma and cigarette smoking, he opined, without any objective support, that this condition was contributed to by coal dust exposure . . . . Finally, while he noted that Miner quit smoking in 1977, he never mentioned the number of pack-years he considered in determining that smoking was not the sole cause of Miner's condition.

2008 Decision and Order at 14.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge