

BRB No. 11-0460 BLA

VELLA THOMPSON, Surviving Spouse of)
WILLIAM THOMPSON)
)
 Claimant-Petitioner)
)
 v.)
)
 MOUNTAINEER COAL DEVELOPMENT) DATE ISSUED: 04/16/2012
COMPANY)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)
)
 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 on Remand - Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand - Denying Benefits (2008-BLA-5844) of Administrative Law Judge Richard A. Morgan on a survivor's claim filed on September 20, 2007, pursuant to 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). This case is on appeal to the Board for the second time. Initially, in a Decision and Order dated June 23, 2009, the administrative law judge found that claimant established twenty-two years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b). The administrative law judge, however, found that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, denied benefits. Administrative Law Judge's 2009 Decision and Order (ALJ 2009 D&O).

Claimant appealed. Pursuant to claimant's appeal, the Board vacated the administrative law judge's decision denying benefits, and remanded the case for the administrative law judge to consider whether claimant was entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act,² 30 U.S.C. §921(c)(4), an issue that was not previously considered by the administrative law judge. *Thompson v. Mountaineer Coal Development Co.*, BRB No. 09-0712 BLA (June 30, 2010)(unpub). Specifically, the Board held that, because employer conceded that the miner had at least fifteen years of qualifying coal mine employment, on remand the administrative law judge must determine whether the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), in order to invoke the Section 411(c)(4) presumption. The Board also held that, if the administrative law judge found the presumption invoked, he must then determine whether employer met its burden of rebutting the presumption. Further, in light of the change in the burdens of proof pursuant to the presumption, the Board held that the administrative

¹ Claimant is the widow of the miner, who died on April 18, 2007. Director's Exhibit 9. There is no evidence in the record that the miner filed a lifetime claim for benefits.

² On March 23, 2010, 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 his death he was totally disabled by pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling impairment, *see* 20 C.F.R. §718.204(b), are established. In order to rebut the presumption, employer must establish that the miner did not have pneumoconiosis or that his death was not due to pneumoconiosis. 30 U.S.C. §921(c)(4).

law judge must allow the parties an opportunity to submit additional evidence, in accordance with the evidentiary limitations set forth in 20 C.F.R. §725.414, and in compliance with the regulation at 20 C.F.R. §725.456(b)(1). *Thompson*, slip op. at 3-4.

On remand, the administrative law judge considered the case pursuant to Section 411(c)(4), and found that the evidence was insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b). The administrative law judge, therefore, found that claimant was not entitled to invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. In addition, the administrative law judge found that, since he had previously determined that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), claimant was not entitled to benefits under 20 C.F.R. Part 718 in this case. Accordingly, the administrative law judge denied benefits. Administrative Law Judge's 2011 Decision and Order (ALJ 2011 D&O).

On appeal, claimant contends that the administrative law judge erred in finding that the miner did not have a totally disabling respiratory impairment at the time of his death, and erred, therefore, in finding that claimant was not entitled to the Section 411(c)(4) presumption. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in response to the appeal.

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.³ 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).

In finding that the Section 411(c)(4) presumption was not invoked, the administrative law judge found that the evidence failed to establish that the miner had a totally disabling respiratory impairment pursuant to Section 718.204(b).⁴ In so finding, the administrative law judge determined that the sole pulmonary function study of record, dated September 11, 2000, while qualifying, did not establish total respiratory disability

³ Because the miner's last coal mine employment was in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

⁴ Total disability is defined as a pulmonary or respiratory impairment that, standing alone, prevents or prevented the miner from performing his or her usual coal mine employment or comparable work. 20 C.F.R. §718.204(b)(1)(i), (ii).

pursuant to Section 718.204(b)(2)(i) because it failed to comply with the applicable quality standards. Further, the administrative law judge found that, while the qualifying blood gas studies, which were contained in the miner's treatment record, "suggest[ed] the presence of hypoxia," they did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), as they "either were performed during or soon after an acute respiratory or cardiac illness or were not accompanied by the requisite physician[']s report." ALJ 2011 D&O at 6; *see* ALJ 2009 D&O. The administrative law judge also found that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii), as the record did not contain any evidence that the miner had cor pulmonale with right-sided congestive heart failure.

Turning to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that total respiratory disability was not established thereunder, as the record did not contain a medical opinion that the miner had a totally disabling respiratory impairment⁵ and the miner's treatment record, while noting "that the miner experienced respiratory failure shortly before his death, ... does not contain a physician[']s opinion regarding whether the miner was totally disabled due to a respiratory or pulmonary impairment." ALJ 2011 D&O at 6. The administrative law judge, therefore, found that the medical opinion evidence, as well as the treatment record, were insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv).

Claimant contends, however, that the administrative law judge erred in finding that the evidence failed to establish total respiratory disability, because the evidence in the miner's treatment record, namely a treatment note dated April 16, 2007, which was two days prior to the miner's death, indicated that "[the miner] had been in respiratory failure for the past several days, requiring "mechanical" treatment for ... respiratory failure for the past several days." Claimant's Brief at 13. Claimant also notes that the "final discharge note, from Pikeville Medical Center, reflected that the miner had to be intubated for hypoxia." *Id.* Additionally, claimant notes that the miner's final diagnosis included hypoxia and hypercapnic respiratory failure, requiring mechanical ventilation. *Id.* Claimant contends that, "[s]ince the miner was in such respiratory distress that he was in respiratory failure requiring mechanical ventilation, it is clear that [the miner] had a totally disabling pulmonary [or respiratory] impairment at the time of his death," *id.*,

⁵ The administrative law judge noted that, on remand, reports, dated November 2 and November 8, 2010, were submitted from Dr. Zaldivar based on his review of the miner's medical records, and that Dr. Zaldivar opined that, based on the miner's records, he could not determine whether the miner suffered from a disabling respiratory impairment. Administrative Law Judge's 2011 Decision and Order (ALJ 2011 D&O); Employer's Exhibit 7.

and, therefore, that the evidence was sufficient to invoke the Section 411(c)(4) presumption.

A review of the record reveals that the miner was hospitalized from March 19, 2007 until his death on April 18, 2007. During this time he was diagnosed with metastatic lung cancer, as well as pneumonia, hypoxia, atrial fibrillation, acute respiratory failure, low albumin, chronic obstructive pulmonary disease with exacerbation, chronic anemia and a history of tobacco abuse was noted. Director's Exhibit 11; Employer's Exhibits 2, 3. The miner's treatment record in the days prior to his death reflected that he was in acute respiratory distress, which required mechanical ventilation. Director's Exhibit 11.

Contrary to claimant's argument, the administrative law judge properly found that claimant was not entitled to the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis because claimant failed to establish that the miner was totally disabled pursuant to Section 718.204(b). The fact that evidence shows that the miner was in acute respiratory distress in the days prior to his death, and at the time of his death, does not establish that the miner was totally disabled pursuant to Section 718.204(b)(2)(i)-(iv). *See* 20 C.F.R. §718.204(b)(2)(i)-(iv). Section 718.204(b) provides four methods for establishing a totally disabling respiratory impairment. *Id.* In this case, the administrative law judge considered the relevant evidence under each of these subsections and properly found that the pertinent evidence did not establish total respiratory disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(en banc), *aff'd on recon.* 9 BLR 1-104 (1986)(en banc). We, therefore, affirm the administrative law judge's finding that claimant failed to establish that the miner was totally disabled pursuant to Section 718.204(b) and, consequently, failed to establish invocation of the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4).

We turn next to the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis⁶ pursuant to Section 718.205(c).⁷ The administrative law judge found that:

⁶ To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a

[o]nly two physicians provided opinions concerning death causation, Dr. Bartley, who attended the miner during his terminal admission and signed the death certificate, and Dr. Dennis, the autopsy prosector.⁸

ALJ 2009 D&O at 15.

The administrative law judge found that Dr. Bartley listed, on the death certificate, the causes of death as “post obstructive pneumonia and non[-]small cell lung cancer.” ALJ 2009 D&O at 15; Director’s Exhibit 9. The administrative law judge further found that Dr. Bartley provided no explanation or reasoning for his findings and the death

“substantially contributing cause” of the miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

⁷ In finding that death causation was not established pursuant to Section 718.205(c) in his 2011 Decision and Order, the administrative law judge stated that he had “previously determined that the evidence does not establish that the miner’s death was due to pneumoconiosis.” ALJ 2011 D&O. In vacating the administrative law judge’s 2009 Decision and Order denying benefits and remanding the case for consideration under Section 411(c)(4), the Board also vacated the administrative law judge’s finding at Section 718.205(c), without determining whether the administrative law judge’s finding thereunder could be affirmed. In light of the Board’s holding, that claimant has not invoked the Section 411(c)(4) presumption, however, the Board reinstates and reviews the administrative law judge’s previous finding on death causation pursuant to Section 718.205(c).

⁸ The administrative law judge also found that the new opinions of Drs. Zaldivar and Caffrey did not establish death causation. ALJ 2011 D&O; Employer’s Exhibits 6, 7. Specifically, the administrative law judge found that Dr. Zaldivar opined that the miner’s death was caused by “pulmonary embolus which was a consequence of the intravascular coagulation produced by the very large cancer in the lung which was metastatic to the mediastinal nodes,” and that neither coal workers’ pneumoconiosis nor chronic obstructive pulmonary disease played any role in the miner’s death. ALJ 2011 D&O at 5; Employer’s Exhibit 7. Regarding Dr. Caffrey’s opinion, the administrative law judge noted that Dr. Caffrey concluded that the miner’s death was caused by “a highly malignant neoplasm which apparently began in the left lung but also metastasized to the left adrenal gland and the heart.” ALJ 2011 D&O; Employer’s Exhibit 6. The administrative law judge further noted that Dr. Caffrey specifically opined that the miner’s death was not caused by or hastened by his coal dust exposure. ALJ 2011 D&O at 4; Employer’s Exhibit 6.

certificate does not refer to coal workers' pneumoconiosis. The administrative law judge, therefore, properly accorded little weight to the death certificate. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263-64 (4th Cir. 2000); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Turning to the opinion of Dr. Dennis, the autopsy prosector, the administrative law judge accorded Dr. Dennis's opinion little weight because it consisted of a short, post-autopsy letter, written in response to claimant's counsel's inquiry regarding the cause of the miner's death. The administrative law judge noted that Dr. Dennis, in his two paragraph letter, stated that it would be hard to identify the precise degree of contribution made by coal workers' pneumoconiosis to the miner's death, but that "the evidence supports [sic] less than 10% of the miner's basic underlying pulmonary pathology contributed to his demise." ALJ 2009 D&O at 15; Claimant's Exhibit 1. The administrative law judge found, however, that as the evidence reflected that the miner had numerous "pulmonary pathologies," including smoking-induced bronchitis, chronic obstructive pulmonary disease, respiratory failure, post-obstructive pneumonia, and emphysema, and Dr. Dennis provided no reasoning or explanation on which to base a finding that the "pulmonary pathology" to which he was referring was pneumoconiosis. The administrative law judge, therefore, reasonably found that Dr. Dennis's opinion was insufficient to establish death causation. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-263-64.

In addition, the administrative law judge reasonably found that Dr. Dennis's autopsy report supported this finding.⁹ Specifically, Dr. Dennis noted that the miner's "[malignant] tumor burden was overwhelming with marked necrosis present," and stated that "the miner's death was not attributed to [pneumoconiosis]." *See Sparks*, 213 F.3d at 192, 22 BLR at 2-263-64; ALJ 2009 D&O at 15; Director's Exhibit 12. The administrative law judge further found that Dr. Dennis, while listing pneumoconiosis as a diagnosis, did not "explain any relationship between [pneumoconiosis] and the miner's death or how [pneumoconiosis] may have hastened [the miner's] death." *Sparks*, 213 F.3d at 192, 22 BLR at 2-263-64; ALJ 2009 D&O at 15. Consequently, the administrative law judge properly found that Dr. Dennis's opinion failed to establish that the miner's death was due to pneumoconiosis and that the relevant evidence failed to establish death causation pursuant to Section 718.205(c).

⁹ In his autopsy report, Dr. Dennis diagnosed simple coal worker's pneumoconiosis with marked fibrosis, marked panlobular emphysema, tumor necrosis, a malignant metastatic tumor, pulmonary infarction, usual interstitial fibrosis, cardiovascular disease, and pneumonia hemorrhage. Director's Exhibit 12.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge