U.S. Department of Labor

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

BRB No. 15-0486 BLA

REBA L. HONEYCUTT (Widow of WILLIAM HONEYCUTT) Claimant-Petitioner v. BROWNIES CREEK COLLIERIES and TRAVELERS INDEMNITY COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/18/2016 DECISION and ORDER

Appeal of the Decision and Order of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (12-BLA-5308) of Administrative Law Judge Scott R. Morris 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 February 9, 2011.

After crediting the miner with 9.94 years of coal mine employment,[2] the administrative law judge found that the evidence did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[3] Accordingly, the administrative law judge denied benefits.[4]

On appeal, claimant contends that the administrative law judge erred in crediting the miner with less than ten years of coal mine employment. Claimant also argues that

[1] Claimant is the widow of the miner, who died on December 15, 1997. Director's Exhibit 9.

[2] 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. Because the administrative law judge credited the miner with less than fifteen years of coal mine employment, he found that claimant was not entitled to consideration under Section 411(c)(4). Therefore, the administrative law judge addressed whether claimant satisfied her burden to establish all of the elements of entitlement under 20 C.F.R. Part 718.

[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 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).

[4] Section 422(*l*) of the Act 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 the miner's 1983 lifetime claim for benefits was dismissed as abandoned in 1986. Director's Exhibit 1.

the administrative law judge erred in finding that the evidence did not establish clinical and legal pneumoconiosis. Employer/carrier responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, claimant reiterates her previous contentions.

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.[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).

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 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

Evidentiary Issues

Claimant initially argues that the administrative law judge, in evaluating the survivor's claim, abused his discretion in declining to consider evidence submitted in the miner's unsuccessful claim, based upon the evidentiary limitations set forth at 20 C.F.R. §725.414.[6] Claimant does not dispute that this regulation is applies to her survivor's

[5] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R.

claim. *See* 20 C.F.R. §725.2(c). Instead, Claimant contends the administrative law judge misapplied the regulation to exclude evidence in the miner's claim after it had been admitted into the record without objection. Claimant's Brief at 10-11. Contrary to claimant's contention, the evidentiary limitations are mandatory and may not be waived. *Smith v. Martin County Coal Co.*, 23 BLR 1-69, 1-74 (2004). Moreover, the Board has held that evidence from a miner's previous claim is not automatically available in a subsequent survivor's claim. Instead, the medical evidence from a prior living miner's claim must be designated as evidence by one of the parties, in accordance with the limitations of 20 C.F.R. §725.414, in order for the evidence to be included in the record in the survivor's claim. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007) (en banc).

In addition, although claimant argues that all relevant evidence must be considered, the United States Court of Appeals for the District of Columbia Circuit and the Board have rejected the arguments that the evidentiary limitations violate the provision of Section 413(b) of the Act, that all relevant evidence be considered, or violate the Administrative Procedure Act, which specifically allows for the exclusion of irrelevant or unduly repetitious evidence. *Nat'l Mining Ass'n v. Dep't. of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (en banc). Moreover, the administrative law judge acted within his discretion in determining that claimant failed to demonstrate "good cause" for exceeding the evidentiary limitations. Decision and Order at 3; 20 C.F.R. §725.456(b)(1). We, therefore, hold that the administrative law judge properly limited his consideration of claimant's evidence to the exhibits that claimant identified in her July 9, 2015 Evidence Summary Form. *Keener*, 23 BLR at 1-241; Decision and Order at 3.

We also reject claimant's contention that the administrative law judge erred in admitting into evidence the medical reports submitted by employer, namely, the reports

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§725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

of Drs. Rosenberg, Oesterling, and Caffrey. In accordance with the evidentiary limitations, the administrative law judge properly admitted Dr. Rosenberg's April 7, 2014 report as one of employer's two affirmative medical reports,[7] and Dr. Oesterling's July 29, 2011 report as employer's affirmative autopsy report. 20 C.F.R. §725.414(a)(3)(i); *Keener*, 23 BLR at 1-237-38; Director's Exhibit 12; Employer's Exhibit 1. The administrative law judge also properly admitted Dr. Caffrey's July 17, 2002 report as one of employer's two affirmative medical reports, as well as employer's rebuttal autopsy report. *See Keener*, 23 BLR at 1-239 (holding that where a physician reviews not only the autopsy report and slides, but also reviews additional medical records and then bases his or her findings and conclusions both on the pathological and clinical evidence, the report constitutes both an autopsy report and a medical report for the purposes of the evidentiary limitations).

The Existence of Pneumoconiosis

In considering whether the evidence established the existence of clinical pneumoconiosis, the administrative law judge acted within his discretion in according the greatest weight to the autopsy evidence as the most reliable evidence regarding the existence and extent of pneumoconiosis.[8] *See Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); Decision and Order at 16. The autopsy evidence consists of the opinion of the autopsy prosector, Dr. Davis, and the reviewing opinions of Drs. Shaker, Oesterling, and Caffrey.

Dr. Davis performed the miner's autopsy on December 16, 1997. Although Dr. Davis's gross examination revealed "[m]oderate amounts of subpleural anthracotic pigment" within all lobes of the miner's lungs, the doctor's microscopic examination

[7] The administrative law judge also admitted Dr. Rosenberg's June 1, 2014 addendum into the record. Administrative Law Judge's June 26, 2015 Evidentiary Order at 2; Decision and Order at 7.

[8] The administrative law judge noted that the miner's autopsy was performed fourteen years after the 1982 and 1983 x-rays that were interpreted in this case. Decision and Order on 24. Because the administrative law judge permissibly found that the autopsy evidence was more reliable than the fourteen-year old x-ray evidence, we need not resolve claimant's contentions of error regarding the administrative law judge's weighing of the x-ray evidence. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

revealed that there was "[n]o diagnostic abnormality" of the lungs. Director's Exhibit 11. Dr. Davis's final anatomical diagnoses did not include a diagnosis of clinical pneumoconiosis. *Id.*

Dr. Shaker, a pathologist, reviewed the miner's lung tissue slides. Dr. Shaker interpreted the slides as revealing "macules of anthracotic laden macrophages adjacent to bronchioles that shows [sic] emphysematous changes." Claimant's Exhibit 4. Dr. Shaker did not further elaborate on his findings.

Two additional pathologists, Drs. Oesterling and Caffrey, reviewed the miner's autopsy slides. In a report dated July 29, 2011, Dr. Oesterling found that black pigment was present in the miner's lung tissue. Director's Exhibit 12. Dr. Oesterling described the changes as "mild anthracotic cuffing." *Id.* Dr. Oesterling, however, opined that the miner's lung tissue did not reveal the presence of clinical pneumoconiosis. *Id.*

In a report dated July 17, 2012, Dr. Caffrey identified a mild to moderate amount of "anthracotic pigment" in the miner's autopsy slides, but did not diagnose clinical pneumoconiosis. Employer's Exhibit 2. During his October 8, 2012 deposition, Dr. Caffrey explained that "anthracotic pigment itself is not synonymous with the lesion of coal workers' pneumoconiosis." Employer's Exhibit 3 at 15. Dr. Caffrey further explained that, in order to constitute a diagnosis of clinical pneumoconiosis, the anthracotic pigment must stimulate the production of collagen. *Id.* at 14. Because the miner's lung tissue slides did not reveal any reticulin or collagen associated with the anthracotic pigment, Dr. Caffrey opined that the miner did not suffer from clinical pneumoconiosis. *Id.* at 15.

In addressing whether the autopsy evidence established the existence of clinical pneumoconiosis, the administrative law judge noted that Dr. Davis did not find any "diagnostic abnormality" of the lungs. Decision and Order at 19. The administrative law judge accorded less weight to Dr. Shaker's opinion because the doctor "never rendered an opinion as to the presence or absence of pneumoconiosis." *Id.* The administrative law judge credited the opinions of Drs. Oesterling and Caffrey that the miner did not suffer from clinical pneumoconiosis, finding that Dr. Oesterling's opinion was entitled to "normal weight," and that Dr. Caffrey's "detailed, well documented and reasoned" opinion was entitled to "full probative weight." *Id.* at 19-20. The administrative law judge, therefore, found that the autopsy evidence did not establish the existence of clinical pneumoconiosis. *Id.* at 20.

Claimant argues that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of clinical pneumoconiosis. Claimant asserts that the "anthracotic pigment" identified by Drs. Davis, Oesterling and Caffrey, and the

"macules of anthracotic laden macrophages" identified by Dr. Shaker are sufficient to constitute a diagnosis of clinical pneumoconiosis. We disagree. The regulations provide that "a finding on autopsy . . . of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis." 20 C.F.R. §718.202(a)(2); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995) (holding that a finding of a "pigmented macrophage" is not sufficient, by itself, to establish the existence of pneumoconiosis). In this case, the administrative law judge noted that, while Drs. Davis, Oesterling and Caffrey found the presence of anthracotic pigment on the miner's autopsy slides, and Dr. Shaker found "macules of anthracotic laden macrophages," none of the physicians diagnosed clinical pneumoconiosis. Decision and Order at 19-20. The administrative law judge, therefore, found that the autopsy evidence did not establish the existence of clinical pneumoconiosis. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the autopsy evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

The administrative law judge also considered the medical reports of Drs. Matheny, Laufe, Rosenberg and Caffrey. In 1983, Dr. Matheny diagnosed clinical pneumoconiosis based upon positive x-ray interpretations. Claimant's Exhibit 6. In a report dated April 1, 2014, Dr. Laufe diagnosed clinical pneumoconiosis based upon the results of the miner's x-ray interpretations and pulmonary function study results. Claimant's Exhibit 8. Drs. Rosenberg and Caffrey opined that the miner did not suffer from clinical pneumoconiosis. Employer's Exhibits 1, 3, 4.

In addressing whether the medical opinion evidence established the existence of clinical pneumoconiosis, the administrative law judge accorded little weight to Dr. Matheny's diagnosis of pneumoconiosis because it was based upon positive x-ray interpretations called into question by the more probative autopsy evidence. Decision and Order at 24. The administrative law judge accorded less weight to Dr. Laufe's opinion because it was "conclusory" and based upon evidence not part of the record. *Id.* at 25. By contrast, the administrative law judge credited the opinions of Drs. Rosenberg and Caffrey that the miner did not suffer from clinical pneumoconiosis. *Id.* The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant argues that the administrative law judge erred in finding that the opinions of Drs. Matheny and Laufe did not establish the existence of clinical pneumoconiosis. We disagree. The administrative law judge permissibly found that Dr. Matheny's opinion that the miner suffered from clinical pneumoconiosis was not persuasive because it was based upon x-ray evidence found less probative than the autopsy evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103

(6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 24. The administrative law judge also permissibly accorded less weight to Dr. Laufe's diagnosis of clinical pneumoconiosis because it was based, in part, on x-ray interpretations outside the record. Decision and Order at 25; *see Keener*, 23 BLR at 1-242 n.15; *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-09 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring & dissenting). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We also affirm the administrative law judge's finding that the evidence, considered together, did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[9] *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 218 (6th Cir. 2012).

Claimant also generally contends that the administrative law judge erred in failing to find that the opinions of Drs. Matheny and Laufe established the existence of legal pneumoconiosis. Claimant's specific contentions of error, however, focus not upon any diagnosis of legal pneumoconiosis made by Drs. Matheny and Laufe,[10] but rather upon their respective diagnoses of clinical pneumoconiosis. Claimant's Brief at 23-26. Because claimant does not assert any specific error in regard to the administrative law judge's finding that the evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an

[9] Claimant contends that the administrative law judge should have credited the miner with fourteen years of coal mine employment from 1968 to 1981. Claimant's Brief at 12-13. We need not resolve this issue since fourteen years of coal mine employment is still an insufficient length of coal mine employment for claimant to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). While a finding of ten years of coal mine employment would entitle claimant to a presumption that the miner's clinical pneumoconiosis arose of his coal mine employment, *see* 20 C.F.R. §718.203(b), the administrative law judge did not address this issue, having found that the evidence did not establish the existence of clinical pneumoconiosis.

[10] Claimant does not specifically identify any lung disease diagnosed by Dr. Matheny or Dr. Laufe that would constitute legal pneumoconiosis.

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. *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