U.S. Department of Labor

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

BRB No. 18-0356 BLA

REBECCA COBURN (Executrix of the Estate of ALMA M. RICHARDS, Deceased Widow of EMORY A. RICHARDS)	)	
Claimant-Petitioner	)	
v.	)	
UNITED STATES STEEL MINING COMPANY, LLC	)	DATE ISSUED: 05/21/2019
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2014-BLA-05571) of Administrative Law Judge Drew A. Swank, denying benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving a survivor's claim filed on August 21, 2013,[1] is before the Board for the second time.

In the initial decision, the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, he found claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge found claimant established that the miner had at least fifteen years of qualifying coal mine employment.[3] The administrative law judge further found the evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found claimant invoked the Section 411(c)(4)

[1] While the survivor's claim was pending before the Office of Administrative Law Judges, the miner's widow died on October 3, 2015. Hearing Transcript at 15. Claimant is the executrix of the widow's estate and is pursuing the survivor's claim on behalf of the estate. *Id*. at 4.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was 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 a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(*l*) of the Act also provides that a survivor of a miner who was 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. 30 U.S.C. §932(*l*) (2012). Claimant cannot benefit from Section 422(*l*), however, as the miner's lifetime claims for benefits were denied. Decision and Order on Remand at 12.

[3] The miner's coal mine employment was in West Virginia. Director's Exhibit 3. 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).

presumption that the miner's death was due to pneumoconiosis. He also found employer did not rebut the presumption and awarded benefits.[4]

Pursuant to employer's appeal, the Board noted that the administrative law judge did not make any specific findings regarding whether the miner's surface coal mine employment occurred in conditions that were "substantially similar to those in an underground mine." *Richards v. U.S. Steel Mining Co.*, BRB Nos. 16-0640 BLA, 16-0640 BLA-A (Sept. 18, 2017) (unpub.). The Board therefore vacated the administrative law judge's determination that claimant established that the miner had the requisite fifteen years of qualifying coal mine employment for invocation of the Section 411(c)(4) presumption. *Id.* The Board also vacated the administrative law judge's finding that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *Id.* Consequently, the Board vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. The Board further vacated the administrative law judge's finding that employer did not rebut the presumption. *Id*. Finally, pursuant to claimant's cross-appeal, the Board vacated the administrative law judge's determination that the autopsy evidence did not establish complicated pneumoconiosis.[5] *Id*.

On remand, the administrative law judge again found the evidence did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). He further found the evidence did not establish that the miner had at least fifteen years of qualifying coal mine employment, and therefore found claimant could not invoke the Section 411(c)(4) presumption.[6] Accordingly, the administrative law judge denied benefits.

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[4] The administrative law judge found that, without the benefit of the Section 411(c)(3) and Section 411(c)(4) presumptions, claimant could not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b). Decision and Order at 16.

[5] The Board affirmed, as unchallenged on appeal, the administrative law judge's determination that, without the benefit of the Section 411(c)(3) and Section 411(c)(4) presumptions, claimant could not establish that the miner's death was due to pneumoconiosis. *Richards v. U.S. Steel Mining Co.*, BRB Nos. 16-0640 BLA, 16-0640 BLA-A, slip. op. at 10 n.12 (Sept. 18, 2017) (unpub.).

[6] Because claimant did not establish the requisite fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption, the administrative law judge did not reconsider whether the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

On appeal, claimant contends the administrative law judge erred in finding that the evidence did not establish complicated pneumoconiosis. Claimant further argues the administrative law judge erred in finding the miner did not have at least fifteen years of qualifying coal mine employment, and therefore erred in finding that claimant did not invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. 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, 1-86 (1988). A miner's death will be considered due to pneumoconiosis if it was a substantially contributing cause of the miner's death, 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

Claimant argues that the administrative law judge erred in crediting the opinions of Drs. Oesterling and Caffrey over that of Dr. Kahn in finding the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).[7] We disagree.

[7] 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 suffered 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. The administrative law judge found that claimant could not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c). Decision and Order on Remand at 7-9. We affirm these findings as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Dr. Barreta, the autopsy prosector, diagnosed simple pneumoconiosis only.[8] Director's Exhibit 11. Three Board-certified pathologists, Drs. Kahn, Oesterling, and Caffrey, reviewed the miner's autopsy lung tissue slides. Although Dr. Kahn diagnosed complicated pneumoconiosis, Claimant's Exhibits 1, 2, Drs. Oesterling and Caffrey opined that the miner did not have the disease. Employer's Exhibits 1, 2, 4, 5. In weighing the conflicting evidence, the administrative law judge credited the opinions of Drs. Oesterling and Caffrey over that of Dr. Kahn because he found they provided more detailed findings that were consistent with other evidence. Decision and Order on Remand at 8. He therefore found the autopsy evidence did not establish complicated pneumoconiosis. *Id.*

The administrative law judge noted that Dr. Kahn prepared a one-page report, wherein he provided only summary conclusions.[9] Decision and Order at 8; Claimant's Exhibit 2. Conversely, the administrative law judge found that Drs. Oesterling and Caffrey provided detailed descriptions of the autopsy slides. The administrative law judge noted that Dr. Oesterling provided photomicrographs[10] in support of his opinion that the autopsy slides did not reveal any nodules larger than 7 millimeters. Decision and Order on Remand at 8; Employer's Exhibits 2, 5. The administrative law judge also noted that Dr. Caffrey agreed with Dr. Oesterling that the autopsy slides did not reveal any lesions greater than 7 mm.[11] *Id.*; Employer's Exhibits 2, 4. Having found the opinions of Drs. Oesterling and

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[8] Claimant also contends that the administrative law judge erred in not addressing Dr. Barreta's opinion. Contrary to claimant's contention, the administrative law judge considered Dr. Barreta's opinion, noting that he described fibrotic lesions measuring up to 10 mm. in size. Decision and Order on Remand at 7; Director's Exhibit 11. Because Dr. Barreta did not describe any lesions greater than one centimeter in diameter, his opinion does not support a finding of complicated pneumoconiosis. *See* 20 C.F.R. §718.304; *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255 (4th Cir. 2000).

[9] Dr. Kahn opined that one autopsy slide (slide E) revealed "three contiguous anthracosilicotic nodules" measuring 1.3 cm. in "maximum aggregate dimension" and that another slide (slide M) revealed a single anthracotic nodule measuring 1.1 cm. Claimant's Exhibit 2. The administrative law judge noted that Dr. Kahn acknowledged that, because the borders of the lesions were stellate shaped, "various observers may derive slightly different measurements." Decision and Order at 8; Claimant's Exhibit 2.

[10] Dr. Oesterling's photomicrographs of the autopsy slides included a metric ruler to indicate the size of the lesions. Employer's Exhibits 1, 5.

[11] The administrative law judge also noted that Dr. Caffrey observed that his findings were consistent with Dr. Elkins' interpretation of a 2005 CT scan revealing lesions

Caffrey better explained and documented, the administrative law judge permissibly credited their opinions over that of Dr. Kahn.[12] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). We therefore affirm the administrative law judge's finding that the autopsy evidence does not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).[13] Consequently, we affirm the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

The Section 411(c)(4) Presumption

In order to invoke the Section 411(c)(4) presumption, claimant must establish that the miner worked for at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]" 20 C.F.R. §718.305(b)(1)(i). Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant

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measuring only 0.7 and 0.8 cms. Decision and Order on Remand at 8; Employer's Exhibit 4.

[12] Claimant contends that the administrative law judge erred in not according greater weight to Dr. Kahn's opinion based upon his superior qualifications. We disagree. In the initial decision, the administrative law judge accurately noted that Drs. Kahn, Oesterling, and Caffrey are Board-certified in Anatomic and Clinical Pathology. *See* Decision and Order at 10. The administrative law judge further noted that Dr. Kahn is a Clinical Associate Professor of Pathology at the West Virginia School of Medicine. *Id.*; Claimant's Exhibit 3. Although claimant accurately notes that the administrative law judge did not reference Dr. Kahn's status as a consulting pathologist for the National Institute of Occupational Safety and Health (NIOSH), Claimant's Brief at 13-14; Claimant's Exhibit 3, the administrative law judge adequately considered the respective qualifications of the reviewing pathologists in assessing their opinions, ultimately determining that the opinions of Drs. Oesterling and Caffrey were better documented and reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

[13] Because the administrative law judge discredited Dr. Kahn's measurements of the miner's lesions, it was not necessary for him to address the doctor's opinion that the nodules "would most likely" have appeared as nodules of 1.5 cm. or larger on a chest x-ray. Claimant's Exhibit 1; *Scarbro*, 220 F.3d at 255.

demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge found that the evidence regarding the nature and extent of the miner's coal mine dust exposure during his twenty years of surface coal mine employment was "exceedingly scant," as there was no testimony from the miner, claimant, or anyone else regarding the miner's working conditions. As the administrative law judge noted, evidence regarding the extent of the miner's coal mine dust exposure was limited to the miner's statement on his 2005 application for black lung benefits:

> My last job was truck driver. I drove from the loader to the dump (a bin where you dump the coal). This was a Yuk truck that held about 35-40 ton[s] of coal. When I dumped the coal, dust was so bad you couldn't hardly see. About 2 1/2 years before I stopped mining, we got air conditioned cabs, but all the time before that, I had an open cab with lots of dust.

Unmarked Exhibit. The administrative law judge found that this statement did not provide sufficient detail regarding the miner's coal mine dust exposure in his various jobs, or adequately address the frequency, amount, or severity of that exposure.[14] Decision and Remand at 5. The administrative law judge, therefore, found that claimant failed to satisfy her burden to establish that the miner was regularly exposed to coal mine dust for at least fifteen years during his surface coal mine employment. *Id.*

Claimant argues that the miner's statement on his application for benefits demonstrates he was exposed to coal dust or rock dust on a regular basis in his above ground coal mine employment, establishing more than fifteen years of coal mine employment in conditions substantially similar to underground coal mines. Claimant's Brief at 17-18. We disagree.

Claimant's argument amounts to a request that we reweigh the evidence. But we cannot reevaluate testimony, resolve inconsistencies, make credibility determinations, or substitute our inferences for those of the administrative law judge. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (the administrative law judge is empowered to weigh the evidence and make credibility determinations). The administrative law judge permissibly found the miner's statement not sufficiently detailed to establish regular exposure to coal

[14] The administrative law judge also considered the miner's work histories, as reported by Drs. Egnor and Rasmussen. The doctors noted that the miner worked in open cabs until two years before leaving the mines, but did not address the extent of his coal mine dust exposure. Decision and Order on Remand at 5.

mine dust for at least fifteen years of surface coal mine employment. *See Underwood*, 105 F.3d at 949. We therefore affirm the administrative law judge's determination. Consequently, we affirm the administrative law judge's finding that claimant did invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.

Although claimant argues that the administrative law judge erred in failing to consider whether the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205, the Board previously affirmed the administrative law judge's determination that the evidence is not sufficient to establish entitlement to benefits without the benefit of the Section 411(c)(3) and Section 411(c)(4) presumptions. *Richards*, slip. op. at 10 n.12.; Decision and Order at 16. Because claimant has not shown that the Board's decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge