U.S. Department of Labor

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

BRB No. 17-0195 BLA

NANCY LOU MCNULTY (Widow of ARTHUR CHRIS MCNULTY) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 01/18/2018 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith, Charleston, West Virginia, for claimant.

Jennifer L. Feldman (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2015-BLA-05600) of Administrative Law Judge Lystra A. Harris, 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 August 7, 2014.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge credited the miner with 23.25 years of above-ground coal mine employment, but found that the evidence did not establish that the employment was qualifying for the purposes of the Section 411(c)(4) presumption.[2] In addition, the administrative law judge found that the evidence failed to establish that the miner had a totally disabling respiratory or pulmonary impairment at the time of his death. The administrative law judge therefore found that claimant did not establish either element necessary to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. Considering whether claimant could establish entitlement without the aid of the presumption, the administrative law judge noted that it was conceded that the miner had pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge found, however, that the evidence did not establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that claimant could not invoke the Section 411(c)(4) presumption. Claimant challenges both

[1] Claimant is the widow of the miner, who died on May 22, 2014. Director's Exhibit 7. The miner filed two claims during his lifetime, both of which were denied. Living Miner (LM) Closed Claims 1, 2. Accordingly, claimant cannot establish entitlement to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012), which provides that a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.

[2] Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner 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 at the time of his death. *See* 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Here, the administrative law judge found that the evidence did not establish that the miner's above-ground employment took place at the site of an underground mine, or in conditions substantially similar to those in an underground mine.

the finding the miner did not have fifteen years of qualifying coal mine employment and the finding that he was not totally disabled. Claimant also argues that the administrative law judge erred in finding that she failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.[3]

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.[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).

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

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents or prevented him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function tests studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas tests showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) medical evidence showing that the miner has or had pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition is or was totally disabling, based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §718.204(b)(2)(i)-(iv).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence established 23.25 years of coal mine employment. *Skrack v. Director, OWCP*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2-3. We further affirm, as unchallenged, the administrative law judge's finding that because there is no evidence of complicated pneumoconiosis, claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *Skrack*, 6 BLR at 1-711; Decision and Order at 9.

[4] The record reflects that the miner's coal mine employment was in West Virginia. LM Closed Claim 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Claimant submitted no pulmonary function studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinion evidence relevant to the assessment of the presence of a totally disabling respiratory or pulmonary impairment. Rather, as the administrative law judge observed, claimant relies on the results of arterial blood gas tests contained in the miner's medical treatment records.[5] Decision and Order at 8.

The administrative law judge considered the results of six arterial blood gas tests. Decision and Order at 4, 8. The tests dated February 5, 2012, February 8, 2012, September 1, 2012, and October 31, 2012 produced qualifying[6] values, while the test dated May 25, 2012, and the most recent test, dated August 14, 2013, produced non-qualifying values.[7] Decision and Order at 4, 8; Director's Exhibit 9. The administrative law judge correctly found that all four qualifying tests were performed while the miner was hospitalized for respiratory complaints. Decision and Order at 8. Noting that the regulations provide that tests "must not be performed during or soon after an acute respiratory or cardiac illness," the administrative law judge concluded that the qualifying blood gas tests are not reliable indicators of total disability. Decision and Order at 8, *citing* Appendix C to 20 C.F.R Part 718. Thus the administrative law judge found that the blood gas test evidence as a whole is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id*.

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[5] We note that the miner's two closed claims do not contain any evidence supportive of a finding of disability. Rather, they contain non-qualifying pulmonary function studies, non-qualifying arterial blood gas tests, and medical opinions from Drs. Rasmussen and Forehand concluding that the miner was not totally disabled by a respiratory or pulmonary impairment. LM Closed Claims 1, 2.

[6] A "qualifying" arterial blood gas test yields values that are equal to or less than the values specified in the tables found in Appendix C to Part 718. 20 C.F.R. Part 718, Appendix C. A "non-qualifying" test exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[7] In her summary of the evidence, the administrative law judge listed the correct dates and values obtained for all six arterial blood gas tests. Decision and Order at 4. In her discussion of the evidence, however, while the administrative law judge correctly noted that four of the six tests produced qualifying values, she mistakenly identified the May 25, 2012 test as qualifying, instead of the February 8, 2012 test. Decision and Order at 8. No party raises this error on appeal. Moreover, as this error did not affect the administrative law judge's weighing of the evidence, it is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant asserts that the administrative law judge erred in finding that the miner's qualifying blood gas tests do not reflect total disability but are instead the result of acute respiratory conditions. Claimant's Brief (unpaginated) at [5]. Claimant notes that the miner was diagnosed with pneumoconiosis before the 2012 hospitalizations and arterial blood gas tests, and that his physician recommended continued respiratory therapy and treatment thereafter. *Id.* Therefore, claimant argues "[t]he fact that these conditions continued after those hospitalizations" demonstrates that the miner had a permanent disabling respiratory impairment. *Id.* at [5-6]. Claimant's assertion lacks merit.

Initially, we note that because all of the blood gas tests in this case are contained in the miner's treatment records, the quality standards set forth at 20 C.F.R. §718.105 and Appendix C do not strictly apply. *See* 20 C.F.R. §718.101(b); *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Despite the inapplicability of the specific quality standards, however, an administrative law judge must still determine if the arterial blood gas study results are sufficiently reliable to support a finding of total disability.[8]

Here, the administrative law judge permissibly found that because all four qualifying blood gas tests were obtained during periods of hospitalization for respiratory problems,[9] and three of the tests were performed while the miner was hospitalized with pneumonia, they have diminished probative value. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v.*

[8] The Department of Labor explained in the comments to the 2001 revised regulations that evidence that is not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by 20 C.F.R. [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[9] Treatment records from Beckley Appalachian Regional Healthcare Hospital indicate that the miner was hospitalized from February 5, 2012 to February 8, 2012, and from September 1, 2012 to September 11, 2012, for pneumonia. Director's Exhibit 9 at 16, 22-23, 28. The miner was readmitted to the hospital on October 31, 2012, where he received respiratory therapy through November 5, 2012. *Id*. at 9-15.

Akers, 131 F.3d 438, 441, 21 BLR 2-269, 2-75-76 (4th Cir. 1997); Decision and Order at 8; Director's Exhibit 9 at 9-16, 22-23, 28. The administrative law judge also noted that the most recent blood gas test was non-qualifying. Decision and Order at 8 n.8; Director's Exhibit 9 at 7. Based on these factors, the administrative law judge permissibly concluded that the qualifying blood gas tests are insufficient to establish that the miner had a totally disabling pulmonary or respiratory impairment. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-75-76; Decision and Order at 8. We therefore affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii).[10] Decision and Order at 8.

As claimant raises no other challenges to the administrative law judge's finding that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2), it is affirmed. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); Decision and Order at 8. Therefore, we also affirm the administrative law judge's finding that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4).[11] 30 U.S.C. §921(c)(4); Decision and Order at 8.

Death Due to Pneumoconiosis

For survivors' claims where the Section 411(c)(3) and 411(c)(4) statutory presumptions are not invoked, a claimant must affirmatively establish that the miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to

[10] Moreover, as the Director, Office of Workers' Compensation Programs, correctly notes, claimant's assertion that the miner was diagnosed with pneumoconiosis before his hospitalizations and received respiratory treatment after his hospitalizations, does not, on its face, establish the existence of a totally disabling respiratory impairment. *See generally Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (existence of pneumoconiosis not relevant to separate issue of total disability); Director's Response Brief at 7.

[11] Claimant's failure to establish total respiratory or pulmonary disability, a requisite element of invocation of the Section 411(c)(4) presumption, obviates the need to address claimant's arguments regarding the administrative law judge's finding that the miner's coal mine employment was not qualifying for purposes of Section 411(c)(4) invocation. *See* 20 C.F.R. §718.305.

pneumoconiosis if the evidence establishes that it was a substantially contributing cause of death. 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). Failure to establish any one of the required elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

Here, the Director conceded that the miner had pneumoconiosis arising out of his coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Decision and Order at 9, *citing* Director's Brief at 4. Therefore, the only issue that remains on appeal is whether the miner's death was due to pneumoconiosis.

The evidence relevant to the cause of the miner's death consists of an autopsy report by Dr. Harris, and a death certificate signed by a physician whose signature is illegible. Decision and Order at 3, 11; Director's Exhibits 7, 8. The administrative law judge correctly found that the autopsy report diagnosed pneumoconiosis but did not offer any opinion regarding the cause of the miner's death. Decision and Order at 3, 11; Director's Exhibit 8. The administrative law judge further found that although the death certificate identified "occupational anthracosilicosis" as a "significant condition contributing" to the miner's death, it did not constitute a reasoned and documented opinion as to the cause of the miner's death.[12] Decision and Order at 11, *citing Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000) (holding that a death certificate stating that pneumoconiosis contributed to death, and an autopsy report diagnosing pneumoconiosis, without some further explanation, were insufficient to support a finding of death due to pneumoconiosis); Director's Exhibit 7. Thus, the administrative law judge concluded that the evidence failed to establish death to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Decision and Order at 11.

Claimant concedes that, pursuant to *Sparks*, the miner's death certificate, standing alone, is not sufficiently reasoned to establish that his death was due to pneumoconiosis. Claimant's Brief (unpaginated) at [6]. Claimant contends, however, that "in this case, the opinion as to cause of death on the death certificate is amply supported by the autopsy report demonstrating the presence of pneumoconiosis, the objective medical evidence showing a chronic and ongoing respiratory impairment which was totally disabling as well as the opinions of the [examining] physicians." Claimant's Brief (unpaginated) at

[12] The death certificate identified "Parkinson's Disease" as the "immediate cause" of death and "occupational anthracosilicosis" and "coronary artery disease" as "other significant conditions contributing to death," but not resulting in the underlying cause of death. Director's Exhibit 7.

[6]. Thus claimant asserts that the administrative law judge erred in discrediting the miner's death certificate. We disagree.

Although claimant generally asserts that the evidence of record supports the conclusions on the death certificate, she identifies no physician's opinion, or other medical evidence, explaining how or to what extent the miner's pneumoconiosis contributed to his death. The administrative law judge correctly determined that the autopsy report "offers no opinion as to [the] miner's cause of death as it was limited to [the] miner's lungs and determining if pneumoconiosis were present." Decision and Order at 3, 11; Director's Exhibit 8. Further, the administrative law judge correctly observed that "the record provides no indication [that] the individual signing the death certificate possessed any relevant qualifications or personal knowledge of the miner upon which to assess the cause of death." Decision and Order at 11. Thus, contrary to claimant's argument, the administrative law judge permissibly found that the conclusions on the death certificate are not sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-263; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order at 11; Director's Exhibit 7.

As the trier-of-fact, the administrative law judge is charged with assessing the credibility of the medical evidence, and assigning it appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 321, 25 BLR 2-255, 2-262 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 315-16, 25 BLR 2-115, 2-130 (4th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We therefore affirm the administrative law judge's finding that the evidence of record failed to carry claimant's burden to establish that the miner's pneumoconiosis was a substantially contributing cause or factor leading to his death, pursuant to 20 C.F.R. §718.205(b). *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992). As claimant failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement, benefits are precluded. *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