U.S. Department of Labor

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

BRB No. 16-0416 BLA

MARY I. HOWARD (Widow of DENZEL HOWARD) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 04/26/2017 DECISION and ORDER

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

Mary I. Howard, Wooton, Kentucky.

Emily Goldberg-Kraft (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, DC, for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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 (2012-BLA-05024) of Administrative Law Judge Larry A. Temin denying benefits 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 September 2, 2010. In a Proposed Decision and Order dated February 2, 2011, the district director denied benefits. Claimant thereafter requested modification, which the district director denied on July 28, 2011. Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

After crediting the miner with nineteen years of underground coal mine employment,[2] the administrative law judge found that the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that the miner was totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge also found that the Section 411(c)(3) presumption is inapplicable.[4] 30 U.S.C. §921(c)(3) (2012).

Turning to whether claimant could affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge found that the

[1] Claimant is the surviving spouse of the miner, who died on October 10, 2007. Director's Exhibit 7.

[2] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. 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, 1-202 (1989) (en banc).

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

[4] Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), provides that a 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 receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Claimant cannot benefit from this provision, as there is no indication in the record that the miner was awarded benefits during his lifetime.

medical opinion evidence did not establish the existence of legal pneumoconiosis[5] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge found, however, that the evidence established that the miner suffered from clinical pneumoconiosis[6] pursuant to 20 C.F.R. §718.202(a).[7] The administrative law judge further found that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish that the miner's death was due to clinical pneumoconiosis. 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

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 administrative law judge's 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are 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).

We initially note that the administrative law judge was not required to consider whether the evidence was sufficient to establish modification of the district director's denial of claimant's survivor's claim. The Board has held that an administrative law judge is not required to make a preliminary determination regarding whether a claimant has established a basis for modification of the district director's denial of benefits before reaching the merits of entitlement. Rather, the Board has recognized that such a determination is subsumed into the administrative law judge's decision on the merits.

[5] "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).

[6] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] The administrative law judge found that the district director made a mistake in a determination of fact in finding that the evidence did not establish the existence of pneumoconiosis. 20 C.F.R. §725.310.

The Board has held that an administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of the district director's decision is sought. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14, 1-17 (1992); *Kott v. Director, OWCP*¸ 17 BLR 1-9, 1-12 (1992). The administrative law judge, therefore, was authorized to address the merits of claimant's survivor's claim without first addressing whether the evidence was sufficient to establish modification of the district director's denial of the claim.

Death Due to Pneumoconiosis

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable, or the presumption set forth at 20 C.F.R. §718.305 is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4). 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).

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner was suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304; *Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-616, 2-624 (6th Cir. 1999). The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *Gray* 176 F.3d at 388-89, 21 BLR at 2-626-29; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

Dr. Ayos interpreted the miner's October 31, 2016 CT scan of the chest as showing nodules in the right upper lobe, right lower lobe, and left lower lobe of the lungs. Director's Exhibit 12 at 3. The administrative law judge accurately noted that this CT scan was the only evidence suggestive of complicated pneumoconiosis. Decision and Order at 10. However, because Dr. Ayos failed to address the etiology of the masses, the administrative law judge properly found that this CT scan cannot establish the presence of complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 10. We therefore affirm the administrative law judge's determination that the evidence did not establish complicated pneumoconiosis, and that claimant did not invoke the irrebuttable presumption at 20 C.F.R. §718.304.

The Section 411(c)(4) Presumption

Under Section 411(c)(4) of the Act, Act, 30 U.S.C. §921(c)(4), and its implementing regulation, 20 C.F.R. §718.305, there is a rebuttable presumption that a miner's death was due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. In considering whether the evidence established the existence of a totally disabling respiratory impairment, the administrative law judge accurately found that there were no pulmonary function studies or arterial blood gas studies in the record. Decision and Order at 11. The administrative law judge also accurately found that there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. *Id.* We therefore affirm the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Chaney, Koura, and Wicker. The administrative law judge noted that Dr. Chaney opined that the miner should "abstain from any further dusty environmental exposure." Decision and Order at 11; Claimant's Exhibit 4. The administrative law judge permissibly found that Dr. Chaney did not offer a reasoned diagnosis of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), because a prohibition on further dust exposure is not a diagnosis of a totally disabling respiratory or pulmonary impairment.[8] *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989).

[8] Dr. Chaney did not opine that the miner suffered from a respiratory or pulmonary impairment that prevented him from performing his usual coal mine employment, and did not diagnose total disability independent of finding that the miner should avoid further coal dust exposure. Director's Exhibit 9; Employer's Exhibit 1.

Dr. Koura opined that the miner suffered from a pulmonary impairment. Decision and Order at 11; Claimant's Exhibit 1. The administrative law judge accurately noted, however, that Dr. Koura did not make a determination as to whether it would prevent the miner from performing his usual coal mine employment, and the administrative law judge permissibly found Dr. Koura's opinion to be entitled to little weight because the physician's opinion was unsupported by any objective data. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 11.

Dr. Wicker opined that the miner's respiratory capacity "does not appear to be adequate" to return to his usual coal mine employment. Claimant's Exhibit 3. The administrative law judge permissibly found Dr. Wicker's opinion to be entitled to little weight because he did not indicate what data he relied upon in making his assessment and he did not reference any objective testing. *Groves*, 277 F.3d at 836, 22 BLR at 2-330. We affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) as supported by substantial evidence.

Because claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment, we also affirm the administrative law judge's finding that claimant did not invoke the presumption of death due to pneumoconiosis pursuant to Section 411(c)(4).

Part 718 Entitlement

Where the Section 411(c)(3) and 411(c)(4) presumptions do not apply, claimant must establish that pneumoconiosis was a substantially contributing cause or factor in the miner's death. *See* 20 C.F.R. §§718.1, 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). Pneumoconiosis may be found to have hastened a miner's death, however, 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). A physician who opines that pneumoconiosis hastened death through a "specifically defined process" must explain how and why it did so. *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04, 24 BLR 2-257, 2-266 (6th Cir. 2010).

The administrative law judge considered the opinions of Drs. Chaney and Koura. Dr. Chaney opined that "[the miner] died from renal cell cancer" and that low pulmonary reserve "may have caused him more difficulty with the renal cell carcinoma." Director's Exhibit 12 at 7. The administrative law judge permissibly found that, even if the "low

pulmonary reserve" was attributable to pneumoconiosis, Dr. Chaney's opinion that it "may have" caused him difficulty with his renal cell carcinoma was too equivocal to support a finding that the miner's death was due to pneumoconiosis. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 17.

The administrative law judge also permissibly found that Dr. Koura's general statement that "coal workers' pneumoconiosis either contributed to his death or hastened [the miner's] death" was "too conclusory and vague" to explain how pneumoconiosis hastened death through a specifically defined process. Decision and Order at 27; *see Conley*, 595 F.3d at 303, 24 BLR at 2-266; *Williams*, 338 F.3d at 518, 22 BLR at 2-655.

The administrative law judge finally considered the two death certificates contained in the record. Dr. Ghazal completed the miner's initial death certificate in October 2007, attributing the miner's death to bladder cancer. Director's Exhibit 7. An amended death certificate, issued in November of 2007, includes "pneucenosis (sic), impaired due to chemotherapy for bladder cancer" as a cause of death. Claimant's Exhibit 3. The administrative law judge permissibly determined that the miner's amended death certificate was not sufficiently reasoned, however, because the inclusion of pneumoconiosis as a cause of death was "vague and unsupported." *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Addison v. Director, OWCP*, 11 BLR 1-68 (1988). We therefore affirm the administrative law judge's finding that the medical evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Consequently, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.

As claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions, and did not establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

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