U.S. Department of Labor

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

BRB No. 14-0185 BLA

ROSA L. MILLER (Widow of CURTIS M. MILLER) Claimant-Respondent v. NATIONAL MINES CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/09/2015 DECISION and ORDER

Appeal of the Decision and Order on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak and Nunnery), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

Employer/carrier (employer) appeals the Decision and Order on Remand (07-BLA-05582) of Administrative Law Judge Joseph E. Kane 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 May 25, 2006,[1] and is before the Board for the second time.

In the initial decision, Administrative Law Judge Pamela Lakes Wood found that the evidence did not establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, Judge Wood denied benefits. Claimant filed an appeal with the Board.

While claimant's claim was pending before the Board, Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption.[2] *Id.*

By Decision and Order dated June 7, 2010, the Board vacated Judge Wood's denial of benefits, and remanded the case for consideration of whether claimant was entitled to benefits pursuant to amended Section 411(c)(4). *Miller v. Nat'l Mines Corp.*, BRB No. 09-0689 BLA (June 7, 2010) (unpub.).

In light of the applicability of amended Section 411(c)(4), Judge Wood reopened the record on remand, and allowed the parties an opportunity to submit additional evidence, and/or to request a de novo hearing. In response, employer requested a de novo hearing. By Order dated June 15, 2011, Judge Wood granted employer's request, and returned the case to the Office of Administrative Law Judges for the scheduling of a

[1] Claimant is the surviving spouse of the miner, who died on July 17, 2005. Director's Exhibit 13.

[2] The amendments also revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her 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*). Claimant cannot benefit from this provision, as the miner's claim for benefits was denied.

hearing. Administrative Law Judge Joseph E. Kane (the administrative law judge) was assigned the case, and held a hearing on May 3, 2012.[3]

Applying amended Section 411(c)(4), the administrative law judge credited the miner with twenty-six years of underground coal mine employment,[4] and determined that the medical evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not establish rebuttal of the presumption.[5] 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 Assocs., Inc.*, 380 U.S. 359 (1965).

[3] At the hearing, employer submitted additional evidence in the form of medical reports and deposition testimony from Drs. Rosenberg and Jarboe. Employer's Exhibits 1-4.

[4] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] Because employer does not challenge the administrative law judge's determination that claimant established that the miner had twenty-six years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Employer argues that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and, therefore, erred in finding that claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

Employer initially 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). The administrative law judge considered four pulmonary function studies conducted on August 2, 2000, August 3, 2000, April 8, 2002, and October 7, 2002. Director's Exhibits 25, 27.

In finding that the pulmonary function study evidence established total disability, the administrative law judge stated that:

> Three of the four PFTs of record were qualifying. On August 2, 2000 and April 8, 2002, the Miner's FEV_1, MVV, and FVC were all equal to or less than the applicable table values found in Appendix B of Part 718. On August 3, 2000, the Miner's MVV and FVC were equal to or less than the applicable table values found in Appendix B of Part 718. Although the October 7, 2002 PFT was non-qualifying, I find the preponderance of the PFT evidence weighs in favor of establishing total disability.

Decision and Order on Remand at 22 (footnotes and exhibit numbers omitted).

Employer contends that the administrative law judge erred in characterizing the August 3, 2000 pulmonary function study as qualifying[6] solely because it produced qualifying FVC and MVV values. We agree. For a pulmonary function test to constitute evidence of total disability pursuant to Section 718.204(b)(2)(i), it must produce *both* a qualifying FEV_1 value *and* either an FVC or MVV value equal to or less than those values appearing in the tables set forth in Appendix B, or it must produce an FEV_1 to FVC ratio equal to or less than 55%. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). Although the administrative law judge correctly stated that the August 3, 2000 pulmonary function study produced qualifying MVV and FVC values, the study did not also produce a

[6] A qualifying pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

qualifying FEV_1value.[7] Director's Exhibit 10. Therefore, contrary to the administrative law judge's finding, the August 3, 2000 pulmonary function study is non-qualifying. Because the administrative law judge mischaracterized the pulmonary function study evidence, 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 the case for further consideration. *See Director, OWCP v. Rowe,* 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). On remand, the administrative law judge must weigh the qualifying and non-qualifying pulmonary function studies,[8] and explain his determination of whether the pulmonary function study evidence establishes total disability.[9]

[7] The miner was 74 years old and 71 inches tall at the time of the August 3, 2000 pulmonary function study. Pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). According to Appendix B of Part 718, the qualifying FEV_1 value for a 71 year old miner with a height of 71 inches is 1.98. The miner's pulmonary function study of August 3, 2000 produced a non-qualifying FEV_1 value of 2.06. Director's Exhibit 27.

[8] The August 2, 2000 study produced qualifying values before the administration of a bronchodilator; the August 3, 2000 study produced non-qualifying values before the administration of a bronchodilator; the April 8, 2002 study produced qualifying values both before and after the administration of a bronchodilator; and the October 7, 2002 study produced non-qualifying values before the administration of a bronchodilator. Director's Exhibits 25, 27.

[9] Citing testimony from Dr. Rosenberg, employer also argues that the administrative law judge "ignore[d] uncontradicted evidence in the record" that the pulmonary function studies conducted while the miner was hospitalized in August 2000 should not have been considered because they reflect the effects of pancreatitis, a non-respiratory condition. Employer's Brief at 15. Employer, however, did not dispute the relevance of this pulmonary function study evidence for purposes of determining total disability when this claim was pending before the administrative law judge. Employer's objection will not be considered for the first time on appeal to the Board. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987) (Levin, J., concurring). Furthermore, we note that unlike the physician's opinion in *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986), Dr. Rosenberg's opinion did not provide the requisite foundation for employer's argument: a statement that the miner's pancreatitis fully accounts for the decline measured in the August 2000 pulmonary function studies.

Employer also argues that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Rosenberg and Jarboe. In a report dated June 29, 2011, Dr. Rosenberg opined that, "[f]rom a pulmonary perspective, [the miner] was not disabled from performing his previous coal mining job *until the latter portion of life*." Employer's Exhibit 1 (emphasis added). However, during a February 21, 2012 deposition, Dr. Rosenberg opined without qualification that from a pulmonary standpoint, the miner "would've been able to perform his previous coal mine jobs." Employer's Exhibit 3 at 19-20. Conversely, Dr. Jarboe opined that the miner suffered from severe hypoxia, and was therefore unable, from a respiratory standpoint, to perform his usual coal mine employment. Employer's Exhibits 2 at 12, 4 at 15-16.

The administrative law judge accorded less weight to Dr. Rosenberg's opinion because he found that the doctor provided contradictory opinions regarding the extent of the miner's pulmonary impairment. Decision and Order on Remand at 23. The administrative law judge also discredited Dr. Jarboe's opinion, that the miner was totally disabled from a pulmonary standpoint, because it was based upon unreliable arterial blood gas study evidence.[10] *Id.* Having discredited the opinions of both physicians, the administrative law judge determined that the medical opinion evidence "neither establishes nor refutes a finding of total disability." *Id.* The administrative law judge, therefore found that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer argues that the administrative law judge mischaracterized Dr. Rosenberg's opinions as contradictory. We disagree. The administrative law judge accurately noted that Dr. Rosenberg's 2012 deposition testimony, that the miner was not totally disabled from a pulmonary standpoint, contradicted his earlier assessment, in a 2011 medical report, that the miner suffered from a totally disabling pulmonary impairment during "the latter portion of life." Decision and Order on Remand at 23. Thus, the administrative law judge permissibly discredited Dr. Rosenberg's assessment of the miner's pulmonary impairment because the doctor provided inconsistent opinions. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799, 1-802 (1984). We therefore affirm the administrative law

[10] The administrative law judge considered eight arterial blood gas studies contained in treatment records. Director's Exhibits 27, 29. The administrative law judge determined that because these studies were performed during the miner's hospitalizations for acute cardiac and respiratory illnesses, the studies were not reliable indicators of the miner's pulmonary function. Decision and Order at 22.

judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[11]

In sum, in light of our determination to vacate the administrative law judge's evaluation of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i), we also vacate the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and remand the case for further consideration of all relevant evidence. Because we vacate the administrative law judge's finding that total respiratory disability was established at 20 C.F.R. §718.204(b)(2), we also vacate the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, and that employer failed to rebut the presumption.[12] 30 U.S.C. §921(c)(4).

On remand, should the administrative law judge find that the pulmonary function study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204, and invocation of the Section 411(c)(4) presumption. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). If, on remand, the administrative law judge finds that claimant has invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, he should determine whether the employer has rebutted the presumption. If the administrative law judge, on remand, finds that the evidence is insufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204 and, therefore,

[11] Employer also contends that the administrative law judge mischaracterized Dr. Jarboe's opinion, and failed to explain his determination that the doctor's opinion was not sufficient to establish the absence of a pulmonary impairment. We disagree. Relying upon arterial blood gas study results demonstrating an impairment of gas exchange, Dr. Jarboe opined that the miner "did have a pulmonary impairment prior to his death" and would not have retained the functional capacity to work as a coal miner. Employer's Exhibit 4 at 15-16. Thus, the administrative law judge reasonably found that Dr. Jarboe's opinion "weigh[ed] in favor of establishing total disability." Decision and Order on Remand at 23. However, as previously noted, the administrative law judge accorded less weight to Dr. Jarboe's assessment because it was based in part upon unreliable arterial blood gas study results. *Id.*

[12] Therefore, we decline to address, as premature, employer's objections regarding the administrative law judge's finding that employer did not rebut the presumption of death due to pneumoconiosis.

determines that claimant is not entitled to invoke the Section 411(c)(4) presumption, he must address whether claimant has satisfied her burden to establish all elements of entitlement under 20 C.F.R. Part 718. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205 (2013).

Accordingly, the administrative law judge's Decision and Order on Remand 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.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge