



BRB Nos. 19-0404 BLA
and 19-0405 BLA

ZEDA MARTIN)
(o/b/o and Widow of MARVIN RAY)
MARTIN))
))
Claimant-Respondent)
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v.)
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DAYCO COAL COMPANY)
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and)
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ASHLAND COAL, INCORPORATED)
))
Employer/Carrier-)
Petitioners)
))
and)
))
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
))
Party-in-Interest)

DATE ISSUED: 08/27/2020

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in the Miner's Claim and of the Decision and Order Awarding Survivor's Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler, Jr. (Kirk Law Firm), Pikeville, Kentucky, for Claimant.

Lee Jones and Denise Hall Scarberry (Jones & Walter, PLLC), Pikeville, Kentucky, for Employer/Carrier.

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits in the Miner's Claim (2018-BLA-05393) and Decision and Order Awarding Survivor's Benefits (2018-BLA-05285) on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a Miner's subsequent claim filed on August 22, 2016,¹ and a survivor's claim filed on February 24, 2017.²

The administrative law judge adjudicated the Miner's claim and the survivor's claim in separate decisions. In a Decision and Order dated May 17, 2019, he addressed the Miner's claim.³ He credited the Miner with twenty-six years of underground coal mine employment⁴ and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found the Miner established a change in an applicable condition of entitlement and invoked the presumption of total disability

¹ The Miner filed a previous claim on October 7, 1991. Director's Exhibit 1. Although the district director denied the claim on October 5, 1994, a memo in the file indicates the records from this claim were destroyed. *Id.* The administrative law judge therefore proceeded under an assumption that the Miner's initial claim was denied based on his failure to establish any element of entitlement. Decision and Order (Miner's Claim) (hereinafter, Decision and Order) at 2 n.6, 3.

² Employer's appeal in the Miner's claim was assigned BRB No. 19-0404 BLA and its appeal in the survivor's claim was assigned BRB No. 19-0405 BLA. The Board has consolidated these appeals for purposes of decision only.

³ The Miner died on February 4, 2017. Director's Exhibit 44. Claimant, the Miner's surviving spouse, is pursuing the Miner's claim on his behalf. Director's Exhibit 54.

⁴ The Benefits Review Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 22.

due to pneumoconiosis at Section 411(c)(4) of the Act.⁵ 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.⁶

In a second Decision and Order dated May 17, 2019, the administrative law judge addressed Claimant's survivor's claim. Based on the award in the Miner's claim, he found Claimant automatically entitled to survivor's benefits pursuant to Section 422(l) of the Act.⁷ 30 U.S.C. §932(l) (2018).

On appeal, Employer contends the administrative law judge erred in finding the Miner had a totally disabling respiratory or pulmonary impairment and therefore erred in finding the Miner invoked the Section 411(c)(4) presumption. Claimant responds in support of the awards of benefits in both claims. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in this appeal. In a footnote to her letter to the Board, however, she urges the Board to reject Employer's contention that the administrative law judge should not have considered the October 6, 2016 blood gas study because the physician did not provide a statement indicating "that the test results were produced by a chronic respiratory or pulmonary condition." *See* 20 C.F.R. §718.105(d).

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decisions and Orders if they are 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

⁵ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he 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.

⁶ Because it is unchallenged on appeal, we affirm the administrative law judge's finding of twenty-six years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁷ Section 422(l) provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of 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 must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found the new pulmonary function and blood gas studies established total disability. 20 C.F.R. §718.204(b)(2)(i),(ii); Decision and Order at 16-17; Director's Exhibit 16. He also found the new medical opinion evidence established total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18; Director's Exhibit 16. Weighing all the evidence together, he found the Miner was totally disabled due to a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Decision and Order at 18.

The record contains only one new pulmonary function study, a qualifying study⁸ conducted on October 6, 2016, as part of Dr. Sikder's Department of Labor-sponsored pulmonary evaluation. Director's Exhibit 16. The administrative law judge therefore found the pulmonary function study evidence established total disability. Decision and Order at 17. Employer does not challenge the administrative law judge's finding that the October 6, 2016 pulmonary function study produced qualifying values. Instead, it contends the administrative law judge erred in determining the study was valid. Employer's Brief at 4-6. We disagree.

In assessing the validity of the study, the administrative law judge noted the technician who conducted the study indicated the Miner provided good cooperation and demonstrated a fair ability to understand instructions and follow directions. Decision and Order at 16; Director's Exhibit 16. The administrative law judge further noted Dr. Sikder, the administering physician, signed a certification affirming the test was "conducted and reported in compliance with the specifications and instructions provided by the Department of Labor." *Id.* The administrative law judge also noted Dr. Sikder indicated the Miner, despite being very weak and hypoxic, provided good effort during the test. *Id.* Additionally, the administrative law judge noted Dr. Gaziano provided an independent

⁸ A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

review of the tracings and found them to be acceptable, explaining that the Miner's best efforts were valid and satisfied American Thoracic Society criteria.⁹ *Id.* By contrast, the administrative law judge noted Dr. Vuskovich invalidated the study, testifying "it was impossible for [the Miner] to generate technically acceptable valid spirometry results because he just couldn't put forth any type of maximum effort."¹⁰ Decision and Order at 16; Employer's Exhibit 1 at 10.

In evaluating the conflicting evidence, the administrative law judge found Dr. Vuskovich's opinion regarding the Miner's effort during the October 6, 2016 pulmonary function study was called into question by the first-hand observations of Dr. Sikder and the administering technician. He also noted Dr. Gaziano validated the test. Decision and Order at 16-17. The administrative law judge permissibly credited the opinions of Dr. Sikder and the technician over Dr. Vuskovich's opinion because they administered the October 6, 2016 study and Dr. Gaziano further validated the study. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (an administrative law judge may rely on the opinion of the physician who actually administered the ventilatory study over those who reviewed the results); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231 (6th Cir. 1994). Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the October 6, 2016 pulmonary function study was valid and established total disability. 20 C.F.R. §718.204(b)(2)(i).

Employer also contends the administrative law judge erred in his consideration of the blood gas study evidence. Dr. Sikder administered the only new blood gas study, a qualifying study¹¹ also conducted on October 6, 2016. Director's Exhibit 16. Dr. Gaziano validated this study. *Id.* Dr. Vuskovich also reviewed the study, opining that the Miner "had severely reduced pulmonary oxygen transfer" compatible "with severe clinical emphysema combined with severe cor pulmonale." Director's Exhibit 18 at 5. Because the only blood gas study was qualifying, the administrative law judge found the blood gas study evidence established total disability. Decision and Order at 17.

Employer notes the regulations provide that "[i]f one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be

⁹ Dr. Gaziano explained that "limitation of forced [sic] primarily related to general weakness." Director's Exhibit 16 at 16.

¹⁰ Dr. Vuskovich indicated the Miner's initial efforts were not maximum efforts and the Miner prematurely terminated his efforts. Director's Exhibit 18.

¹¹ A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition." Employer's Brief at 6, *citing* 20 C.F.R. §718.105(d). Employer alleges Dr. Sikder was required to submit such a report. *Id.* at 6-7. We disagree. Because the October 6, 2016 blood gas study was not administered during a hospitalization which ended in the Miner's death, the requirement at 20 C.F.R. §718.105(d) is inapplicable. Because Employer does not allege any additional error, we affirm the administrative law judge's finding the blood gas study evidence established total disability. 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge also considered the medical opinion evidence. He noted Dr. Sikder, the only physician to address the extent of the Miner's impairment, opined that he was totally disabled from a pulmonary standpoint. Decision and Order at 18; Director's Exhibit 16 at 40. Contrary to Employer's contention, the administrative law judge permissibly found Dr. Sikder's opinion well-reasoned as supported by the qualifying pulmonary function and blood gas study evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 18. We therefore affirm the administrative law judge's finding that the medical opinion evidence established total disability. 20 C.F.R. §718.204(b)(2)(iv).

Because there is no evidence undermining the qualifying pulmonary function study, the qualifying blood gas study, or Dr. Sikder's medical opinion, we further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability.¹² 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 18. We also affirm his determinations that the Miner established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b)(1), 725.309.

Because it is unchallenged on appeal, we further affirm the administrative law judge's finding that Employer failed to rebut the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We thus affirm the award of benefits in the Miner's claim.

¹² Even if there were merit to Employer's contention that the October 6, 2016 pulmonary function study was invalid, the administrative law judge's finding of total disability would remain affirmable. Dr. Sikder's opinion that the Miner was totally disabled, based in part on the Miner's qualifying October 16, 2016 blood gas study, is not undermined by any contrary evidence.

The Survivor's Claim

The administrative law judge found Claimant satisfied her burden to establish each element necessary to demonstrate entitlement under Section 422(l) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l) (2012); Decision and Order (Survivor's Claim) at 4-5. Because we affirm the administrative law judge's award of benefits in the Miner's claim, we affirm his determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(l) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in the Miner's Claim and the Decision and Order Awarding Survivor's Benefits are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge