U.S. Department of Labor

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

BRB No. 23-0003 BLA

YETTA S. SCOTT (Widow of DONALD L. SCOTT) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 03/12/2024 DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits in Survivor's Claim of Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

Yetta S. Scott, Pennington Gap, Virginia.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge; BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,[1] Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order on Remand Denying Benefits in Survivor's Claim (2014-BLA-05438) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Board for the second time.[2]

In a Decision and Order Denying Request for Modification issued on August 1, 2018, the ALJ credited Miner with at least twenty years of underground coal mine employment, based on the parties' stipulation. The ALJ found Claimant did not establish complicated pneumoconiosis and thus 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). She also found Claimant did not establish the Miner was totally disabled by a respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and thus could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish pneumoconiosis and thus denied benefits. 20 C.F.R. §718.202(a).

On appeal, the Board affirmed the ALJ's findings that Claimant could not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions. *Scott v. Westmoreland Coal Co.*, BRB No. 18-0547 BLA, slip op. at 3-5 (Feb. 27, 2020) (unpub.). The Board further affirmed the ALJ's findings that Claimant did not establish legal pneumoconiosis as well

[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that the Benefits Review Board review the ALJ's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] We incorporate by reference the relevant procedural history set forth in our prior decision in this case. *Scott v. Westmoreland Coal Co.*, BRB No. 18-0547 BLA (Feb. 27, 2020) (unpub.).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if the claimant establishes that the miner had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *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*) (2018). Claimant cannot benefit from Section 422(*l*), however, as the miner's claims for benefits were denied.

as her weighing of the x-ray evidence and the opinions of Drs. Rasmussen and Dennis in regard to clinical pneumoconiosis. *Id.* at 6-7. However, the Board agreed with the argument made by the Director, Office of Workers' Compensation Programs (the Director), that the ALJ erred in evaluating Dr. Perper's opinion on the existence of clinical pneumoconiosis.[4] *Id.* at 8. The Board therefore vacated the ALJ's finding that Claimant failed to establish clinical pneumoconiosis and remanded the case for further consideration of Dr. Perper's report.[5] *Id.* at 8-9.

On remand, the ALJ again found Claimant failed to establish clinical pneumoconiosis at 20 C.F.R. §718.202(a) and denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. The Director responds in support of the denial.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

[4] The ALJ discredited Dr. Perper's medical opinion because he relied on evidence outside of the record and Dr. Dennis's discredited autopsy findings. *Scott*, BRB No. 18-0547 BLA, slip op. at 3-5. The Director requested remand because Dr. Perper's report includes a "discrete section" evaluating the Miner's autopsy slides, and this section contains diagnoses of pneumoconiosis based solely on his review of those slides. *Id.* at 8 (quoting Director's Jan. 15, 2020 Response Brief).

[5] The Board instructed the ALJ to first determine whether Dr. Perper's review of the Miner's autopsy slides could be considered independently of the rest of his opinion. *Id.* at 9. If so, the Board instructed the ALJ to weigh all relevant evidence on the issue of clinical pneumoconiosis, including the contrary opinions of Drs. Fino, Zaldivar, and Rosenberg, and the contrary autopsy reports of Drs. Oesterling and Caffrey. *Id.*; Employer's Exhibits 8-10, 12.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

On remand, the ALJ determined the portion of Dr. Perper's analysis of the Miner's autopsy slides "can be considered in isolation and apart from the other diagnoses and explanations contained in [his] report." Decision and Order on Remand at 3. She therefore reconsidered this portion of Dr. Perper's opinion diagnosing clinical pneumoconiosis, as well as the contrary opinions of Drs. Fino, Zaldivar, Rosenberg, and Caffrey. *Id.* Noting "the opinions on clinical pneumoconiosis are so heavily linked with the pathology evidence," the ALJ gave little weight to the opinions of Drs. Fino, Zaldivar, and Rosenberg, all of whom are board-certified pulmonologists rather than pathologists.[7] *Id.* at 6. She found Drs. Perper and Caffrey are both "highly qualified pathologists who disagree on what the most highly probative evidence regarding clinical pneumoconiosis indicates in this case."[8] *Id.* Finding "no basis on which to accord greater weight to one over the other,"

[7] The ALJ initially incorrectly stated only Dr. Caffrey is a board-certified pathologist but later correctly stated both Drs. Caffrey and Perper "are highly qualified pathologists." Decision and Order on Remand at 6. We thus consider the omission of Dr. Perper's credentials in the ALJ's initial statement to be a scrivener's error. The report of Dr. Oesterling, also a board-certified pathologist, was submitted as autopsy evidence, not as a medical opinion, and was thus considered separately from the opinions of Drs. Caffrey and Perper. *Id.* at 6-7.

[8] The ALJ summarized the disagreement between Drs. Perper's and Caffrey's opinions, noting:

> [T]he crux of the discrepancy is that Dr. Perper makes a diagnosis that is explained by the presence of coal dust in the lungs, [dust-related diffuse fibrosis], whereas Dr. Caffrey diagnoses a condition that excludes coal dust as a factor but the two physicians disagree on the degree of anthracotic pigment observed in the slides, and also appear to disagree on whether the

she thus found their opinions "equally balanced." *Id.* She therefore concluded Claimant did not meet her burden to establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4).

We see no error in the ALJ's finding that Claimant did not meet her burden to establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). The ALJ has the discretion to evaluate the conflicting evidence, draw appropriate inferences, and assess probative value, which she did here. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439 (4th Cir. 1997). Therefore, because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4).

The ALJ reinstated her conclusion that the autopsy evidence does not support a finding of clinical pneumoconiosis, as she found Dr. Oesterling's unrefuted review of the autopsy slides to be well-reasoned and well-documented. Decision and Order on Remand at 7. We find no error in this determination and therefore affirm the ALJ's finding. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 439; 20 C.F.R. §718.202(a)(2). She also noted that although the opinions of Drs. Oesterling, Caffrey, and Perper were considered in separate categories, Drs. Caffrey and Oesterling concurred in not finding clinical pneumoconiosis. As the Board has already affirmed the ALJ's finding that the x-ray evidence does not support a finding of clinical pneumoconiosis, *Scott*, BRB No. 18-0547 BLA, slip op. at 6, we affirm, as supported by substantial evidence, the ALJ's conclusion that the evidence as a whole fails to establish clinical pneumoconiosis at 20 C.F.R. §718.202 and therefore affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-1.

> anthracotic pigment must create collagen or reticulin that is observable on the slides.

Decision and Order on Remand at 6.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge