U.S. Department of Labor

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

BRB No. 16-0210 BLA

VIRGINIA H. ALEXANDER (Widow of GEORGE ALEXANDER)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 01/31/2017
and	)	
CONSOL ENERGY, INCORPORATED	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Thomas E. Springer III (Springer Law Firm, PLLC), Madisonville, Kentucky, for claimant.

Kevin M. McGuire and William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-05308) of Administrative Law Judge Timothy J. McGrath, rendered on a survivor's claim filed on

April 18, 2012, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited the miner with at least eighteen years of underground coal mine employment, based on the parties' stipulation and claimant's testimony, and adjudicated the miner's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge initially determined that the evidence was insufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Therefore, the administrative law judge concluded that claimant was unable to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that claimant was not entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in Section 411(c)(3) of the Act, as the record contained no evidence of complicated pneumoconiosis. The administrative law judge further determined that claimant proved the existence of simple clinical pneumoconiosis[3] arising out of coal mine employment under 20 C.F.R. §§718.202(a) and 718.203(b), but did not establish the existence of legal pneumoconiosis[4] under 20 C.F.R. §718.202(a). Finally, the administrative law judge concluded that claimant failed to satisfy her burden to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits.

[1] Claimant is the widow of the miner, who died on March 17, 2012. Decision and Order at 2; Director's Exhibit 14. The miner filed a claim for black lung benefits in 1983, which was subsequently withdrawn. Closed Living Miner's Claim.

[2] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or 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), as implemented by 20 C.F.R. §718.305.

[3] 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).

[4] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

On appeal, claimant asserts that the miner suffered from a "debilitating" pulmonary condition and the administrative law judge should have applied the rebuttable presumption of death due to pneumoconiosis set forth in Section 411(c)(4) of the Act and implemented by 20 C.F.R. §718.305. Claimant's Brief at [3-4] (unpaginated). Claimant also contends that the administrative law judge incorrectly determined that she failed to affirmatively establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(b). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least eighteen years of underground coal mine employment, and his determination that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a), or complicated pneumoconiosis at 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] 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).

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

The administrative law judge determined that claimant did not establish that the miner had a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2)(i)-(iii), because the pulmonary function study and blood gas study evidence is non-qualifying[7] and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 7-9.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Simpao, Taylor, Basheda, and Farney. Decision and Order at 15-16. The administrative law judge found that Dr. Simpao did not diagnose a totally disabling respiratory or pulmonary impairment because he indicated that the miner could lift up to ninety pounds and the miner reported that his job as a welder required him to lift seventy-five pounds. *Id*. at 15; Director's Exhibit 17. The administrative law judge determined that Dr. Taylor did not offer an opinion on the issue of total disability, while Dr. Basheda did not explicitly attribute the miner's disability to a respiratory or pulmonary condition. Decision and Order at 15-16; Claimant's Exhibit 2; Employer's Exhibit 1. The administrative law judge discredited Dr. Farney's diagnosis of a totally disabling pulmonary impairment because Dr. Farney also stated that he could not assess the miner's pulmonary function because no recent objective evidence was available. Decision and Order at 16; Employer's Exhibit 2. Based upon these findings, the administrative law judge concluded that the medical opinion evidence was insufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).[8] Decision and Order at 17. He further determined, based on a weighing of all of the evidence, that claimant failed to prove total respiratory or pulmonary disability under 20 C.F.R. §718.204(b). *Id*.

Claimant states that the administrative law judge's finding on the issue of total disability was erroneous because the miner "suffered from a substantial and debilitating

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The administrative law judge found that the blood gas studies in the miner's treatment records could not support a finding of total respiratory or pulmonary disability because they were obtained during an acute illness. Decision and Order at 16-17, *citing* 20 C.F.R. §718.105. He rejected claimant's lay testimony on the ground that the record contained medical evidence relevant to the issue of total disability. Decision and Order at 18; 20 C.F.R. §718.204(d)(3).

pulmonary condition," and "the presumptions contained in 30 U.S.C. [§]921(c)(4) and 20 C.F.R. [§]718.305 should be applied." Claimant's Brief at [3-4]. The Board is not empowered to engage in *de novo* proceedings or unrestricted review of a case brought before it and must limit its review to contentions of error that are specifically raised by the parties on appeal. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). In the absence of a specific challenge to the administrative law judge's weighing of the relevant evidence, we affirm the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). We further affirm, therefore, the administrative law judge's determination that claimant was not entitled to invocation of the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(iii).

II. Entitlement Under 20 C.F.R. Part 718 – Death Due to Pneumoconiosis

To establish entitlement to survivor's benefits without benefit of the presumptions set forth in 20 C.F.R. §§718.304 and 718.305, claimant must demonstrate 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. §§718.3, 718.202, 718.203, 718.205(a); *Conley v. Nat'l Mines Corp*., 595 F.3d 297, 303, 24 BLR 2-255, 2-266-67 (6th Cir. 2010); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993). Death is considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or if death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1)-(3). 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

The administrative law judge determined that claimant did not satisfy her burden under 20 C.F.R. §718.205(b), because the death certificate did not identify pneumoconiosis as a cause of death and Dr. Taylor, the only physician to indicate that pneumoconiosis played a role in the miner's death, did not provide a well-reasoned opinion. Decision and Order at 32-33; Director's Exhibit 14; Claimant's Exhibit 2. Claimant contends that the administrative law judge erred in finding that Dr. Taylor's opinion does not support a finding of death due to pneumoconiosis. Claimant maintains that Dr. Taylor "expressly concluded that [the miner's] death was attributable to or hastened by pneumoconiosis." Claimant's Brief at [4]. Claimant's allegation of error does not have merit.

Dr. Taylor's opinion regarding the cause of the miner's death appears on a Department of Labor medical report questionnaire. Claimant's Exhibit 2. Dr. Taylor

checked the pre-printed box marked "NO" in response to the question "[d]o you believe pneumoconiosis contributed to or played a hastening role in the miner's death?" *Id.* He also signed the form in the appropriate place and dated his signature "5/8/10." *Id.* Dr. Taylor apparently changed his mind, as he subsequently wrote "yes" in a square drawn next to the pre-printed boxes marked "YES" and "NO," printed his first initial and last name, and dated it "7/25/12." *Id.* In the section asking for the rationale underlying his death causation opinion, Dr. Taylor wrote, "part of chronic lung disease." *Id.*

Contrary to claimant's contention, the administrative law judge's determination that Dr. Taylor's opinion is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b) is rational and supported by substantial evidence. The administrative law judge acted within his discretion in finding that Dr. Taylor's opinion, as set forth on the questionnaire, was inadequately explained, because he did not identify the specific, immediate cause of the miner's death and did not explain his apparent conclusion that pneumoconiosis played a role in the miner's death because it was "part of [the miner's] 'chronic lung disease'." Claimant's Exhibit 2; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); Decision and Order at 33. We therefore affirm the administrative law judge's finding that claimant failed 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 claimant did not satisfy her burden to prove that the miner's death was due to pneumoconiosis under 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 benefits under 20 C.F.R. Part 718. *See Trumbo*, 17 BLR at 1-87-88.

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