

BRB No. 09-0791 BLA

MARY MORGAN)
(Widow of CARL R. MORGAN))
)
 Claimant-Petitioner)
)
 v.)
)
 HUMPHREYS ENTERPRISES,) DATE ISSUED: 08/13/2010
 INCORPORATED)
)
 and)
)
 CNA INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 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 of Paul C. Johnson, Jr.,
Administrative Law Judge, United States Department of Labor.

Mary Morgan, Coeburn, Virginia, *pro se*.

Philip J. Reverman, Jr. (Boehl, Stopher & Graves), Louisville, Kentucky,
for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen
James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL,
Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order Denying Benefits (2008-BLA-5814) of Administrative Law Judge Paul C. Johnson, Jr., (the administrative law judge), on a survivor's claim filed on August 20, 2007, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² The administrative law judge credited the miner with 27.68 years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. Noting that the sole issue before him was whether the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law judge found that it did not.³ Accordingly, benefits were denied.

On appeal, claimant contends generally that the administrative law judge erred in finding that death due to pneumoconiosis was not established and in denying benefits. Employer responds, urging affirmance of the administrative law judge's Decision and

¹ Jerry Murphree, 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. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

² Claimant is the widow of a miner, who died on January 31, 2007. Director's Exhibit 8. The miner filed a claim for lifetime benefits on December 30, 2002. That claim was finally denied by Administrative Law Judge Thomas M. Burke on February 5, 2007 who found that clinical pneumoconiosis arising out of coal mine employment and total disability were established at 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b), but that total disability *due to* pneumoconiosis was not established at 20 C.F.R. §718.204(c). The survivor's August 20, 2007 claim was also considered to be a request for modification of the February 5, 2007 denial of the miner's claim. The request for modification was denied by the district director on March 20, 2008, because claimant failed to submit any evidence showing that the miner was disabled due to pneumoconiosis at Section 718.204(c). The denial of modification on the miner's claim was not appealed, and, therefore, became final.

³ On April 24, 2008, the district director issued a proposed decision awarding benefits on the survivor's claim, finding that all elements of entitlement were established. Director's Exhibit 20. Employer requested a formal hearing. Director's Exhibit 21. The case was forwarded to the Office of Administrative Law Judge's. Director's Exhibit 24.

Order Denying Benefits.⁴ The Director, Office of Workers' Compensation Programs (the Director), responds, stating that it will not file a substantive response brief unless specifically requested to do so by the Board.

In an appeal filed by a claimant proceeding without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 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.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hichman & 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, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *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(c)(5); *see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

⁴ Employer also contends that the benefits counselor who requested that the Board review the administrative law judge's decision should be treated as a lay representative. By Order dated September 14, 2009, however, the Board stated that it would treat claimant as representing herself on appeal, as Stone Mountain Health Services has indicated that "they do not act as lay representatives, as defined in the regulations, for claimants that they assist." *See Shelton*, 19 BLR at 1-90 n. 1; 20 C.F.R. §725.363; 20 C.F.R. §802.202(d)(2). Based on the letter submitted on behalf of claimant by Mr. Murphree, a benefits counselor with Stone Mountain Health Services, we reject employer's contention that Mr. Murphree should be treated as a lay representative in this case.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

Death Causation

In finding that the miner's death was not due to pneumoconiosis at Section 718.205(c), the administrative law judge properly found that the opinion of Dr. Mullins, who had treated the miner for ten years, and who opined that the miner's pneumoconiosis weakened his resistance to the infection that killed him, could not be credited because Dr. Mullins relied on an incorrect understanding of the extent of the miner's pneumoconiosis, as he believed the miner's pneumoconiosis was more severe than the mild pneumoconiosis diagnosed on autopsy. *See* 20 C.F.R. §718.104(d)(5); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, the administrative law judge properly found that the opinion of Dr. Mullins could not be credited as it was equivocal and speculative because, even though Dr. Mullins found that the miner's pneumoconiosis weakened his resistance to the infection that killed him, Dr. Mullins ultimately opined that "it cannot be said one way or the other whether [the] [m]iner died earlier than he would have from his illnesses." *Justice v. Director, OWCP*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 14. Likewise, the administrative law judge found that the opinion of Dr. Sheppard, a partner of Dr. Mullins, who had also treated the miner, was equivocal and speculative because Dr. Sheppard opined both that pneumoconiosis played "at least a minimal part," in the miner's death, and that, in light of the miner's idiopathic fibrosis and acute respiratory disease, "his [respiratory] condition was such that he would have died when he did regardless of whether he had pneumoconiosis." *Justice*, 11 BLR at 1-94; Decision and Order at 14.

Instead, the administrative law judge permissibly credited the opinions of Drs. Fino and Caffrey, finding that the miner's death was due to idiopathic pulmonary fibrosis and/or pneumonia unrelated to coal dust exposure, because they unequivocally stated that the miner's pneumoconiosis did not cause his death. The administrative law judge observed that Dr. Fino opined that the miner would have died when he did "had he never stepped foot in the mines," Employer's Exhibit 2, and that Dr. Caffrey opined that the miner's "minimal clinical pneumoconiosis ... did not cause or contribute to the usual pneumonitis that caused [the] [m]iner's death, and [the] [m]iner would have died at approximately the same time that he did whether or not he had ever worked in or around a coal mine." Employer's Exhibit 1. The administrative law judge also found that the opinions of Drs. Fino and Caffrey were "better supported by the objective evidence" and "based on a more complete understanding of [the] [m]iner's medical history," in that they reviewed more of the medical evidence of record and explained how it supported their opinions than did Drs. Mullins and Sheppard. *See Clark*, 12 BLR at 1-155; Decision and Order at 11-14. The administrative law judge concluded, therefore, that the credible medical opinion evidence of record established that the miner died from sepsis, *i.e.*, an overwhelming infection that had spread to his bloodstream that was caused by pneumonia and/or idiopathic pulmonary fibrosis unrelated to his coal dust exposure, and that

pneumoconiosis did not contribute to, or hasten, the miner's death at Section 718.205(c).⁶ The administrative law judge, therefore, properly found that claimant did not carry her burden of establishing that pneumoconiosis caused the miner's death pursuant to Section 718.205(c), and that finding is affirmed.

Section 411(c)(4)

On March 23, 2010, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that, at the time of death, he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal

⁶ The administrative law judge also discussed the following evidence relevant to the issue of death causation at Section 718.205(c), and found that it did not establish death causation thereunder. The administrative law judge found that the miner's death certificate states that the cause of the miner's death was sepsis as a consequence of idiopathic pulmonary fibrosis and coal workers' pneumoconiosis. Director's Exhibit 8. However, as the death certificate provided no discussion of the underlying basis for its conclusion, the administrative law judge properly found that it did not establish death causation. *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

Discussing the autopsy report, which was limited to the heart and lungs, the administrative law judge found that Dr. Brooks, stated "that [the] [m]iner's death was caused by severe respiratory compromise secondary to chronic long-standing lung diseases, which include simple coal workers' pneumoconiosis and emphysema." Decision and Order at 4. The administrative law judge noted, however, that Dr. Brooks stated that she would not have found the miner's sepsis on autopsy, because "she does not routinely culture the blood." Decision and Order at 5. She stated that, assuming the miner had sepsis, that condition would have been a substantial factor in the miner's death and "might [have] cause[d] her to alter her autopsy comment[.]" regarding the cause of the miner's death. Decision and Order at 5. The administrative law judge further noted that Dr. Brooks acknowledged that her limited autopsy, was "an incomplete assessment" and her attribution of the miner's death "might or might not be accurate" and "she did not reach a conclusion as to the cause of death." Decision and Order at 5.

Regarding the miner's hospitalization records and treatment notes, the administrative law judge observed that, while some of them included a diagnosis of coal workers' pneumoconiosis, they also included diagnoses of sepsis, idiopathic pulmonary fibrosis, and congestive heart failure. Decision and Order at 5-7.

mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. In addition, under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), as amended, a qualified survivor of a miner, who filed a successful claim for benefits, is automatically entitled to survivor's benefits without the burden of establishing entitlement.

By Order dated May 14, 2010, the Board permitted supplemental briefing in this case to address the impact, if any, of the 2010 amendments in this claim. Employer argues that the Section 411(c)(4) presumption is not applicable in this case because the miner's surface coal mine employment is not comparable to the underground coal mine employment required to invoke the presumption. Employer also contends that, even if the presumption were applicable, employer could rebut the presumption by showing that the miner did not have pneumoconiosis and/or that his totally disabling respiratory impairment was not due to pneumoconiosis.⁷ Employer also contends that Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), does not confer automatic entitlement on the survivor in this case because the miner's claim was denied. The Director responds, noting that the amendments to the Black Lung Act do affect this case, and that claimant is entitled to have her claim considered under Section 411(c)(4), as the miner established more than fifteen years of coal mine employment and a totally disabling respiratory impairment. Thus, the Director maintains that the denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of claimant's entitlement to the rebuttable presumption of death due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

After review of the parties' responses to the Board's May 14, 2010 Order, and our review of the case, we are persuaded that the Director is correct that the amendment reinstating the Section 411(c)(4) presumption is applicable in this case, as the survivor's claim was filed after January 1, 2005 and was pending on March 23, 2010.⁸ Accordingly,

⁷ Employer points out that Administrative Law Judge Thomas Burke, in a Decision and Order issued on February 5, 2007, denied benefits on the miner's claim because the evidence failed to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Supplemental Brief at 2.

⁸ Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), as amended, providing automatic entitlement to the qualified survivor of a miner who filed a successful claim for benefits, without the burden of establishing entitlement, is not, however, applicable, as the miner's lifetime claim for benefits was finally denied.

we agree with the Director that the administrative law judge's decision denying benefits must be vacated, and the case remanded to the administrative law judge for consideration under Section 411(c)(4).⁹ As the Director contends, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to reopen the record, substitute evidence, or submit additional, relevant evidence, in compliance with the evidentiary limitations at 20 C.F.R. §725.414, or upon a showing of good cause at 20 C.F.R. §725.456(b)(1).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁹ As employer contends, invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), requires a determination that the miner worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509 (7th Cir. 1988). The administrative law judge must, therefore, determine whether claimant has satisfied this requirement.