U.S. Department of Labor

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

BRB No. 17-0080 BLA

LANA G. SPROUSE (Widow of JAMES SPROUSE) Claimant-Petitioner v. ELKAY MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/07/2017 DECISION and ORDER

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

Lana G. Sprouse, Chapmanville, West Virginia.

Ann B. Rembrandt (Jackson Kelly, PLLC), Charleston, West Virginia, for employer.

BEFORE: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2016-BLA-05041) of Administrative Law Judge Drew A. Swank, rendered on a survivor's claim filed on May 8, 2015,[2] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Although the administrative law judge credited the miner with at least fifteen years of underground coal mine employment, he found that the evidence was insufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant was unable to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4) (2012).[3] Considering claimant's entitlement without benefit of the Section 411(c)(4) presumption, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and thus was unable to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).[4] Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying her claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

[1] Claimant is the widow of the miner, James Sprouse, who died on September 23, 2008. Director's Exhibit 1.

[2] The administrative law judge determined that claimant had timely requested withdrawal of a prior survivor's claim filed on November 4, 2008. Decision and Order at 2-3. 20 C.F.R. §725.309. Therefore, the case involves an initial claim for survivor's benefits.

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

[4] Claimant is not entitled to automatic survivor's benefits under Section 422(*l*) of the Act, as there is no indication in the record that the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are 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).

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

In the absence of contrary probative evidence, a miner's disability is established by: (i) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R. Part 718; or (ii) arterial blood-gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or if (iii) the miner had pneumoconiosis and also suffered from cor pulmonale with right-sided congestive heart failure; or (iv) where a physician exercising reasoned medical judgment concludes that the miner's respiratory or pulmonary condition was totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge noted that there is one pulmonary function study and one arterial blood-gas study in the record. Decision and Order at 9-10; Director's Exhibit 1. As neither of the studies was qualifying,[6] the administrative law judge properly found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). The administrative law judge also correctly found that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence in the record indicating that the miner had cor pulmonale with right-sided congestive heart failure. Decision and Order at 10.

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that the miner's last coal mine employment was as a belt man, which required heavy

[5] The record reflects that the miner's coal mine employment was in Virginia and West Virginia. Director's Exhibit 4. 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).

[6] A "qualifying" pulmonary function study or arterial 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 and C. A "non-qualifying" study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

manual labor. Decision and Order at 12. The administrative law judge correctly found that "none of the medical opinions state[s] that the miner was unable to return to his usual coal mine employment from [a respiratory or] pulmonary standpoint."[7] *Id*. Thus, we affirm the administrative law judge's finding that claimant failed to establish total disability, based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

We further affirm the administrative law judge's determination that claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment, based on consideration of all the relevant evidence together at 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 13. We therefore affirm the administrative law judge's finding that claimant is unable to establish invocation of the Section 411(c)(4) presumption. 30 U.S.C. § 921(c)(4) (2012); 20 C.F.R. §718.305.

II. Entitlement Under 20 C.F.R. Part 718 - Existence of Pneumoconiosis

In a survivor's claim, where the presumptions at Sections 411(c)(3) and 411(c)(4) do not apply,[8] claimant must establish, by a preponderance of the evidence, that the miner

[7] Dr. Espiritu, the miner's treating physician for the five years prior to the miner's death, prepared a letter on October 31, 2008. Director's Exhibit 1. The administrative law judge correctly found that while Dr. Espiritu noted that the miner received breathing treatments and used a CPAP mask to help with his breathing problems, Dr. Espiritu "did not opine on whether the miner had the pulmonary capacity to perform his last coal mine job at the time of his death." Decision and Order at 12; *see* Director's Exhibit 1.

In a report dated January 6, 2010, Dr. Rosenberg reviewed the miner's medical records and opined that the miner retained the respiratory capacity to perform his last coal mine job as a beltman or similarly arduous labor. Director's Exhibit 1.

In a report dated February 8, 2010, Dr. Hippensteel reviewed the medical records and indicated that the miner was not totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1.

[8] The administrative law judge correctly found that there is no evidence that the miner had complicated pneumoconiosis, and thus claimant is not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304; Decision and Order at 18.

had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. 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 requisite elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

In considering whether the miner suffered from pneumoconiosis, the administrative law judge first weighed two x-rays. Dr. Rasmussen, a B reader, interpreted a September 13, 2007 x-ray as positive for pneumoconiosis and there were no other readings of that film. Director's Exhibit 1. Dr. Zaldivar, a B-reader, and Dr. Wiot, dually qualified as a Board-certified radiologist and B reader, interpreted a December 19, 2007 x-ray as negative. *Id*. In resolving the conflict in the x-ray evidence, the administrative law judge permissibly assigned controlling weight to Dr. Wiot's negative reading, based on Dr. Wiot's superior credentials as a dually qualified radiologist. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993): Decision and Order at 17. Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 CFR §718.202(a)(1). Decision and Order at 17.

The administrative law judge next considered the autopsy evidence. Decision and Order at 17-18; *see* 20 C.F.R. §718.202(a)(2). Dr. Tomchin performed the miner's autopsy on September 23, 2008. Director's Exhibit 1. Dr. Tomchin identified "brown-black anthracotic pigment" in the right lung and lymph nodes, mild sub-pleural fibrosis in the left lung, as well as mild to moderate emphysematous changes seen bilaterally. *Id.* Drs. Oesterling and Caffrey also reviewed the miner's autopsy slides. In his October 29, 2009 report, Dr. Oesterling noted "very minimal anthracotic pigmentation" in the miner's lung tissue, and opined that the miner's "coal dust inhalation has not resulted in [an] identifiable disease." Decision and Order at 17; Director's Exhibit 1. Dr. Caffrey similarly opined that the autopsy slides show anthracotic pigmentation but do not "show the necessary findings to make a diagnosis of coal workers' pneumoconiosis." *Id*. Dr. Caffrey indicated that the miner had emphysema, but he did not address the etiology of that condition. *Id*.

The administrative law judge correctly noted that under the regulations "a finding on autopsy or biopsy of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis." 20 C.F.R. §718.202(a)(2); *see Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); Decision and Order at

17. Because none of the pathologists diagnosed findings consistent with clinical pneumoconiosis,[9] or attributed the miner's emphysema to coal dust exposure, we affirm the administrative law judge's findings that claimant failed to establish that the miner had either clinical or legal pneumoconiosis,[10] based on the autopsy evidence.[11] *Id.*

Finally, the administrative law judge considered the death certificate, the treatment records and the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). The death certificate does not assist claimant as it lists the cause of the miner's death as cancer and does not mention pneumoconiosis. Director's Exhibit 1. Moreover, the administrative law judge permissibly gave little weight to the death certificate, signed by Dr. Brannin, because Dr. Brannin's qualifications were not in the record. Decision and Order at 21, *citing Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-21 (1989).

The administrative law judge considered a treatment note that referred to a history of chronic obstructive pulmonary disease, but permissibly found that it did not constitute a reasoned diagnosis. Decision and Order at 20; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge also noted that Dr. Al-Asadi stated that there was x-ray evidence of "very simple coal worker [sic] pneumoconiosis," but did not identify the date of the x-ray evidence. Decision and Order at 20, *quoting* Director's Exhibit 1. Moreover, because the actual x-ray readings contained in the treatment records "did not comment on the existence of pneumoconiosis," the administrative law judge permissibly gave Dr. Al-Asadi's statement little weight. Decision and Order at 20, *citing Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); *see Clark*, 12 BLR 1-at 1-155.

[9] 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).

[10] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[11] The administrative law judge correctly found that the presumptions listed at 20 C.F.R. §718.202(a)(3) do not apply in this case. Decision and Order at 18.

Lastly, in weighing the medical opinion evidence, the administrative law judge noted correctly that Dr. Espiritu reviewed the autopsy report and diagnosed clinical pneumoconiosis, based, in part, on the pathological findings of anthracotic pigmentation. Decision and Order at 19; Director's Exhibit 1. As discussed *supra*, the administrative law judge correctly observed that under the regulations, a finding of anthracotic pigmentation is insufficient, by itself, to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2). To the extent that Dr. Espiritu relied on the pathology findings of anthracotic pigmentation to support his diagnosis of pneumoconiosis, we affirm the administrative law judge's determination to give Dr. Espiritu's opinion little weight. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995); Decision and Order at 19. Furthermore, as neither Dr. Rosenberg nor Hippensteel diagnosed pneumoconiosis, their opinions do not assist claimant.[12] Director's Exhibit 1.

Because the administrative law judge properly found that the death certificate, treatment records and medical opinion evidence are insufficient to establish that the miner had clinical or legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), we affirm his finding. *See Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985); Decision and Order at 21. We further affirm the administrative law judge's overall conclusion, based on his weighing of all the relevant evidence together, that claimant failed to establish the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 21.

Since claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's determination that an award of benefits in this survivor's claim is precluded. *See* 20 C.F.R. §718.202(a); *Trumbo*, 17 BLR at 1-87-88; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

[12] Drs. Rosenberg and Hippensteel opined that the miner did not have clinical or legal pneumoconiosis. Director's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge