U.S. Department of Labor

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

BRB No. 17-0610 BLA

HALLIE MARIE LEWIS (Widow of GEORGE LEWIS) Claimant-Respondent v. E & L CONSTRUCTION and KENTUCKY EMPLOYERS' MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/14/2018 DECISION and ORDER

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

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-05775) of Administrative Law Judge Peter B. Silvain, Jr. awarding 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 June 15, 2012.

After crediting the miner with nineteen years of qualifying coal mine employment,[1] the administrative law judge found that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant[2] invoked the Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in crediting the miner with at least fifteen years of qualifying coal mine employment. Employer also argues that the administrative law judge erred in finding that the evidence established total

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

[2] Claimant is the surviving spouse of the miner, who died on August 7, 2011. Director's Exhibit 9.

[3] 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 underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 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 this provision, however, as the miner did not file any claims during his lifetime.

disability pursuant to 20 C.F.R. §718.204(b)(2). Employer, therefore, argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award 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).

Invocation of the Section 411(c)(4) Presumption

Qualifying Coal Mine Employment

Employer argues that the administrative law judge erred in finding that the miner had sufficient qualifying coal mine employment for claimant to invoke the Section 411(c)(4) presumption. Section 411(c)(4), as implemented by 20 C.F.R. §718.305, requires at least fifteen years of employment, either in "underground coal mines," or in "coal mines other than underground coal mines" in substantially similar conditions. 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 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 credited the miner with nineteen years of above-ground coal mine employment.[4] Decision and Order at 5. In assessing whether the miner was regularly exposed to coal mine dust, the administrative law judge stated:

> Claimant testified that the Miner returned home from work covered in dust *every day*. She explained that the Miner had to bathe after work and that the bath had to be cleaned afterward due to the dust and dirt. She also testified that she had to clean the washing machine after washing the Miner's work clothes as it was "[j]ust black." Additionally, Mr. Lewis, the Miner's co-

[4] Although employer contends that the evidence does not establish fifteen years of qualifying coal mine employment, it does not challenge the administrative law judge's determination that the miner had nineteen years of above-ground coal mine employment. This finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

> worker and brother, testified that the process of cleaning coal, breaking coal, and loading coal onto trucks created a lot of dust and that as operators of the equipment, he and the Miner were in the dust and breathing it "all the time really." He described the Miner's working conditions as dusty, providing that he [p]retty much worked in every pit of coal, he helped break it all, and loaded a lot of it."

Decision and Order at 18 (emphasis added) (Hearing Transcript cites omitted).

The administrative law judge found that the claimant's testimony, along with that of the miner's brother, established that the miner was regularly exposed to coal mine dust during his nineteen years of surface coal mine employment. Decision and Order at 18. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012); *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999). The Board will not substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because it is based on substantial evidence,[5] we affirm the administrative law judge's determination that claimant established that the miner had nineteen years of qualifying coal mine employment. 20 C.F.R. §718.305(b)(2); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014) (holding that claimant need only establish that a miner was regularly exposed to coal dust to prove substantially similar conditions between his above ground and underground mining); Decision and Order at 18.

Total Disability

Employer also contends that the administrative law judge erred in finding that the evidence established that the miner was totally disabled pursuant to 20 C.F.R.

[5] Employer notes that the miner's brother testified that the miner, for a portion of his coal mine employment with Black Magic Mining, operated a loader with a cab on it. Employer's Brief at 7; Hearing Transcript at 26. The miner's brother, however, did not indicate that the miner was not exposed to coal dust while operating the dozer. Moreover, because claimant was married to the miner for the entirety of his coal mine employment, her testimony that the miner returned home from work every day covered in dust, as credited by the administrative law judge, is sufficient to establish that the miner was regularly exposed to coal mine dust for nineteen years. Employer suggests that claimant could have become dirty as a consequence of dealing with non-coal-mining-related dirt; however, we note that claimant testified that the miner was not merely dirty, but "looked like he had been working in coal." Employer's Brief at 6; Hearing Transcript at 14.

§718.204(b)(2). Employer specifically argues that the administrative law judge erred in finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[6] The record contains two pulmonary function studies conducted on January 4, 2011 and July 29, 2011. Director's Exhibits 17, 19. Because both of the studies produced qualifying values,[7] the administrative law judge found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 19.

Employer contends that the administrative law judge erred in finding that the pulmonary function study evidence supported a finding of total disability because the studies do not conform to the quality standards set forth at 20 C.F.R. §718.103(b). Employer's Brief at 8-10. The record reflects, however, that the pulmonary function studies were submitted as part of the miner's hospitalization and treatment records. Thus, these studies are not subject to the quality standards set forth in 20 C.F.R. Part 718, as they were not generated in connection with a claim for benefits. *See* 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Rather, the issue before the administrative law judge was whether the pulmonary function studies were sufficiently reliable to support a finding of total disability, despite the inapplicability of the quality standards. *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

Employer cites evidence that it alleges undermines the reliability of the two pulmonary function studies. Employer notes that Dr. Jarboe reviewed the January 4, 2011 pulmonary function study, opining that it could not be validated because only one flow volume curve was presented. Employer's Exhibit 4 at 11. Dr. Jarboe further opined that the "curve does not show maximum effort throughout the exhalation maneuver." *Id.* In regard to the July 29, 2011 pulmonary function study, employer notes that the comments on the hospital report indicate that the miner "does not have teeth," a fact which employer alleges could have affected the study.[8] Employer's Brief at 9; Director's Exhibit 19 at 10.

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[6] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). Decision and Order at 18-20.

[7] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i). Employer does not dispute that the two pulmonary function studies of record are qualifying.

[8] The hospital report listing the results of the July 29, 2011 pulmonary function study indicates, however, that the miner provided "good effort and cooperation." Director's Exhibit 19 at 10. Moreover, unlike his review of the January 4, 2011 study, Dr. Jarboe

In this case, the administrative law judge did not address this evidence or determine whether the January 4, 2011 and July 29, 2011 pulmonary function studies were sufficiently reliable to support a finding of total disability. Since it is the administrative law judge's duty to make factual determinations, *see Director, OWCP v. Rowe*, 710 F.2d 251 (6th Cir. 1983), we vacate his finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand this case for further consideration. On remand, the administrative law judge should address whether the pulmonary function studies contained in the miner's hospitalization and treatment records are sufficiently reliable to support a finding of total disability.

In light of our decision to remand the case to the administrative law judge for reconsideration of the pulmonary function study evidence, we vacate his finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), as that finding was based upon his finding that the pulmonary function study evidence established total disability. Because we have vacated the administrative law judge's finding of total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption.[9] 30 U.S.C. §921(c)(4).

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reviewed the July 29, 2011 pulmonary function without questioning its validity. Dr. Jarboe opined that the study revealed "severe airflow obstruction." Employer's Exhibit 4 at 9.

[9] Because we have vacated the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption, we decline to address, at this time, employer's challenge to the administrative law judge's determination that it failed to establish rebuttal of the presumption. On remand, should the administrative law judge again find that claimant has invoked the Section 411(c)(4) presumption, employer may challenge the administrative law judge's findings on rebuttal in a future appellate proceeding.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge