U.S. Department of Labor

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

BRB No. 19-0065 BLA

HELENA SHORTT (Widow of MICHAEL SHORTT) Claimant-Petitioner v. CAM MINING, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/25/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William T. Barto, Administrative Law Judge, United States Department of Labor.

Helena Shortt, Jackhorn, Kentucky.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC) Pikeville, Kentucky, for employer.

Kathleen H. Kim (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2013-BLA-05272) of Administrative Law Judge William T. Barto 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 October 26, 2011.

The administrative law judge credited the miner with thirty-one years of underground coal mine employment, but found claimant did not invoke the Section 411(c)(4) presumption of death due to pneumoconiosis because she failed to establish the miner had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4).[2] Evaluating whether claimant established entitlement to benefits without the presumption, the administrative law judge found claimant did not establish the miner's death was due to pneumoconiosis and denied benefits.[3]

On appeal, claimant generally challenges the denial of benefits and states the case should be remanded to the Office of Administrative Law Judges for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. ___, 138 S.Ct. 2044 (2018), which held that administrative law judges must be appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II §2, cl. 2.[4] Employer responds in support of the denial of benefits and

[1] Claimant is the widow of the miner, Michael Shortt, who died on April 19, 2011. Director's Exhibit 10. Claimant remarried on July 1, 2012. Decision and Order at 6; Hearing Transcript at 12.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Section 422(*l*) of the Act, 30 U.S.C. §932 (*l*) (2012), provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. Because there is no indication in the record that the miner was eligible to receive benefits at the time of his death, claimant is not eligible for automatic survivor's benefits pursuant to Section 422(*l*).

[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

asserts claimant forfeited her Appointments Clause challenge by failing to raise it before the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response agreeing with employer that claimant's Appointment's Clause challenge is not timely.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether substantial evidence supports the decision and order below. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's decision if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

Appointments Clause

We agree with employer and the Director that claimant forfeited her Appointments Clause argument by failing to raise it before the administrative law judge. Employer's Response Brief at 9-12 [unpaginated]; Director's Response Brief at 2-6.

The Appointments Clause issue is "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted). *Lucia* was decided on June 21, 2018, giving claimant, who was then represented by counsel, more than three months to

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 12.

raise the issue to the administrative law judge prior to his October 3, 2018 Decision and Order Denying Benefits. Had claimant timely raised her Appointments Clause challenge to the administrative law judge, he could have considered the issue and, if appropriate, provided the relief claimant is requesting, i.e., he could have referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision based on the record developed at that hearing. *Powell v. Service Employees Intnl, Inc.*, __ BRBS __, BRB No. 18-0557, slip op. at 4 (Aug. 8, 2019); *Kiyuna v. Matson Terminal Inc.*, __ BRBS __, BRB No. 19-0103, slip op. at 4-5 (June 25, 2019). Based on these facts, we conclude claimant forfeited her Appointments Clause challenge by not timely raising it. *See Powell*, BRB No. 18-0557 BLA, slip op. at 4*; Kiyuna*, BRB No. 19-0103 BLA, slip op. at 4.

Furthermore, claimant has not identified any basis for excusing her forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Thus, we deny the relief requested and will consider the merits of the administrative law judge's Decision and Order Denying Benefits.

Invocation of the Section 411(c)(4) Presumption

Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner was totally disabled "at the time of his death." 20 C.F.R. 718.305(b)(iii). A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by: qualifying pulmonary function studies or arterial blood gas studies,[6] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). If the administrative law judge finds that total disability has been established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-

[6] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge correctly found, and thus we affirm, that claimant did not establish total disability at 20 C.F.R. §718.205(b)(2)(i)-(iii), as there are no qualifying pulmonary function studies[7] or blood gas studies in the record,[8] and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 7, 16; *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005).

In evaluating the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Alam, Hall and Vuskovich. Decision and Order at 16-17; *see* Director's Exhibits 15, 18; Employer's Exhibit 1. He found Dr. Alam's opinion does not "discuss [the miner's] respiratory capabilities," neither Dr. Alam nor Dr. Hall address whether the miner was able to perform his usual coal mine work from a respiratory standpoint, and Dr. Vuskovich concluded the miner had the respiratory capacity to perform coal mine work. Decision and Order at 16-18. The administrative law judge therefore found the medical opinion evidence did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18.

We are unable to affirm the administrative law judge's conclusion. A medical opinion need not be phrased in terms of "total disability" before total disability can be established. An administrative law judge must consider all relevant evidence concerning the miner's respiratory capacity and may draw an inference of total disability from a physician's report as to the extent of a miner's impairment. *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534, 7 BLR 2-209, 2-210 (11th Cir. 1985). Moreover, even a mild pulmonary impairment may be totally disabling, depending on the exertional requirements of a miner's usual coal mine employment. *Cornett v. Benham Coal Co.*, 277 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). Contrary to

[7] The administrative law judge considered the results of six pulmonary function studies contained in the miner's treatment records, dated January 19, 2004, March 23, 2004, January 27, 2010, and February 24, 2010. Decision and Order at 7; Director's Exhibit 15. Two of the studies are undated. *Id*.

[8] The miner's treatment records contain blood gas studies that the administrative law judge did not consider. *See* Decision and Order at 16; Director's Exhibit 15. Remand is not required on this basis, however, as none of the studies were qualifying and, therefore, do not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

the administrative law judge's finding, Dr. Alam, one of the miner's treating physicians, addressed the miner's pulmonary capabilities by diagnosing a "moderate pulmonary limitation related to his exercise" based on the results of a cardiopulmonary exercise test and a FEV1 value that was only sixty percent of predicted. Director's Exhibit 15. Moreover, he specifically opined the miner had "disability from a pulmonary point of view." *Id*. Further, Dr. Hall, another treating physician, diagnosed the miner with a mild mixed airflow defect and, contrary to the administrative law judge's finding, observed the miner had chronic obstructive pulmonary disease (COPD) in addition to bronchitis.[9] Director's Exhibit 15.

The administrative law judge erred in not comparing these physicians' assessments with the exertional requirements of claimant's usual coal mine employment in order to assess whether claimant is totally disabled. *See Cornett*, 227 F.3d at 578; *Walker*, 927 F.2d at 184-85; *Director, OWCP v. Rowe*, 710 F.2d 251, 255(6th Cir. 1983); Director's Exhibits 15, 18. Moreover, the administrative law judge did not consider claimant's hearing testimony concerning the miner's physical limitations or evaluate the exertional requirements of the miner's coal mine work in light of these limitations. *See Cornett,* 227 F.3d at 578; *Walker*, 927 F.2d at 184-85; *Rowe*, 710 F.2d at 255; Hearing Transcript at 15-16, 22-25.

Further, the administrative law judge did not adequately consider all relevant evidence in assessing the import of the miner's oxygen use. *See* Decision and Order at 17-18. He correctly noted that the miner was prescribed oxygen for pneumonia on June 28, 2010, the miner's oxygen saturation substantially improved by a July 9, 2010 follow up visit, and there is no additional documentation in the treatment records showing his continued use of supplemental oxygen. Decision and Order at 17-18; *see* Director's Exhibits 15, 18. In concluding that the miner only used oxygen for a short time while he was suffering from pneumonia, however, the administrative law judge did not discuss claimant's testimony that the miner continued to use oxygen after his bout with pneumonia and even brought his oxygen tank to work to use when he had trouble breathing.[10] *See* 30

[9] The administrative law judge stated: "I note that nowhere in Dr. Hall's treatment notes did she diagnose [the miner] with [chronic obstructive pulmonary disease] COPD, or any other chronic pulmonary or respiratory condition other than bronchitis." Decision and Order at 17. But Dr. Hall ordered an x-ray, dated June 28, 2010, which includes COPD as an impression. Director's Exhibit 15.

[10] Claimant stated the miner would leave the tank in his truck, go and use it when he had trouble breathing, and then return to the office and finish his work when he felt better. Hearing Transcript at 16.

U.S.C. §923(b) (the fact finder must address all relevant evidence); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 17-18; Hearing Transcript at 16, 24-25.

Finally, the administrative law judge relied, in part, on Dr. Vuskovich's opinion to support his determination that the miner had the respiratory capacity to perform his coal mine work at the time of his death. Decision and Order at 17-18. The administrative law judge did not discuss, however, whether Dr. Vuskovich had an accurate understanding of the exertional requirements of the miner's usual coal mine work or was aware that the miner's job duties may have changed in the last year of his employment.[11] *See* Employer's Exhibit 1. Based on the administrative law judge's errors in weighing the evidence, we vacate his finding claimant did not establish total disability based on the medical opinion evidence or the evidence as a whole. 20 C.F.R. §718.204(b)(2), (iv). Thus, we also vacate his finding claimant did not invoke the Section 411(c)(4) presumption. Further, because the administrative law judge's reweighing of the medical opinions concerning total disability could affect his weighing of their credibility concerning death causation, we must vacate his determination that claimant did not establish the miner's death was due to pneumoconiosis at 20 C.F.R.§718.205(b).

Remand Instructions

The administrative law judge must reconsider whether claimant established total disability based on the medical opinion evidence. He must first determine the miner's usual coal mine work[12] and the exertional requirements of such work. *See Cornett*, 227

[11] A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time, *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of a respiratory inability to do his usual coal mine work. *Pifer* v. *Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984). "[Usual coal mine work] cannot be 'favored' work; that is, work designed to accommodate an already debilitated miner." *Bowling v. Director, OWCP*, 920 F.2d 342, 344 (6th Cir. 1990). Thus, the work a miner performed at the time he retires or dies is not necessarily his usual coal mine work. *Brown v. Cedar Coal Co.*, 8 BLR 1-86, 1-87 (1985).

[12] As the administrative law judge observed, claimant indicated in a March 28, 2012 statement to the Director, Office of Workers' Compensation Programs, the miner worked as continuous miner operator until approximately a year before his death on April 19, 2011. Director's Exhibit 6. She stated employer removed the miner from this position because he was unable to perform the position's required physical work and transferred him to an office job outside of the mines. *Id*. But she clarified that employer did not change the

F.3d at 578; *Ward*, 93 F.3d at 218-19. Next, he must reconsider the medical opinions together with claimant's testimony[13] to determine whether claimant established total disability in light of those determinations. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005). If the administrative law judge determines the miner was totally disabled, claimant will have invoked the Section 411(c)(4) presumption. The administrative law judge must then determine whether employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). Alternatively, if the administrative law judge finds claimant cannot establish the miner had a totally disabling respiratory or pulmonary impairment at the time of his death, he must reconsider whether claimant is entitled to

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miner's job classification and he remained classified and paid as a continuous miner operator. *Id*. Similarly, at the hearing and her June 25, 2012 deposition, claimant testified that the miner was moved to an office job during his last year of coal mine employment due to breathing difficulties working as a continuous miner operator underground. *See* Hearing Transcript at 14-15; Director's Exhibit 24 at 8-9. The miner's treatment records support claimant's statements. Dr. Alam noted on May 13, 2010 that the miner "is now in a less dusty environment." Director's Exhibit 15. Dr. Hall stated in her letter that the miner "was transferred from underground status to work only outside on the surface secondary to his respiratory status" in the spring of 2010. Director's Exhibit 18.

In contrast, employer submitted a questionnaire concerning the miner's employment and job duties that Patsy Blackburn, employer's Safety Director, completed. Director's Exhibit 23. She stated his job was inside the mine and regularly exposed him to dust, but did not require heavy physical labor; it required standing or kneeling holding a remote box, occasionally hanging cable or curtains. *Id.* She also indicated the miner never failed to complete his job because of health complaints and he was not given special consideration in the performance of his duties. *Id.*

In response to Ms. Blackburn's answers on the questionnaire, Claimant noted in her March 28, 2012 statement to the Director that Ms. Blackburn appeared to be describing the miner's duties as a continuous miner operator and disputed the accuracy of her description of both the miner's job duties and his ability to perform those duties. Director's Exhibit 6. In addition, claimant accurately noted Ms. Blackburn conceded on the questionnaire that she did not observe the miner on a daily basis. *Id.; see* Director's Exhibit 23.

[13] The administrative law judge may not rely on lay testimony alone to establish total disability but may consider it in conjunction with the medical evidence. *See* 20 C.F.R. §718.305(b)(4); *Coleman v. Director, OWCP*, 829 F.2d 3, 5, (6th Cir. 1987); *Sword v. G & E Coal Co.*, 25 BLR 1-127, 131-32 (2014)(Hall, J., dissenting).

survivor's benefits under 20 C.F.R. Part 718.[14] *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-87-88 (1993). In rendering his findings on remand, the administrative law judge must explain the bases for his credibility determinations as required by the Administrative Procedure Act.[15] *See Wojtowicz*, 12 BLR at 1-165.

[14] In a survivor's claim where the Section 411(c)(3) and 411(c)(4) presumptions are not invoked, claimant must establish the miner had pneumoconiosis arising out of coal mine employment and that the miner's 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).

[15] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge