

U.S. Department of Labor

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



BRB No. 19-0439 BLA

DIANA G. DIX)	
(Widow of JAMES E. DIX))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SEWELL COAL COMPANY/PITTSTON)	DATE ISSUED: 06/26/2020
COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith, Charleston, West Virginia, for claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits on Remand (2015-BLA-05041) of Administrative Law Judge Lauren C. Boucher rendered on a claim filed pursuant to 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 October 11, 2013, and is before the Board for the second time.

In a Decision and Order Awarding Benefits issued on December 29, 2016, Administrative Law Judge Adele Higgins Odegard credited the miner with twenty-two years of underground coal mine employment and found claimant established the miner was totally disabled at the time of his death. 20 C.F.R. §718.204(b)(2). Judge Odegard therefore found claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. She further found employer did not rebut the presumption and awarded benefits.

Upon review of employer's appeal, the Board affirmed, as unchallenged, Judge Odegard's finding of twenty-two years of underground coal mine employment, but vacated her finding that the medical opinion evidence established total respiratory disability. The Board held Judge Odegard erred in crediting the opinions of Drs. Swedarsky and Castle as sufficient to establish total disability. Consequently, the Board vacated her determination that claimant invoked the Section 411(c)(4) presumption.

The Board instructed Judge Odegard to reconsider the relevant evidence on remand and determine whether claimant established the miner was totally disabled at the time of his death and invoked the Section 411(c)(4) presumption. If claimant invoked the presumption, the Board instructed Judge Odegard to consider whether employer

¹ Claimant is the widow of the miner, who died on August 12, 2013. Director's Exhibit 10. The miner did not file a claim for benefits. Therefore, Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), which 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 survivor's benefits, is not applicable in this case. 30 U.S.C. §932(l).

² Under Section 411(c)(4) of the Act, a miner's death is presumed to be due to pneumoconiosis if claimant establishes the miner had at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and he also suffered from a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

rebutted it by establishing that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).³ If claimant did not invoke the presumption, however, the Board instructed Judge Odegard to reconsider whether claimant established the miner had clinical or legal pneumoconiosis and, if so, whether his death was due to pneumoconiosis.⁴ *Dix v. Sewell Coal Co.*, BRB No. 17-0194 BLA (Feb. 5, 2018) (unpub.).

On remand, as Judge Odegard is no longer with the Office of Administrative Law Judges, the case was assigned to Administrative Law Judge Lauren C. Boucher (the administrative law judge), who found claimant did not establish the miner was totally disabled at the time of his death and could not invoke the Section 411(c)(4) presumption. She also found claimant did not establish legal pneumoconiosis or that the miner's death was due to clinical pneumoconiosis and therefore denied benefits.

In the present appeal, claimant contends the administrative law judge erred in finding she did not establish total disability or the miner's death was due to pneumoconiosis. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision and order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁵ 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).

³ The Board affirmed, as unchallenged, the administrative law judge's findings that employer failed to disprove the existence of clinical and legal pneumoconiosis and, therefore, failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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). At this juncture in the adjudication of this case, claimant may establish total disability based on medical opinions.⁶ 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant 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). On remand, the administrative law judge determined the medical opinions and evidence as a whole do not establish total disability. Decision and Order Denying Benefits on Remand (Decision and Order on Remand) at 4-12.

Claimant argues the administrative law judge “fail[ed] to review the complete record” and erred “in simply relying on the unexplained opinions of the [employer’s] physicians.” Claimant’s Brief at 4-7 (unpaginated). We reject these contentions. On remand, the administrative law judge considered the opinions of Drs. Anderson, Oesterling, Swedarsky, and Castle, the miner’s treatment records from Greenbrier Valley Medical Center, and Dr. Sawyer’s autopsy report. Decision and Order on Remand at 4-12; Director’s Exhibits 10, 12, 13, 23; Employer’s Exhibits 4, 5, 6, 8. The administrative law judge correctly noted that Drs. Anderson,⁷ Oesterling,⁸ and Sawyer⁹ did not discuss the

⁶ The administrative law judge considered and adopted Judge Odegard’s finding that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order Denying Benefits on Remand (Decision and Order on Remand) at 4, *citing* 2016 Decision and Order at 13-14. We affirm this finding as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

⁷ In a note dated March 25, 2014, Dr. Anderson stated that pneumoconiosis, as Dr. Sawyer diagnosed in the miner’s autopsy report, helped contribute to the miner’s death, but she did not address the extent his respiratory issues prevented him from performing his usual coal mine employment at the time of his death. Director’s Exhibit 13.

⁸ Dr. Oesterling reviewed the miner’s autopsy slides and concluded coal workers’ pneumoconiosis may have produced lifetime symptomatology, but would not appear to have precipitated, caused or significantly hastened the miner’s death. Director’s Exhibit 23.

⁹ In her August 23, 2013 autopsy report, Dr. Sawyer diagnosed complicated coal workers’ pneumoconiosis, bilateral acute pneumonia, and left-sided pulmonary embolism, but did not address the issue of total disability. Director’s Exhibit 12.

miner's physical capabilities or address the miner's ability to perform his usual coal mine work at the end of his life. Decision and Order on Remand at 8-9; Director's Exhibits 12, 13, 23. She therefore permissibly found these opinions were neither well-reasoned nor well-documented. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order on Remand at 8-9. The administrative law judge further found that although Dr. Swedarsky stated the miner became "increasingly debilitated" around 2011¹⁰ and Dr. Castle stated the miner was "totally disabled near the end of his death [sic] because of multiple medical problems,"¹¹ neither physician opined whether the miner's respiratory impairments, standing alone, were sufficient to render him totally disabled. Decision and Order on Remand at 9, citing 20 C.F.R. §718.204(b)(1); Employer's Exhibits 6, 8. Thus, the administrative law judge permissibly found the medical opinion evidence failed to establish the miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2)(iv); see *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Decision and Order on Remand at 10.

Reviewing the miner's death certificate¹² and treatment records,¹³ the administrative law judge found they do not address the extent to which the miner was impaired and do not

¹⁰ Dr. Swedarsky reviewed the miner's medical records, death certificate, and autopsy report and slides. Employer's Exhibit 6. He stated the medical record indicates the miner became increasingly debilitated about 2011 as a consequence of rheumatoid arthritis, osteoporosis, spinal compression and rib fractures with exaggerated kyphoscoliosis, diabetes, dementia, poor nutrition, "anemia of chronic disease," repeat episodes of aspiration pneumonia, cardiovascular disease and pulmonary embolus. *Id.* at 17.

¹¹ Dr. Castle reviewed the miner's medical records, death certificate, and Dr. Sawyer's autopsy report, and stated that while it was possible the miner had some respiratory impairment, it was not possible for him to accurately determine whether the miner had a disabling respiratory impairment during his life. Employer's Exhibit 8 at 30.

¹² On the miner's death certificate, Dr. Anderson listed respiratory failure due to congestive heart failure as the immediate cause of the miner's death. Director's Exhibit 10.

¹³ The administrative law judge considered the miner's hospitalization records from Greenbrier Valley Medical Center from August 2001 to August 2013 and his treatment records from Greenbrier Physicians, Inc. from October 1998 to July 2013. Decision and Order at 10-11; Employer's Exhibits 4, 5.

represent well-reasoned opinions. Decision and Order on Remand at 10-11; Director’s Exhibit 10; Employer’s Exhibits 4, 5. She therefore found the evidence, considered as a whole, does not establish the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order on Remand at 11.

The administrative law judge is empowered to weigh the medical evidence and draw her own inferences, and the Board may not reweigh the evidence or substitute its own inferences. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, (4th Cir. 1993); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999). Because claimant has not shown error in the administrative law judge’s weighing of the evidence, we affirm her findings that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and the evidence as a whole did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2). *See Compton*, 211 F.3d at 207-208; *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d 438, 441; Decision and Order on Remand at 10-11. Consequently, we affirm the administrative law judge’s determination that claimant cannot invoke the presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order on Remand at 12.

Establishing Entitlement without the Presumption

In a survivor’s claim where no statutory presumptions are invoked,¹⁴ claimant must establish the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203(b), 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner’s death is considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of death, or if pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. §718.205(b)(1), (2). 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 Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 184 (4th Cir 2014).

¹⁴ The administrative law judge considered and adopted Judge Odegard’s finding that claimant did not establish complicated pneumoconiosis and, therefore, could not invoke the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 13 n.10, *citing* 2016 Decision and Order at 12, *Dix v. Sewell Coal Co.*, BRB No. 17-0194 BLA, slip op. at 2 n.3 (Feb. 5, 2018) (unpub.). We affirm this finding as unchallenged on appeal. *Skrack*, 6 BLR at 1-711. We have affirmed, *supra*, the administrative law judge’s determination that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis at 20 CFR §718.305.

The administrative law judge found claimant established the miner had clinical pneumoconiosis, but not legal pneumoconiosis. Decision and Order on Remand at 13-19. As claimant does not challenge the finding she did not establish legal pneumoconiosis, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In determining whether the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(b), the administrative law judge considered the miner's death certificate attributing his death to respiratory failure due to congestive heart failure, the opinions of Drs. Anderson, Oesterling, Swedarsky, and Castle,¹⁵ and Dr. Sawyer's autopsy report.¹⁶ Decision and Order on Remand at 19-21.

Noting Dr. Anderson was the only physician to relate the miner's pneumoconiosis to his death, the administrative law judge found her opinion that pneumoconiosis "helped contribute" to the miner's death insufficient to meet claimant's burden to show pneumoconiosis caused or substantially contributed to the miner's death. Decision and Order on Remand at 20, *citing* 20 C.F.R. §718.205(b)(1)-(2); Director's Exhibit 13. Additionally, because Dr. Anderson did not explain the reasoning or basis for her conclusion, the administrative law judge found her opinion insufficiently reasoned and conclusory, and entitled to "little probative weight." *Id.* Moreover, she found it notable that Dr. Anderson did not list pneumoconiosis as a cause of the miner's death on his death certificate. Decision and Order on Remand at 21; Director's Exhibit 10. She therefore concluded claimant failed to establish the miner's death was due to pneumoconiosis. Decision and Order on Remand at 21.

Claimant generally asserts the administrative law judge erred in finding pneumoconiosis "played no part" in the miner's death. Claimant's Brief at 5 (unpaginated).

¹⁵ Dr. Anderson, the miner's treating physician, opined that pneumoconiosis "helped contribute" to the miner's death. Director's Exhibit 13. Dr. Oesterling reviewed the tissue slides from the miner's autopsy, and opined that coal workers' pneumoconiosis "would not appear to have precipitated, caused, or significantly hastened the miner's death." Director's Exhibit 23 at 8. Dr. Swedarsky reviewed the miner's medical records and tissue slides from his autopsy and opined that coal workers' pneumoconiosis did not play a significant part in his death. Employer's Exhibit 6 at 17. Dr. Castle reviewed medical records and opined the miner died from chronic and acute aspiration pneumonia, congestive heart failure, and pulmonary embolus, and his death was not caused by, contributed to, or hastened by coal workers' pneumoconiosis. Employer's Exhibit 8 at 30.

¹⁶ The administrative law judge considered the miner's autopsy report, noting Dr. Sawyer did not opine on the cause of the his death. Decision and Order on Remand at 20; Director's Exhibit 12.

Claimant, however, has not identified any specific error the administrative law judge made in weighing the evidence on this issue or set forth any basis for overturning her finding claimant failed to establish the miner's death was due pneumoconiosis.

The Board must limit its review to contentions of error the parties specifically raise. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). As the administrative law judge permissibly discredited the only medical opinion supportive of a finding that pneumoconiosis was a contributing cause of the miner's death, we affirm her finding claimant did not establish the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205. Because claimant did not establish the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm her denial of survivor's benefits. *See* 20 C.F.R. §§718.205; *Trumbo*, 17 BLR at 1-87-88.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge