

U.S. Department of Labor

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



BRB No. 15-0424 BLA

MARGARET A. SHORT)
(Widow of EUGENE SHORT))
)
 Claimant-Petitioner)
)
 v.)
)
EASTOVER MINING COMPANY) DATE ISSUED: 07/07/2016
)
 and)
)
UNDERWRITERS SAFETY AND CLAIMS)
)
 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 Peter B. Silvain, Jr.,
Administrative Law Judge, United States Department of Labor.

Margaret A. Short, Helton, Kentucky, *pro se*.

William Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2011-BLA-6301) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a survivor's claim filed on June 15, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹ The administrative law judge determined that claimant was not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis under Section 411(c)(4), 30 U.S.C §921(c)(4) (2012), based on his finding that claimant established that the miner had only 7.86 years of coal mine employment.² The administrative law judge further determined that claimant proved that the miner had clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), but did not prove that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(c), or that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits.³ Employer responds, urging affirmance of the denial of benefits and asserting that the administrative law judge erred in finding that claimant established that the miner had clinical

¹ Claimant is the widow of the miner, Eugene Short, who died on April 26, 2010. Director's Exhibit 9. There is no evidence in the record that the miner was awarded black lung benefits or that the miner had a claim for benefits pending at the time of his death. Therefore, claimant is not derivatively entitled to benefits pursuant to 30 U.S.C. §932(l) (2012).

² Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or 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.

³ Judy Hamblin, a lay representative with Stone Mountain Health Services of St. Charles, Virginia, filed a letter requesting, on behalf of claimant, that the Board review the administrative law judge's decision, but she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order). In the letter Ms. Hamblin stated, "[w]e feel that the medical evidence in [the] file will prove that the miner did have [p]neumoconiosis and was totally disabled from a respiratory impairment from this disease." Letter Dated July 20, 2015 at 1 (unpaginated).

pneumoconiosis. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *See 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.⁴ 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).

When, as in this case, the administrative law judge has determined that the Section 411(c)(3)⁵ and 411(c)(4) statutory presumptions do not apply, claimant must establish 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(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause of a miner's death 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, 303-04, 24 BLR 2-257, 2-266-67 (6th Cir. 2010). Failure to establish any one of these elements of entitlement precludes an award of benefits in the survivor's claim. *See Trumbo*, 17 BLR at 1-87-88.

⁴ The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁵ Because there is no evidence of record that the miner had complicated pneumoconiosis, the presumption at 20 C.F.R. §718.304 is not available in this case. 20 C.F.R. §§718.202(a)(3), 718.304.

I. Length of Coal Mine Employment

Claimant bears the burden of establishing the length of the miner's coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Because the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

The administrative law judge considered the miner's employment history summary, his Federal Insurance Contributions Act (FICA) earnings records, his Social Security Administration (SSA) earnings records, and claimant's hearing testimony. Decision and Order at 5-8; Director's Exhibits 2-6; Hearing Transcript at 14, 18-19. The administrative law judge also indicated that he gave probative weight to the employment history and description of coal mine work forms submitted by claimant because the dates of employment were consistent between the forms. Decision and Order at 6; Director's Exhibits 2, 3. He further credited claimant's hearing testimony because she was able to recall the specific dates of the miner's employment.⁶ Decision and Order at 6; Hearing Transcript at 14, 18-19.

The administrative law judge determined that the miner's SSA earnings records showed coal mine employment from 1975 through 1994. Decision and Order at 6-8; Director's Exhibit 6. For the period from 1975 through 1977, the administrative law judge found that the miner earned over \$50.00 per quarter from coal mine employment for ten quarters, and credited the miner with 2.5 years of coal mine employment. Decision and Order at 6. For 1978 and 1979, the administrative law judge found that the miner's earnings in each year were virtually equal to the yearly wage base set forth in Exhibit 609 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual* and, therefore, credited the miner with two years of coal mine employment. *Id.* at 6-7. For 1980 through 1983, the administrative law judge determined that the evidence was insufficient to establish the beginning and end dates of the miner's employment, and that the miner's yearly earnings were below the yearly wage base in Exhibit 609. *Id.* at 7-8. The administrative law judge cited the formula set forth in 20

⁶ Claimant testified that the miner worked "[p]robably seven and a half, something like that, years" in coal mine employment. Hearing Transcript at 14.

C.F.R. §725.101(a)(32)(iii)⁷ and divided the miner's earnings from coal employment in each year by the wage base for each year, as reported in Exhibit 609. *Id.* at 7. The administrative law judge credited the miner with one year of coal mine employment in 1980, .97 years of coal mine employment in 1981, .93 years of coal mine employment in 1982, and .46 years of coal mine employment in 1983, based on his calculations, resulting in a total of 3.36 years of coal mine employment for 1980 through 1983. *Id.* at 7-8.

Adding 3.36 to the 2.50 years credited for 1975 to 1977, and to the 2 years credited for 1978 and 1979, the administrative law judge found that the miner had a total of 7.86 years of coal mine employment. Decision and Order at 8. The administrative law judge concluded, therefore, that the miner did not have the ten years of coal mine employment necessary to invoke the presumption that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), or the fifteen years necessary to invoke the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4). *Id.* at 18, 25-26.

We hold that the administrative law judge permissibly credited the miner with 2.50 years of coal mine employment for the period prior to 1978, when the SSA reported earnings by quarter because he earned over \$50 per quarter in ten quarters. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); Decision and Order at 6; Director's Exhibit 6. In calculating the length of the miner's coal mine employment between 1981 and 1983, however, the administrative law judge should have used Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual* rather than Exhibit 609.⁸ Notwithstanding this error, remand is not required because, even if the

⁷ The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides:

If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

⁸ Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base," contains the coal mine industry daily earnings data referenced in 20 C.F.R. §725.101(a)(32)(iii). Exhibit 609 sets out the annual limit on income subject to Social Security tax. The Social Security

administrative law judge credited the miner with a full year of coal mine employment for each year from 1975 through 1983, the miner would have, at most, nine years of such employment, which is insufficient for the purposes of invoking the presumptions at 20 C.F.R. §718.203(b) and Section 411(c)(4).⁹ See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984). Accordingly, we affirm the administrative law judge's finding that claimant could not invoke the presumptions at 20 C.F.R. §§718.203(b) and Section 411(c)(4) because the miner did not have the requisite length of coal mine employment. 20 C.F.R. §§718.203(b), 718.305(b).

II. Death Causation - 20 C.F.R. §718.205(c)

The administrative law judge concluded that claimant could not establish that the miner's death was due to pneumoconiosis because the evidence is insufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment. Decision and Order at 27; 20 C.F.R. §718.205(c). In the alternative, the administrative law judge found that even if claimant met her burden at 20 C.F.R. §718.203(b), she "would ultimately be unable to establish that the [m]iner's death was due to pneumoconiosis due to a lack of medical evidence." Decision and Order at 28 n.123.

The administrative law judge's finding that the medical evidence is insufficient to establish death due to pneumoconiosis is rational and supported by substantial evidence. The record contains treatment records from numerous physicians, the medical opinions of Drs. Vuskovich, and Rosenberg, and a death certificate prepared by Dr. Ghazal. The miner's treatment records reflect that he underwent a coronary artery bypass graft in 2004, was diagnosed with adenocarcinoma in his right lung in 2009, and received chemotherapy and supportive care for his lung cancer until his death on April 26, 2010. Director's Exhibits 12, 13; Claimant's Exhibits 2, 3. They also reflect that the miner had a history of diabetes, emphysema, hypertension, coronary artery disease, and "possible" pneumoconiosis. *Id.* There are no statements in the treatment records describing a causal relationship between pneumoconiosis and the miner's death. Drs. Vuskovich and

earnings records may underreport a miner's actual wages because the earnings records do not typically show income that exceeds the wage base amount.

⁹ Similarly, we decline to reach the issue of whether the administrative law judge's reliance on Exhibit 609 to calculate the miner's coal mine employment in 1978, 1979, and 1980 was appropriate, in light of his decision to credit the miner with one year of coal mine employment in each of these years. See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984); Decision and Order at 6-7.

Rosenberg, the only physicians to provide opinions directly addressing death causation, both indicated that coal dust exposure did not cause or contribute to the miner's demise. Director's Exhibit 14; Employer's Exhibit 4. Finally, Dr. Ghazal listed "lung cancer" as the sole cause of the miner's death on the death certificate. Director's Exhibit 9.

We affirm the administrative law judge's finding that claimant did not satisfy her burden of proof under 20 C.F.R. §718.205(c) because he accurately determined that there is no medical evidence identifying pneumoconiosis as a direct or contributing cause of the miner's death. *See Conley*, 595 F.3d at 303-04, 24 BLR at 2-266-67; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002). We must also, therefore, affirm the denial of benefits. *See Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge