U.S. Department of Labor

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

BRB No. 17-0572 BLA

VIRGIE LOU SCOTT (Widow of DENNIS SCOTT) Claimant-Petitioner v. BENHAM COAL, INCORPORATED c/o INTERNATIONAL TRUCK & ENGINE Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/13/2018 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (2012-BLA-05789) of Administrative Law Judge Peter B. Silvain, Jr. 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 September 7, 2011.

The administrative law judge credited the miner with twenty-seven years of underground coal mine employment, based on employer's concession, but found that claimant did not establish that the miner had a totally disabling respiratory or pulmonary impairment at the time of his death pursuant to 20 C.F.R. §718.204(b)(2). Thus he found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He also found that because the evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).

Considering whether claimant could establish entitlement without the aid of the Section 411(c)(3) or Section 411(c)(4) presumptions, the administrative law judge found that while claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), she established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b).[3] He

[1] Claimant is the surviving spouse of the miner, who died on December 28, 2001. Director's Exhibit 13. The miner filed a claim in May 1985, which was finally denied by Administrative Law Judge Robert Hillyard on March 28, 1990. Because the miner was not awarded benefits during his lifetime, claimant is not eligible for automatic survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

[2] Under Section 411(c)(4) of the Act, the 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 also suffered from a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] "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). "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).

further found, however, that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 and denied benefits accordingly.

On appeal, claimant contends that the administrative law judge erred in finding that she did not establish that the miner had a totally disabling respiratory or pulmonary impairment at the time of his death and, therefore, erred in finding that she did not invoke the Section 411(c)(4) presumption. Claimant also contends that the administrative law judge erred in finding that she did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[4]

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).

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

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(iii). A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by pulmonary function

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-seven years of underground coal mine employment and the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). *Skrack v. Director, OWCP*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 13, 18, 20, 23. We also affirm, as unchallenged, the administrative law judge's findings that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) or the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack*, 6 BLR at 1-711; Decision and Order at 13, 14, 22.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge considered two pulmonary function studies conducted on February 19, 1988 and January 23, 1997 and accurately found that neither is qualifying[6] for total disability, pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 15. Considering the two blood gas studies of record, he found that while the February 19, 1988 study produced qualifying values, the January 23, 1997 study produced non-qualifying values. Decision and Order at 14-15. According greater weight to the 1997 study as more recent by nine years and, thus, more probative of the miner's condition at the time of his death, the administrative law judge found that the blood gas studies do not support total disability, pursuant to 20 C.F. R. §718.204(b)(2)(ii). *Id.* at 15. The administrative law judge also found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R §718.204(b)(2)(iii).[7] Decision and Order at 10-11.

The administrative law judge next considered the medical opinions of Drs. Dahhan, Rosenberg, and Miller, pursuant to 20 C.F.R §718.204(b)(2)(iv). Dr. Dahhan did not render an opinion regarding total respiratory disability. Director's Exhibit 16. Dr. Rosenberg opined that there is no evidence to support the existence of a disabling respiratory impairment. Employer's Exhibit 1. Dr. Miller, claimant's treating physician, diagnosed moderate to severe restrictive lung disease, but did not otherwise address disability. Director's Exhibit 15A; Claimant's Exhibit 2. The administrative law judge found that none of the physicians' opinions is sufficient to establish total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant argues that the administrative law judge erred in finding that Dr. Miller's opinion is not sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). Claimant contends that a "fair reading" of Dr. Miller's treatment records and medical opinion is that he considered claimant to be totally disabled even though he did not explicitly say so. Claimant's Brief at 6. Claimant further argues that the administrative law judge should have given controlling weight to Dr. Miller's opinion on the issue of total

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 14-15.

disability because he was the miner's treating physician and because he was the only physician to conduct a complete physical examination of the miner. Claimant's Brief at 5-7 (unpaginated); Director's Exhibit 15A; Claimant's Exhibit 2. We disagree.

Initially, we note that an administrative law judge is not required to give greater weight to the opinion of a treating or examining physician, based on that status alone. *See* 20 C.F.R. §718.104(d)(5); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-128-129 (4th Cir. 1993); *Collins v. J&L Steel* (*LTV Steel*), 21 BLR 1-181, 1-189 (1999); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985). Rather, the regulation provides that the administrative law judge may accord controlling weight to a treating physician's opinion only if the opinion is also determined to be credible "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003) (holding that the opinions of treating physicians get the deference they deserve based on their power to persuade); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002).

The administrative law judge began his analysis by correctly noting that total disability may be established by a physician exercising "reasoned medical judgment" based on medically acceptable diagnostic techniques who concludes that the miner's respiratory or pulmonary condition prevented him from performing his usual coal mine work. Decision and Order at 15; *citing* 20 C.F.R. §718.204(b)(2)(iv). He acknowledged Dr. Miller's status as the miner's treating physician and considered his treatment records in their entirety, together with his medical reports dated January 16, 2012 and April 10, 2016. Decision and Order at 9, 11-12, 15; Director's Exhibits 15, 15A; Claimant's Exhibit 2. Dr. Miller stated that he last examined the miner on February 17, 2000, at which time he recorded symptoms of "three block dyspnea on exertion," cough and wheezing. Director's Exhibits 15, 15A; Claimant's Exhibit 2; *see* Decision and Order at 9, 12. Dr. Miller also stated that the miner's January 23, 1997 pulmonary function testing revealed "moderate to severe restrictive lung disease without response to bronchodilators" and that arterial blood gas testing performed at the same time "revealed a PO2 of 83 [and a] PCO2 of 39." Director's Exhibits 15, 15A; Claimant's Exhibit 2. The January 23, 1997 pulmonary function study is non-qualifying, however, and Dr. Miller did not address the degree of any respiratory impairment the miner may have had or discuss his respiratory capacity to perform his usual coal mine work at the time of his death.[8] Director's Exhibits 15, 15A; Claimant's Exhibit 2. Contrary to claimant's argument, in light of these factors the

[8] As the administrative law judge correctly noted, the January 23, 1997 arterial blood gas study values obtained by Dr. Miller are also non-qualifying. Decision and Order at 8.

administrative law judge permissibly found that despite his treating status, Dr. Miller's diagnosis of "moderate to severe restrictive lung disease" is not sufficient, standing alone, to meet claimant's burden to establish total disability through reasoned medical opinion evidence. *See* 20 C.F.R. §§718.104(d)(5), 718.204(b)(2)(iv); *Odom*, 342 F.3d at 492, 22 BLR at 2-622; *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 15.

It is the province of the administrative law judge to assess the evidence of record and determine if a medical opinion is sufficiently documented and reasoned to satisfy a party's burden of proof. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark*, 12 BLR at 1-155. 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 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

As there are no other medical opinions in the record supportive of claimant's burden of proof, we affirm the administrative law judge's finding that the medical opinion evidence does not establish that the miner had a totally disabling respiratory or pulmonary impairment at the time of his death.[9] 20 C.F.R. §718.204(b)(2)(iv); *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 15. Because claimant did not establish that the miner was totally disabled by a respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant is unable to invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

Death Due to Pneumoconiosis

For survivor's claims where the Section 411(c)(3) and 411(c)(4) presumptions are not invoked, claimant must establish by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment, and that the miner's 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 pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause of

[9] Weighing all of the relevant evidence together, the administrative law judge determined that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc); Decision and Order at 15.

the miner's 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); *see Conley v. Nat'l Mines Corp*., 595 F.3d 297, 303-304, 24 BLR 2-257, 2-266-267 (6th Cir. 2010). Failure to establish any one of these elements of entitlement precludes an award of benefits in the survivor's claim. *See Trumbo*, 17 BLR at 1-87-88.

Here, the administrative law judge found that the evidence established the existence of simple clinical pneumoconiosis arising out of the miner's coal mine employment, but did not establish the existence of legal pneumoconiosis. 20 C.F.R. §§718.202(a)(1), (4), 718.203(b); Decision and Order at 18-23. Relevant to whether clinical pneumoconiosis caused the miner's death, the administrative law judge considered the miner's death certificate and the medical opinions of Drs. Dahhan, Rosenberg, and Miller,[10] together with the miner's treatment records.[11] Decision and Order at 23-24.

The miner's death certificate, signed by Coroner Philip Bianchi, listed acute cardiac dysrhythmia as the immediate cause of death, and listed coronary artery disease as an underlying cause of death. Director's Exhibit 13. Drs. Dahhan and Rosenberg also attributed the miner's death to coronary conditions, and opined that pneumoconiosis did not hasten or contribute to his death.[12] Director's Exhibit 16; Employer's Exhibit 1. In contrast, Dr. Miller opined that coal workers' pneumoconiosis was a contributing factor in the miner's death. Director's Exhibit 15A; Claimant's Exhibit 2. The administrative law judge discredited Dr. Miller's opinion and, therefore, concluded that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 23-24.

[10] In reports dated January 16, 2012 and April 10, 2016, Dr. Miller considered the miner's coal mine employment and cigarette smoking histories, physical examination, objective testing and chest x-ray. Director's Exhibit 15A; Claimant's Exhibit 2.

[11] The administrative law judge considered the treatment records from 1975 to 2001 that documented that the miner had a wide range of medical problems, including coal workers' pneumoconiosis. Decision and Order at 11-12, 20, 24; Director's Exhibits 13-15.

[12] Dr. Dahhan opined that the miner's death was caused by "cardiac dysrhythmia caused by coronary artery disease refractory to coronary bypass surgery and aggressive medical therapy." Director's Exhibit 16. Dr. Rosenberg similarly opined that the miner died as a result of cardiopulmonary arrest which was related to his atherosclerotic coronary artery disease. Employer's Exhibit 1.

Claimant contends that the administrative law judge erred in finding Dr. Miller's opinion insufficient to establish that pneumoconiosis hastened the miner's death. Claimant's Brief at 6-7 (unpaginated). We disagree. The United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis may be found to have hastened the miner's death only if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Williams*, 338 F.3d at 518, 22 BLR at 2-655. A physician who opines that pneumoconiosis hastened death through a "specifically defined process" must explain how and why it did so. *Conley*, 595 F.3d at 303-04, 24 BLR at 2-266. As the administrative law judge correctly observed, Dr. Miller stated that coal workers' pneumoconiosis contributed to the miner's death based on his coal mine employment and smoking histories, a physical examination, objective testing and a chest x-ray, as well as "the lack of other explanation for the severity of [the miner's] dyspnea and restrictive lung disease." Decision and Order at 23; *see* Director's Exhibit 15A; Claimant's Exhibit 2. The administrative law judge noted, however, that Dr. Miller did not address the ultimate cause of the miner's death or how his death occurred, or cite to any specific medical evidence that substantiated his opinion that pneumoconiosis was a contributing cause. Decision and Order at 23-24; Director's Exhibit 15A; Claimant's Exhibit 2. Based on the foregoing, the administrative law judge rationally determined that Dr. Miller's unsupported conclusion is not sufficient to establish that pneumoconiosis hastened the miner's death through a specifically defined process and by an estimable time. *See Williams*, 338 F.3d at 518, 22 BLR at 2-655; *Conley*, 595 F.3d at 303-04, 24 BLR at 2-266; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F. 2d at 255, 5 BLR at 2-103; Decision and Order at 23-24; Director's Exhibit 15A; Claimant's Exhibit 2.

As substantial evidence supports the administrative law judge's determination to discredit the opinion of Dr. Miller, the only opinion supportive of claimant's burden, we 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. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

In light of our affirmance of 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(c), 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