U.S. Department of Labor

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

BRB No. 14-0332 BLA

EDNA R. KELLY (Widow of CLYDE V. KELLY) Claimant-Petitioner v. U.S. STEEL MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/30/2015 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Edna R. Kelly, Big Stone Gap, Virginia, *pro se*.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of legal counsel,[2] the Decision and Order Denying Benefits (2012-BLA-05257) of Administrative Law Judge Linda S. Chapman

[1] Claimant is the surviving spouse of the miner, Clyde V. Kelly, who died on March 8, 2006. Director's Exhibit 10.

[2] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the

administrative law judge's decision, but Mr. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

rendered on a second petition for modification of the denial of a survivor's claim filed on May 22, 2006 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). In the original Decision and Order, issued on September 8, 2008, Administrative Law Judge Richard Stansell-Gamm found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, and denied benefits. Claimant's initial request for modification, filed on September 4, 2009, was denied by the district director on January 11, 2010, and claimant's second modification request, filed on January 5, 2011, was denied by the district director on September 23, 2011.[3] Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges and was subsequently assigned to Judge Chapman (the administrative law judge), who issued a decision on the record.

After crediting the miner with thirty-four years of coal mine employment, the administrative law judge determined that claimant could not affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, because the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). While she found that the miner had more than fifteen years of underground coal mine employment, the administrative law judge concluded that claimant was not entitled to invocation of the presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[4] because the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge denied modification pursuant to 20 C.F.R. §725.310, as she found that claimant failed to demonstrate a mistake of fact in Judge Stansell-Gamm's prior determination that the

[3] Pursuant to her first modification request, claimant submitted Dr. Shamiyeh's May 3, 2006 letter stating that the miner had black lung. In support of her second modification request, claimant submitted a 1982 Kentucky Department of Labor Workers' Compensation Award which included several conflicting medical opinions regarding whether the miner's x-rays demonstrated the existence of pneumoconiosis. Decision and Order at 2, 6-7; Director's Exhibits 51, 56.

[4] Congress enacted amendments to the Black Lung Benefits 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 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). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

evidence was insufficient to establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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 Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, that the miner suffered from complicated pneumoconiosis, or that the presumption at 20 C.F.R. §718.305 is invoked and not rebutted. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304, 718.305; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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 also Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining, Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1989). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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[5] We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of the miner's coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The record reflects that 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 (1989)(en banc).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The fact-finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

In the present case, because the burden would shift to employer to affirmatively disprove the existence of both clinical and legal pneumoconiosis if claimant established invocation of the amended Section 411(c)(4) presumption,[7] we will first review the administrative law judge's findings with regard to the issue of total disability at Section 718.204(b). The administrative law judge properly found that, since the record contains no pulmonary function studies or arterial blood gas studies, total respiratory disability is not established pursuant to Section 718.204(b)(2)(i)-(ii), and we affirm her finding as supported by substantial evidence. However, we cannot affirm her summary finding at Section 718.204(b)(2)(iv), that "despite the brief mention of [chronic obstructive pulmonary disease] in his treatment records, the preponderance of the evidence does not show that [the miner] suffered from any totally disabling respiratory impairment, due to pneumoconiosis or otherwise," as it does not comport with the requirements of the Administrative Procedure Act.[8] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Although the administrative law judge accurately summarized the miner's treatment notes and hospitalization records,[9] and the medical opinions of Drs.

[7] Upon invocation of the amended Section 411(c)(4) presumption, the administrative law judge's finding that the x-ray evidence was in equipoise would not satisfy employer's burden on rebuttal of disproving the existence of clinical pneumoconiosis. *See* Decision and Order at 4-5, 9; 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

[8] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[9] The administrative law judge reviewed the miner's April 2-5 and 23-28, 2005 hospitalizations for pneumonia, with additional diagnoses of chronic renal failure, anemia, renal cell carcinoma, gout, abnormal echocardiogram, pulmonary artery hypertension, hypomagnesemia, and coal workers' pneumoconiosis. She also considered

Shamiyeh,[10] Taylor[11] and Caffrey,[12] she did not address and weigh the medical opinion evidence on the issue of total respiratory disability. Specifically, Dr. Taylor recorded, *inter alia*, that the miner required frequent nebulizer treatments, suffered pulmonary artery hypertension, tachycardia, hypoxia, "significant debilitating dyspnea and chronic shortness of breath," wheezing, deep venous thrombosis due to limited mobility, and was unable to adequately perform the activities of daily living from a cardiopulmonary standpoint. Decision and Order at 7; Director's Exhibit 12. Thus, Dr. Taylor identified respiratory symptomology, and described exertional limitations experienced thereby which, if credited, may support a finding that the miner was unable to perform his usual coal mine employment from a respiratory standpoint. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). Consequently we vacate the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(b)(2), and her finding that claimant did not establish a basis for modification pursuant to Section 725.310, and remand this case for further consideration and weighing of all of the evidence relevant to the issue of total disability. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

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treatment records from the miner's various admissions at Cardiovascular Associates between 2005 and 2006 "for a variety of health concerns," including likely recurrent renal cell carcinoma, rapid heart rate, coronary artery disease, chronic obstructive pulmonary disease (COPD), gout, reflux disease, chronic constipation, and pulmonary hypertension. The administrative law judge observed that the January 1, 2006 treatment notes indicated that the miner was short of breath upon climbing a flight of stairs, which was unchanged for over a year. Decision and Order at 5-6; Director's Exhibits 13, 14, 16.

[10] In a May 3, 2006 letter, Dr. Shamiyeh stated that she saw the miner on April 23, 2005, when he was admitted to Lonesome Pine Hospital for treatment of pneumonia, with other diagnoses of chronic renal failure, anemia, weight loss, pneumoconiosis, and hypoxemia. Decision and Order at 6; Director's Exhibit 51.

[11] Dr. Taylor treated the miner for approximately one year for multiple health problems. Director's Exhibit 12. Dr. Taylor was also the miner's attending physician during his hospitalizations from April 2-5, 2005 and from April 23-28, 2005 for pneumonia, requiring treatment with antibiotics, supplemental oxygen and nebulizers, and from May 6-9, 2005 for multiple health problems. Director's Exhibits 13, 14.

[12] Dr. Caffrey reviewed the miner's medical records, stated that his significant medical problems were not attributable to COPD, and opined that coal mine employment "did not cause him any discernible pulmonary problems." Director's Exhibits 15, 61; *see* Decision and Order at 7-8, 10-11.

On remand, the administrative law judge must consider whether the weight of the evidence is sufficient to establish total respiratory disability, regardless of cause, and explain her credibility determinations. If, on remand, the administrative law judge finds total respiratory disability established, claimant will be entitled to invocation of the amended Section 411(c)(4) presumption, and the burden will shift to employer to either disprove the presumed fact of pneumoconiosis or show that the miner's death was unrelated to pneumoconiosis. 20 C.F.R. §718.305; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order Denying 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