U.S. Department of Labor

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

BRB No. 22-0494 BLA

RACHEL S. NELSON (Widow of HENRY NELSON) Claimant-Petitioner v. BEE TREE COALS, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 9/19/2023 DECISION and ORDER

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

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for Employer.

William M. Bush (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: BOGGS, ROLFE, and JONES, Administrative Appeals Judges

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Denying Benefits (2020-BLA-05021) rendered on a survivor's claim filed on October 27, 2017,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant did not establish complicated pneumoconiosis and thus could not invoke the irrebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Further, although the ALJ credited the Miner with twenty-five years of underground coal mine employment, he found Claimant did not 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). Therefore, he found Claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4).[3] 30 U.S.C. §921(c)(4) (2018).

[1] Claimant is the widow of the Miner, who died on September 20, 2017. Director's Exhibit 29. It is undisputed that the Miner's only claim, filed on July 3, 1985, was closed on December 16, 1985, and Claimant does not allege the Miner was eligible to receive benefits at the time of his death; thus, she is not eligible for derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018). Decision and Order at 2; Director's Exhibit 44 at 7.

[2] The ALJ initially stated Claimant filed her claim on October 27, 2017, and he subsequently indicated Claimant filed her claim on March 14, 2019. Decision and Order at 2, 4; Director's Exhibits 16, 17. The record shows Claimant filed an unsigned Survivor's Form for Benefits on October 27, 2017, and submitted a signed copy of the form on March 14, 2019. Director's Exhibits 16, 17. The Proposed Decision and Order states that the claim was timely filed on October 27, 2017. Director's Exhibit 44 at 2. Further, although Form CM-1025a indicates Employer is challenging timeliness, Employer did not raise this issue in its brief before the ALJ or the Board. We therefore affirm that Claimant timely filed her claim on October 27, 2017. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Director's Exhibit 54.

[3] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the Miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally

Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the Miner had clinical pneumoconiosis arising out of coal mine employment, but not legal pneumoconiosis, and that she did not establish the Miner's death was due to clinical pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205(b). Thus, he denied benefits.

On appeal, Claimant argues the ALJ erred in finding the evidence insufficient to establish the Miner's death was due to pneumoconiosis.[4] Employer responds in support of the denial of benefits. It also challenges the constitutionality of Affordable Care Act (ACA) and its provisions reviving the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs, responds, urging the Benefits Review Board to reject Employer's contentions regarding the ACA, but he does not take a position regarding the ALJ's findings on the merits.[5]

The Board's scope of review is defined by statute. 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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant did not invoke the Sections 411(c)(3) or 411(c)(4) presumptions. *See* 20 C.F.R. §§718.304, 718.305*; Skrack*, 6 BLR at 1-711; Decision and Order at 5-6.

[5] Employer objects to the application of 30 U.S.C. §921(c)(4) and 30 U.S.C. §932(*l*), alleging Section 1556 of the Affordable Care Act (ACA), Pub. Law 111-148, which revived these provisions, violates Article II of the United States Constitution. Employer's Response Brief at 2. Because neither of these provisions applies in this case, we need not address Employer's arguments. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). Moreover, the United States Supreme Court has twice upheld the validity of the ACA. *California v. Texas*, 141 S. Ct. 2104 (2021); *National Federation of Ind. Bus. v. Sebelius*, 567 U.S. 519 (2012).

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibits 19, 24; Employer's Exhibit 3 at 19.

Entitlement Under 20 C.F.R. Part 718

In a survivor's claim, if the Section 411(c)(3) and 411(c)(4) presumptions are not invoked, the claimant must establish the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of the requisite elements of entitlement precludes an award of benefits. *See Trumbo*, 17 BLR at 1-87-88. We affirm, as unchallenged on appeal, the ALJ's finding that the evidence establishes clinical pneumoconiosis[7] arising out of coal mine employment but not legal pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203(b); *Skrack*, 6 BLR at 1-711; Decision and Order a 7-10; Employer's Exhibits 1, 2.

Death Due to Pneumoconiosis

A miner's death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of his death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Conley v. Nat'l Mines Corp*., 595 F.3d 297, 302-03 (6th Cir. 2010); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003).

The death certificate listed "Alzheimer's Dementia" as the immediate cause of death, and "coronary artery disease" and "black lung disease" as "other significant conditions contributing to death but not resulting in the underlying cause." Director's Exhibit 29. The ALJ found the death certificate unreliable, correctly noting Board case law that he may permissibly give little weight to a death certificate when there is no indication as to the qualifications of the physician signing it or whether the physician had personal knowledge of the Miner to assess the cause of death. *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order at 11; Director's Exhibit 29.

Dr. Green performed the Miner's autopsy on September 22, 2017. Director's Exhibit 31. She indicated that because her autopsy was limited to the Miner's lungs and

[7] The ALJ relied on Dr. Roggli's autopsy report and Dr. Rosenberg's opinion to find clinical pneumoconiosis established. Decision and Order at 6-9. Dr. Roggli reviewed the Miner's autopsy slides and indicated "[t]his case satisfies histologic criteria for a diagnosis of simple coal worker[s'] pneumoconiosis." Employer's Exhibit 1. Dr. Rosenberg stated that based on the pathology reports he reviewed, the Miner had "a degree of simple coal workers' pneumoconiosis." Employer's Exhibit 2.

pleura, the exact cause of the Miner's death could not be determined. *Id*. She diagnosed acute bronchopneumonia, severe emphysematous changes, and diffuse macules and nodules with associated black pigment but noted "changes of fully developed black lung were not present." *Id.* She opined "these changes significantly compromised respiratory function and contributed to the cause of death." *Id.* 31.

Contrary to Claimant's contention, we see no error in the ALJ's permissible conclusion that Dr. Green's report is unclear as to whether she diagnosed clinical pneumoconiosis and thus her opinion is insufficient to support a finding that the Miner's death was due to clinical pneumoconiosis. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 7, 11; Claimant's Brief at 6. Moreover, because Dr. Green did not indicate the cause of the Miner's emphysema and bronchopneumonia, or otherwise attribute those conditions to coal dust exposure, Dr. Green's opinion does not support a finding that the Miner's death was due to legal pneumoconiosis. Director's Exhibit 31. Although Claimant asserts the ALJ should have interpreted Dr. Green's report differently and drawn inferences that the Miner's death was hastened by clinical pneumoconiosis, Claimant's Brief at 6, Claimant's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Dr. Roggli reviewed the Miner's autopsy slides, and Dr. Rosenberg prepared a consultative report based on the record evidence. The ALJ accurately found that while Dr. Roggli diagnosed clinical pneumoconiosis, he did not provide an opinion on the Miner's cause of death, and Dr. Rosenberg opined the Miner's death was not caused, contributed to, or hastened by coal mine dust exposure. Decision and Order at 11; Employer's Exhibits 1, 2.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant did not establish the Miner's death was due

to pneumoconiosis under 20 C.F.R. Part 718 and the denial of benefits.[8] 20 C.F.R. §718.205; *see Williams,* 338 F.3d at 518; Decision and Order at 11.

[8] Consequently, we need not address Employer's assertion that if the case is remanded, the ALJ should be directed to address its arguments concerning its designation as the responsible operator. Employer's Response Brief at 5.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge