

BRB No. 12-0215 BLA

MILDRED LARUE KEENER)	
(Widow of FRANKLIN V. KEENER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SOUTHERN OHIO COAL COMPANY)	DATE ISSUED: 01/29/2013
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of Decision and Order on Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Mildred LaRue Keener, Philippi, West Virginia, *pro se*.

Ashley M. Harman (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order on Remand (2007-BLA-05671) of Administrative Law Judge Adele H. Odegard denying benefits, rendered on a survivor's claim filed on June 30, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No.

¹ Claimant is the surviving spouse of the miner, Franklin V. Keener, who died on March 31, 2006. Director's Exhibit 12.

111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The relevant procedural history of the case is as follows. On October 27, 2009, Administrative Law Judge Janice K. Bullard awarded benefits to claimant. Pursuant to employer's appeal, the Board affirmed as unchallenged, Judge Bullard's findings that claimant established 32.67 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), 718.203(b). *Keener v. Southern Ohio Coal Co.*, BRB No. 10-0175 BLA, slip op. at 2 (Dec. 15, 2010) (unpub.). However, the Board vacated the award because Judge Bullard erred in omitting Dr. Bush's autopsy report from consideration under 20 C.F.R. §718.205(c), in the absence of an explicit finding that Dr. Bush's opinion on the issue of the cause of the miner's death was derived from sources beyond the scope of his autopsy slide review. *Id.* at 6-7. The Board also held that Judge Bullard erred in shifting the burden of proof to employer and by not considering Dr. Oesterling's opinion in its entirety. *Id.* at 7. The Board further held that Judge Bullard erred in crediting the opinions of Drs. Farnsworth and Schaff, without addressing whether they adequately explained why the miner's death was hastened by pneumoconiosis. *Id.* at 8-10. Thus, the Board vacated Judge Bullard's finding, that the miner's death was due to pneumoconiosis, under 20 C.F.R. §718.205(c), and remanded the case for further consideration. *Id.* at 10. In light of the filing date of the survivor's claim, the Board instructed Judge Bullard to address whether claimant was entitled to the rebuttable presumption of death due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and to allow the parties the opportunity to submit additional evidence addressing the change in the law.² *Id.* at 11.

On remand, because Judge Bullard was no longer with the Department of Labor, the case was assigned to Judge Odegard (the administrative law judge).³ On January 4,

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. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). In relevant part, amended Section 411(c)(4), 30 U.S.C. §921(c)(4), provides that if a miner worked at least fifteen years in underground coal mine employment or in conditions that are substantially similar to those found in an underground mine, and the miner also had a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

³ On April 12, 2011, the administrative law judge issued an Order re-opening the record as directed by the Board. Employer submitted supplemental reports from Drs. Basheda, Bush, and Oesterling, as well as the transcript of Dr. Basheda's deposition. Claimant submitted no additional evidence.

2012, the administrative law judge issued a Decision and Order on Remand denying benefits, which is the subject of this appeal. The administrative law judge credited the miner with at least thirty-two years of coal mine employment and further found that claimant established at least fifteen years of underground coal mine employment. However, because the administrative law judge determined that the evidence was insufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment, she determined that claimant was not entitled to the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to amended Section 411(c)(4). The administrative law judge also found that claimant failed to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Amended Section 411(c)(4)

The administrative law judge found that claimant was not entitled to the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4), because the evidence failed to establish, pursuant to 20 C.F.R. §718.204(b), that the miner had a totally disabling respiratory or pulmonary impairment. *See* 30 U.S.C. §921(c)(4); Decision and Order on Remand at 5-8. We affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), because none of the pulmonary function or arterial blood gas

⁴ As explained in *Keener v. Southern Ohio Coal Co.*, BRB No. 10-0175 BLA, slip op. at 3 n.4 (Dec. 15, 2010) (unpub.), the Board 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) (en banc); Director's Exhibit 5.

studies of record are qualifying⁵ for total disability. Decision and Order on Remand at 7; Director's Exhibit 12; Employer's Exhibits 12-15. The administrative law judge did not make a specific finding under 20 C.F.R. §718.204(b)(2)(iii). However, since there is no evidence in the record that the miner had cor pulmonale with right-sided congestive heart failure, claimant is unable to establish total disability under that subsection.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the miner's medical treatment records, the hearing testimony of the miner's daughter, along with the medical opinions of Drs. Farnsworth, Basheda, Bush and Oesterling.⁶ Decision and Order on Remand at 6-8. The record indicates that Dr. Farnsworth treated the miner from January 1997 to January 2005. Employer's Exhibit 4 at 16, 19. Although Dr. Farnsworth prepared a letter on November 28, 2006, the administrative law judge properly found that he did not address the miner's respiratory state. Decision and Order on Remand at 6; Director's Exhibit 17. During his deposition on June 18, 2007, Dr. Farnsworth testified that an October 13, 1998 pulmonary function study showed minimal obstructive respiratory impairment. Employer's Exhibit 4. The administrative law judge found that Dr. Farnsworth "commented that the [m]iner complained of dyspnea from time to time, but that it was not a problem the [m]iner had at every visit." Decision and Order on Remand at 4. The administrative law judge concluded that because Dr. Farnsworth "did not offer an opinion about whether the [m]iner had a respiratory disability at the time of death," his opinion did not satisfy claimant's burden of proof. *Id.* at 6.

The administrative law judge found that Dr. Basheda specifically opined that "based on the pulmonary function studies he reviewed, the [m]iner did not have a totally disabling respiratory impairment." Decision and Order on Remand at 7, *quoting* Employer's Exhibit 21 at 22. She also found that Dr. Bush specifically stated, "None of the information available to me indicates totally disabling pulmonary or respiratory impairment." Decision and Order on Remand at 7, *quoting* Employer's Exhibit 19.

Dr. Oesterling opined that the miner "would have had periods" of disability due to "marked chronic passive pulmonary congestion" and heart disease. Employer's Exhibit

⁵ A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

⁶ Dr. Schaaf reported that he did not have any information regarding the extent to which the miner's pneumoconiosis affected his lung function; therefore, Dr. Schaaf's opinion does not assist claimant in establishing total disability. Claimant's Exhibit 2.

20. Dr. Oesterling explained: “Passive congestion displaces air within the alveolar sacs, and therefore does have major impact on respiratory capability.” *Id.* In weighing all of the evidence together, the administrative law judge stated:

On review, I find that the only evidence that tends to suggest that the [m]iner may have been disabled was his daughter’s observation about his oxygen use and Dr. Oesterling’s comment about the [m]iner’s passive lung congestion. The [m]iner’s daughter noted that he had been prescribed oxygen about [fourteen] months before his death, and had trouble getting around. However, according to Dr. Basheda, a Board-certified pulmonary physician, being prescribed oxygen does not, of itself, indicate a total respiratory disability.

Decision and Order on Remand at 7-8. The administrative law judge concluded that the evidence as a whole failed to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 8.

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant, therefore, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). We affirm the administrative law judge’s rational finding that the medical opinion and lay testimony evidence fails to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Furthermore, because substantial evidence supports the administrative law judge’s determination that claimant failed to establish that the miner had a totally disabling respiratory impairment, we affirm the administrative law judge’s finding that claimant is unable to invoke the presumption at Section 411(c)(4). *See* 30 U.S.C. §921(c)(4).

II. Entitlement Under 20 C.F.R. Part 718

In order to establish entitlement to survivor’s benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. For survivor’s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner’s death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, that death was caused by complications of pneumoconiosis, or that the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R.

§718.205(c)(1)-(4). 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 Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

The administrative law judge properly noted that the Board had affirmed Judge Bullard’s finding that the miner had pneumoconiosis pursuant to Section 718.202(a). In considering whether the miner’s death was due to pneumoconiosis, the administrative law judge set forth the relevant medical evidence, including Dr. Bush’s August 3, 2007 autopsy report,⁷ Dr. Oesterling’s May 30, 2007 report and August 6, 2008 deposition, Dr. Farnsworth’s November 28, 2006 report and June 18, 2007 deposition, Dr. Schaaf’s April 18, 2008 report and July 10, 2009 deposition, and Dr. Basheda’s August 10, 2007 report and June 27, 2008 deposition. The administrative law judge noted that Dr. Bush opined that the miner’s death was not caused by, contributed to, or hastened by, any chronic dust disease, as Dr. Bush concluded that the miner’s degree of simple coal workers’ pneumoconiosis was “minimal” and could not have contributed to the miner’s death. Decision and Order on Remand at 9; Employer’s Exhibit 5. The administrative law judge permissibly accorded “some weight” to Dr. Bush’s opinion because he supported his conclusions with specific references to autopsy slides, even though his discussion of the cause of the miner’s death was limited. Decision and Order on Remand at 13; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

The administrative law judge noted that, while Dr. Farnsworth treated the miner for many years, his opinion was not entitled to any additional weight, since Dr. Farnsworth did not treat the miner during the last year of his life and his conclusions regarding the effect of pneumoconiosis on the miner’s death were not based on his own observations.⁸ *See* Decision and Order on Remand at 13; Employer’s Exhibit 4 at 26-27.

⁷ In accordance with the Board’s remand instruction, the administrative law judge concluded that “the portion of Dr. Bush’s report based on the [m]iner’s autopsy [was] admissible” and, therefore, she considered that portion of his opinion. Decision and Order on Remand at 12.

⁸ The administrative law judge noted that she was required to address the conflict in the evidence regarding the miner’s heart condition at the time of death. Decision and Order on Remand at 13. The administrative law judge found that Dr. Farnsworth’s comment, that the miner’s cardiac condition was stable, pertained to the miner’s condition in January 2005, and did not necessarily conflict with the statements of Drs. Basheda and Oesterling, that the miner suffered from a significant heart condition, as of March 2006. *Id.* at 13-14.

The administrative law judge permissibly determined that Dr. Farnsworth's opinion, that pneumoconiosis "may have caused some role" in the miner's death, was equivocal and not sufficiently reasoned to satisfy claimant's burden of proof. Decision and Order on Remand at 14; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

The administrative law judge permissibly gave Dr. Basheda's opinion diminished weight for the same reasons articulated by Judge Bullard and affirmed by the Board. *See Keener*, slip op. at 10; Decision and Order on Remand at 16. With regard to Dr. Schaaf, the administrative law judge noted that she was required to follow the Board's remand instruction to determine whether he provided a reasoned and documented opinion regarding the role of pneumoconiosis in the miner's death. *See Keener*, slip op. at 9. The Board instructed the administrative law judge to consider Dr. Schaaf's statement that he did not have any information regarding the extent to which pneumoconiosis affected the miner's pulmonary function, because the Board noted that Dr. Schaaf's statement was relevant to determining whether his opinion, that pneumoconiosis was a substantially contributing cause of the miner's death, was reasoned and documented. *Id.* The administrative law judge concluded:

As to Dr. Schaaf's statement that he did not have any information regarding the extent to which the [m]iner's pneumoconiosis affected pulmonary function, I note that Dr. Schaaf also stated that he did not think he needed to know such information, in order to assess whether pneumoconiosis contributed to the [m]iner's death. Dr. Schaaf explained that the "compromise of lung function" that was involved was the ability to clear secretions and mobilize the immune system, which are not measured by conventional lung function testing. Regarding Dr. Schaaf's comment that there was little fluid in the [m]iner's lungs, in light of Dr. Oesterling's diagnosis of severe passive pulmonary congestion with edema, I note that Dr. Oesterling drew a distinction between acute bronchopneumonia and chronic pneumonia, which was related to the "passive pulmonary congestion." It is not clear whether Dr. Schaaf's comment related to either of Dr. Oesterling's findings, or whether it related only to the issue of edema. Based on my review of the deposition testimony of both physicians, as well as their medical reports, I cannot conclude that their opinions are inconsistent on this point, or that Dr. Schaaf mischaracterized the autopsy findings.

Decision and Order on Remand at 14 (citations omitted). Thus, the administrative law judge found that Dr. Schaaf's opinion was reasoned and documented.

The administrative law judge, however, also found that Dr. Oesterling's opinion provided a reasoned and documented opinion that pneumoconiosis did not hasten the miner's death:

I find that Dr. Oesterling [provided] well-reasoned explanations for why he thought that heart disease (and heart failure) was the major cause of the [m]iner's death, including an explanation of how the [m]iner's heart disease impacted his respiratory system; he also articulated a basis for his conclusion that the [m]iner's pneumoconiosis did not have a contributory effect on his death, which was that [the] amount of pneumoconiosis the [m]iner had did not affect his lung functioning.

Decision and Order on Remand at 15-16. Because the administrative law judge concluded that the opinions of Drs. Schaaf and Oesterling were each entitled to significant weight, she found that claimant did not satisfy her burden of proof under 20 C.F.R. §718.205(c). *Id.* at 16.

Based on our review of the administrative law judge's analysis, we conclude that she properly followed all of the Board's remand instructions and permissibly rendered her credibility determinations. *See Hicks*, 138 F.3d at 533-34, 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42, 21 BLR at 2-275-76. Because she found the opinions of Drs. Schaaf and Oesterling to be the most credible, but also equally probative, we affirm the administrative law judge's finding that claimant failed to satisfy her burden to establish, by a preponderance of the evidence, that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Hicks*, 138 F.3d at 533-34, 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42, 21 BLR at 2-275-76.

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

JUDITH S. BOGGS
Administrative Appeals Judge