

U.S. Department of Labor

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



BRB No. 15-0252 BLA

TRESSA A. FERRELL)
(Widow of BOBBY J. FERRELL))
)
Claimant-Respondent)

v.)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Petitioner)

DATE ISSUED: 05/05/2017

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds),
Norton, Virginia, for claimant.

Emily Goldberg-Kraft (Nicholas C. Geale, Acting Solicitor of Labor; Maia
Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director),¹ appeals the Decision and Order Awarding Benefits (2011-BLA-6027) of Administrative Law Judge Drew A. Swank rendered on a survivor's claim² filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). Applying Section 411(c)(4) of the Act,³ 30 U.S.C. §921(c)(4), the administrative law judge credited the miner with thirty-seven years of qualifying coal mine employment and found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). Further, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, the Director challenges the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment at 20

¹ After filing a notice of appeal and supporting brief in this case, counsel for employer filed a Notice of Effective Date of Bankruptcy and Withdrawal of Counsel, stating that the effective date of the bankruptcy of Patriot Coal Corporation, employer's parent company, was reached as of October 26, 2015, and that therefore employer "no longer meets the criteria for being the responsible operator in this matter." Employer's Notice of Effective Date of Bankruptcy and Withdrawal of Counsel at 2. On December 2, 2016, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Reopen Briefing Schedule, noting that in light of employer's bankruptcy, "the Black Lung Disability Trust Fund is now responsible for any benefits due [claimant]." Director's Motion to Reopen Briefing Schedule at 1. The Director therefore requested that the Board reopen the briefing schedule so that any necessary pleadings could be filed. *Id.* On January 17, 2017, the Board granted the Director's motion, and on February 16, 2017, the Director filed a brief contesting the award of benefits in this case.

² The miner filed three claims during his lifetime, all of which were denied. The miner died on November 11, 2003, and claimant, the miner's widow, filed her survivor's claim on August 30, 2010. Director's Exhibits 2, 9.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); as implemented by 20 C.F.R. §718.305.

C.F.R. §718.204(b)(2), and thus his finding that claimant invoked the Section 411(c)(4) presumption. The Director asserts that because the evidence precludes a finding of total disability, the award of benefits should be reversed. Claimant responds in support of the award of benefits.⁴

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.⁵ 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).

In the absence of contrary probative evidence, a miner's disability shall be established by pulmonary function studies showing values equal to, or less than, those in Appendix B; blood gas tests showing values equal to, or less than, those set forth in Appendix C; evidence establishing cor pulmonale with right-sided congestive heart failure; or if a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition prevents the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(i)-(iv). If total disability has been established under one or more subsections, the administrative law judge must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record to determine whether total disability has been established by a preponderance of the evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987).

The administrative law judge initially found that as neither party submitted any pulmonary function studies or blood gas studies into evidence, and there was no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure, claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 15. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Zaldivar and Tuteur, together with the medical treatment records from Boone Memorial Hospital and Charleston Area Medical Center,⁶ and the results of a November 8, 2003 computed tomography (CT) scan.⁷

⁴ The Director concedes that the administrative law judge's finding that rebuttal was not established was proper. Director's Brief at 4.

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 was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 3, 4.

⁶ The administrative law judge noted that the 2003 medical records from Boone Memorial Hospital document some "pleural effusion and/or thickening" in the miner's

Decision and Order at 15-17. Dr. Zaldivar reviewed the miner's work history, death certificate,⁸ treatment records, an autopsy report by Dr. Jelic⁹ and a pathology report by Dr. Oesterling.¹⁰ At his November 10, 2014 deposition, Dr. Zaldivar acknowledged that the miner's fatal bout of sepsis, due to bacterial pneumonia, ultimately "caused all [of

lungs. Decision and Order at 15, 17; Claimant's Exhibit 1; Employer's Exhibit 6. The remaining medical records, from Charleston Area Medical Center, dated February 8, 1998 to November 11, 2003, include records from the miner's hospitalization prior to his death on November 11, 2003. Claimant's Exhibit 2; Employer's Exhibit 5. The administrative law judge noted that the Charleston Area Medical Center records reflect that the miner suffered from diabetes mellitus, renal disease, pneumonia, cough with yellow sputum, pneumoconiosis, peripheral vascular disease, congestive heart failure, and chronic anemia. Decision and Order at 17; Claimant's Exhibit 2; Employer's Exhibit 5. In addition, the records list "persistent right-sided pleural effusion" in the lungs, "an infiltrate in the right lower lung," pulmonary emboli in the lungs, moderate size bilateral pleural effusions, bibasilar atelectasis, pulmonary arterial hypertension, and "coronary artery disease and cardiomegaly," and "congestive failure." Decision and Order at 15; Claimant's Exhibit 2; Employer's Exhibit 5.

⁷ The November 8, 2003 computed tomography scan was interpreted by Dr. Seaman, a Board-certified radiologist and B reader, as negative for coal workers' pneumoconiosis. Employer's Exhibit 4.

⁸ The miner's death certificate states "pulmonary embolism" as the immediate cause of death and notes "other significant conditions contributing to death," including congestive heart failure and diabetes mellitus. Director's Exhibit 9.

⁹ Dr. Jelic, the autopsy prosector, diagnosed acute bronchopneumonia, organizing pneumonia, acute purulent bronchitis, mild emphysema, and thick adhesions between the right lung, chest wall, and diaphragm. Director's Exhibit 10. He further stated "[o]ccasional macules may suggest simple coal worker's pneumoconiosis and correlation with the professional activity is suggested." *Id.*

¹⁰ Dr. Oesterling reviewed the autopsy slides and opined that the miner experienced "bouts of passive pulmonary congestion, both acute and chronic," which lead to extensive pneumonia that ultimately caused the miner's death. Director's Exhibit 23 at 4-5. Dr. Oesterling specifically stated "dust inhalation did not produce any respiratory distress and/or disability in this gentleman." *Id.* at 4.

his] organs to fail, including the lungs.”¹¹ Employer’s Exhibit 7 at 9, 34. However, Dr. Zaldivar clarified that while the miner was “severely impaired in life due to diabetes and chronic renal failure,” there was no evidence that the miner had any pulmonary impairment that would have prevented him from “performing any work that he desire[d] to do.”¹² Employer’s Exhibit 1 at 4.

Dr. Tuteur reviewed the miner’s work history, death certificate, medical treatment records, the November 8, 2003 chest CT scan, and reports from Drs. Jelic, Oesterling, Zaldivar, and Caffrey.¹³ Employer’s Exhibit 2 at 6. At his November 18, 2014

¹¹ When asked what caused the miner’s death, Dr. Zaldivar explained:

He passed away from the infection. That clearly is what did it. He was septic, hypotensive, meaning he had the leakage [from the] blood vessels, the failure of the organs, the failure of the kidney. . . . [T]he sepsis is really what did it. The sepsis caused all organs to fail, including the lungs

Employer’s Exhibit 7 at 34.

¹² At his deposition, Dr. Zaldivar further explained his opinion that the miner would not have been disabled from a pulmonary standpoint, stating:

There is nothing in the record that contains any information pertaining to any lung disease of any kind. Everybody refers to the kidney problem, the diabetes, and all the vascular problems. So there is no evidence in the records I reviewed that there was any pulmonary disease that would prevent him from doing whatever he wanted to do strictly from the pulmonary standpoint. . . . There is no evidence in these records there was any lung damage.

Employer’s Exhibit 7 at 30-31. When asked whether his opinion would change if he were to assume that the miner’s last coal mine work involved heavy labor, Dr. Zaldivar indicated that it would not because there “is no evidence in the [miner’s treatment] records of any pulmonary dysfunction.” Employer’s Exhibit 7 at 60.

¹³ Dr. Caffrey reviewed the miner’s autopsy slides and medical records, and opined that the miner did not have “any identifiable respiratory problems” as a result of his coal mine employment. Employer’s Exhibit 3 at 6. Although he noted that the slides showed “a very slight amount of emphysema,” Dr. Caffrey attributed it to the miner’s age. *Id.* In addition, he noted that the miner suffered from severe diabetes mellitus with

deposition, Dr. Tuteur similarly testified that at the end of the miner's life, he went into respiratory failure due to bacterial pneumonia, and was effectively totally disabled.¹⁴ Like Dr. Zaldivar, however, Dr. Tuteur emphasized that although the miner would have had exercise limitations because of neuropathy, vasculopathy, and cardiac disease, there was no evidence that the miner was totally disabled from a pulmonary standpoint prior to his terminal hospitalization.¹⁵ Employer's Exhibit 8 at 10-11.

gangrene of the toes of his right foot, and end-stage renal disease. *Id.* Finally, he opined that the miner's "terminal event was acute bronchopneumonia." *Id.*

¹⁴ Dr. Tuteur stated that the immediate cause of the miner's death was bilateral bacterial pneumonia resulting in respiratory failure. He added that this was "complicated by coronary artery disease and its sequelae, diabetes and its sequelae, and the end stage renal disease" Employer's Exhibit 8 at 11-12. When asked whether he agreed that the miner suffered from a totally disabling respiratory impairment prior to his death, Dr. Tuteur responded: "Because of the pneumonia he did, yes." *Id.* at 22-23.

¹⁵ Relevant to whether there was any evidence demonstrating that the miner was disabled from a pulmonary perspective prior to his death, Dr. Tuteur stated: "None whatsoever. Clearly he had exercise limitation because of various factors; the neuropathy, the vasculopathy and the cardiac disease, but even as late as June 30, 2003 in the hospital records of that date it was noted that he did not complain of breathlessness." Employer's Exhibit 8 at 10-11. When asked to clarify his earlier statement that, prior to the miner's death, the miner would have been totally disabled due to his pneumonia, Dr. Tuteur explained:

Let me make it clear. . . . Respiration means impairment of oxygen gas exchange. There's no question that he had respiratory failure when he had the pneumonia. He was intubated, mechanically ventilated, et cetera. He had respiratory failure when he had his 1998 pneumonia due to influenza but he recovered from that. We have no pulmonary function studies in this record, so I can't tell you if he had ventilatory abnormalities or not based on measured impairment. But I have no reason to believe that he had respiratory or ventilatory problems prior to the acute illness that caused his demise.

Employer's Exhibit 8 at 23-24.

The administrative law judge initially found that the medical treatment records “indicate that the miner suffered from some impairment in his lungs,” but they did “not shed much light on whether that impairment caused a totally disabling respiratory or pulmonary condition.” Decision and Order at 17. The administrative law judge similarly found that the November 8, 2003 CT scan interpretation did “not provide much evidence that the miner had a totally disabling respiratory or pulmonary impairment.” *Id.* However, the administrative law judge found that the opinions of Drs. Zaldivar and Tuteur that the miner had lung and respiratory failure before his death established that the miner suffered from a totally disabling respiratory or pulmonary impairment “for at least a brief period.” *Id.*, citing Employer’s Exhibits 7 at 34, 8 at 23-24. Thus, the administrative law judge found that claimant established that the miner was totally disabled by a pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and invoked the Section 411(c)(4) presumption that the miner’s death was due to pneumoconiosis. Decision and Order at 17.

The Director argues that the administrative law judge erred in finding total disability established by the opinions of Drs. Zaldivar and Tuteur because neither doctor diagnosed a chronic respiratory or pulmonary impairment that precluded the miner from performing his usual coal mine employment. Director’s Brief at 3. The Director’s argument has merit.

The regulations provide that “a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from engaging” in his or her usual coal mine employment or comparable and gainful employment. 20 C.F.R. §718.204(b)(1). A non-respiratory or non-pulmonary condition shall only be considered in determining whether a miner was totally disabled if, in turn, it “causes a *chronic* respiratory or pulmonary impairment.” 20 C.F.R. §718.204(a) (emphasis added). Here, both Drs. Zaldivar and Tuteur specifically opined that there was no evidence that the miner suffered from a totally disabling respiratory impairment prior to his terminal hospitalization. Employer’s Exhibits 1 at 4; 7 at 30-31, 60; 8 at 10-11, 22-24. Further, while both Drs. Zaldivar and Tuteur acknowledged that complications from the miner’s non-respiratory conditions, including renal failure, congestive heart failure, bacterial pneumonia, and sepsis ultimately caused the miner’s lungs to fail, neither physician opined that these conditions caused a “chronic” respiratory or pulmonary impairment. Employer’s Exhibits 1 at 4; 2 at 5; 7 at 34; 8 at 11-12. We therefore agree with the Director that the opinions of Drs. Zaldivar and Tuteur do not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).¹⁶ See 20 C.F.R. §718.204(a); *Universal Camera Corp. v. NLRB*, 340

¹⁶ As the Director asserts, this conclusion is consistent with several other regulatory provisions that make clear that an administrative law judge must consider

U.S. 474, 477 (1951) (substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000). Moreover, because there is no other evidence supporting total disability, we must reverse the administrative law judge’s finding at 20 C.F.R. §718.204(b)(2), and his finding that claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4).

We decline to reverse the award of benefits, however, as the Director requests, because claimant must be provided the opportunity to establish that the miner’s death was due to pneumoconiosis under 20 C.F.R. §718.205(c), without benefit of the Section 411(c)(4) presumption.¹⁷ See 20 C.F.R. §718.205(c); see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). In reaching his findings on remand, the administrative law judge must set them forth in detail, including the underlying rationale, in compliance with the Administrative Procedure Act, 5 U.S.C. §556(e), as incorporated into the Act by 30 U.S.C. §932(a). See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

whether objective evidence obtained during a period of acute illness reliably establishes total respiratory disability. Director’s Brief at 4. Specifically, Appendix B to Part 718 provides that pulmonary function studies should “not be performed during or soon after an acute respiratory illness;” Appendix C to Part 718 provides that arterial blood gas studies should “not be performed during or soon after an acute respiratory or cardiac illness;” and 20 C.F.R. §718.105(d) provides that arterial blood gas studies performed during a hospitalization that ended in the miner’s death must be “accompanied by a physician’s report that the test results were produced by a chronic respiratory or pulmonary condition.” Director’s Brief at 4.

¹⁷ Contrary to the Director’s assertion, the administrative law judge did not find that claimant could not establish entitlement to benefits through any other avenue. Director’s Brief at 4. Rather, the administrative law judge observed that the miner’s medical treatment records “specifically state that the miner suffered from pneumoconiosis” and “actually show that pneumoconiosis may have hastened the miner’s death.” Decision and Order at 23, 24.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge