

BRB Nos. 13-0038 BLA
and 13-0039 BLA

JANIE WARNER, Executrix, o/b/o of the)
Estate of FRED C. HARRIS and o/b/o)
MAMIE HARRIS, survivor of FRED C.)
HARRIS)
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED: 09/27/2013
CANNELTON INDUSTRIES,)
INCORPORATED)
)
and)
)
CANNELTON HOLDING 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 Richard A. Morgan,
Administrative Law Judge, United States Department of Labor.

Robert M. Williams (Maroney, Williams, Weaver & Pancake, PLLC),
Charleston, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, 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 Denying Benefits (2011-BLA-5643 and 2011-BLA-5644) of Administrative Law Judge Richard A. Morgan rendered on the request for modification of the denial of a miner's subsequent claim filed on June 8, 2009² and the request for modification of the denial of a survivor's claim filed on July 15, 2009, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Initially, the administrative law judge consolidated the miner's claim and survivor's claim for hearing and decision purposes. Adjudicating both the miner's claim and the survivor's claim under 20 C.F.R. Part 718, the administrative law judge credited the miner with at least sixteen years of underground coal mine employment, based on a stipulation of the parties, but additionally found a total coal mine employment history of thirty-two years. Addressing the merits of the miner's claim, the administrative law judge found that the medical evidence was sufficient to establish the existence of pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203, but insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and disability causation pursuant to 20 C.F.R. §718.204(c). Regarding the survivor's claim, the administrative law judge found that the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge found that entitlement to benefits was not established in either the miner's or the survivor's claim pursuant to 20 C.F.R. Part 718.

The administrative law judge then considered whether entitlement to benefits was established pursuant to amended Section 411(c)(4), 30 U.S.C. §921(c)(4), in the miner's

¹ Claimant, Janie Warner, executrix of the estate of the miner, Fred C. Harris, who died on June 15, 2009, is pursuing the miner's claim on the behalf of his estate and is pursuing the survivor's claim on the behalf of the miner's widow, Mamie Harris.

² The miner filed his first claim for benefits with the Social Security Administration (SSA) on July 3, 1972. The claim was denied by SSA on October 4, 1979 and subsequently by the Department of Labor (DOL) on December 15, 1980. Director's Exhibit 1. The miner filed a second claim for benefits, his initial claim with the DOL, on December 15, 1993. The claim was ultimately denied by Administrative Law Judge John C. Holmes in a Decision and Order on Remand Denying Benefits, issued on July 8, 1998. Director's Exhibit 2. Judge Holmes found that, while the miner established the existence of simple pneumoconiosis, the evidence was insufficient to establish total respiratory disability, or disability causation. Director's Exhibit 2. The Board affirmed Judge Holmes's denial of benefits in a Decision and Order issued on November 18, 1999. *Id.* The record does not reflect that the miner took any further action until he filed his current claim on June 8, 2009. Director's Exhibit 4.

and survivor's claims. On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, which provide rebuttable presumptions of total disability, and death, due to pneumoconiosis, in miner's and survivor's claims, respectively, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. The presumption, in the miner's claim, may be rebutted by establishing that the miner does not, or did not, have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010). In the survivor's claim, the presumption may be rebutted only by establishing that the miner did not have pneumoconiosis, or that his death did not arise out of, or in connection with, his coal mine employment. *Id.*

The administrative law judge found that both the miner's claim and the survivor's claim were filed after January 1, 2005, were pending on March 23, 2010, and that the miner had at least fifteen years of qualifying underground coal mine employment. The administrative law judge found, however, that the amended Section 411(c)(4) rebuttable presumptions of total disability, and death, due to pneumoconiosis were not available in the miner's and the survivor's claims, respectively, because the miner did not have a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that entitlement to benefits in the miner's claim and the survivor's claim could not be established pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge denied benefits on both the miner's and the survivor's claims.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) and, therefore, erred in denying benefits in the survivor's claim. In response, employer urges affirmance of the administrative law judge's Decision and Order Denying Benefits in both the miner's and the survivor's claims as it was rational, supported by substantial evidence, and in accordance with law. Alternatively, employer contends that the administrative law judge's denial of benefits in the miner's claim can be affirmed, as claimant has not identified any specific allegation of legal or factual error by the administrative law judge in denying that claim. The Director, Office of Workers' Compensation Programs, has not filed a response brief in these appeals.

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).

To establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a miner’s claim, claimant must demonstrate by a preponderance of the evidence that the miner is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

In order to establish entitlement to survivor’s benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Because this survivor’s claim was filed after January 1, 1982, claimant must establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner’s death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. 20 C.F.R. §718.205(c)(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(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

Miner’s Claim

Claimant has failed to identify any specific allegation of legal or factual error made by the administrative law judge in denying the miner’s claim. The administrative law judge’s denial of the miner’s claim is, therefore, affirmed. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

³ Because the miner’s coal mine employment was in West Virginia, this case arises within the jurisdiction 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 Exhibits 2, 5; Survivor’s Director’s Exhibit 3.

Survivor's Claim⁴

In considering whether claimant established that the miner's death was due to pneumoconiosis, the administrative law judge found that none of the physicians of record opined that pneumoconiosis was the actual cause of the miner's death. Decision and Order at 38. The administrative law judge further found that the weight of the medical opinion evidence was insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death. The administrative law judge found that the opinions of Drs. Gaziano, Rasmussen, Ashley and Jelic, who stated that pneumoconiosis was a contributing cause of the miner's death, were not well-reasoned and were outweighed by the contrary opinions of record.⁵ Decision and Order at 38-39. The administrative law judge found, therefore, that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Claimant contends that the administrative law judge erred in according little weight to the opinions of Drs. Gaziano, Rasmussen, Ashley and Jelic solely on the basis of their professional qualifications, or lack thereof. Specifically, claimant contends that the administrative law judge erred in discounting the opinions of Drs. Gaziano, Rasmussen and Ashley because they are not Board-certified pulmonologists.⁶ Claimant's Brief at 3. Similarly, claimant contends that the administrative law judge erred in according little weight to the opinion of Dr. Jelic, the autopsy prosector, because his qualifications are not in the record. *Id.* Lastly, claimant contends that the administrative law judge erred in according greater weight to the contrary opinion of Dr. Spagnolo,

⁴ Claimant has not challenged the administrative law judge's finding that claimant is not entitled to entitlement to the Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis, 30 U.S.C. §921(c)(4). That finding is, therefore, affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ The administrative law judge found that six physicians namely Drs. Bush, Oesterling, Spagnolo, Fino, Basheda and Rosenberg, provided well-reasoned opinions that the miner's coal workers' pneumoconiosis did not contribute to his death. Decision and Order at 38.

⁶ The record reflects that Dr. Gaziano is Board-certified in Internal Medicine and Chest Diseases, as well as Board-certified in Critical Care, Survivor's Claimant's Exhibit 1; that Dr. Rasmussen is Board-certified in Internal Medicine, Survivor's Claimant's Exhibit 2; and that Dr. Ashley is Board-certified in Family Practice, Survivor's Claimant's Exhibit 3.

because Dr. Spagnolo lacked experience in treating individuals who suffer, or die, from coal workers' pneumoconiosis. *Id.* at 3-4.

Contrary to claimant's contention, the administrative law judge, acting within his discretion as fact-finder, did not rely on the professional credentials, or absence thereof, of Drs. Gaziano, Rasmussen, Ashley and Jelic, in according their opinions little weight. Rather, the administrative law judge discounted the opinions of Drs. Gaziano and Rasmussen because "the overwhelming bulk of their reports merely regurgitate the evidence they reviewed[.]" Decision and Order at 38. The administrative law judge also discounted the opinions of Drs. Gaziano and Rasmussen because they "[b]oth summarily concluded without reference to any medical authority that [coal workers' pneumoconiosis] made the miner's lungs more susceptible to the effects of a superimposed infection and since most [coal workers' pneumoconiosis] deaths are from terminal superimposed infections that this miner's was too. *Id.* The administrative law judge, therefore, properly found the opinions entitled to little weight because they were "poorly reasoned." *Id.*; Survivor's Claimant's Exhibits 1, 2; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). The administrative law judge also properly found that the opinions of Drs. Gaziano and Rasmussen, as well as that of Dr. Ashley, were entitled to little weight because they opined that the miner had a totally disabling respiratory impairment, which was contrary to the administrative law judge's finding.⁷ See *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Additionally, contrary to claimant's contention, the administrative law judge did not discredit the opinion of Dr. Jelic, the autopsy prosector, solely because his professional qualifications were not in the record. Rather, the administrative law judge permissibly accorded Dr. Jelic's opinion little weight because it was outweighed by the better reasoned medical opinion evidence of record.⁸ See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1986)(en banc); Decision and Order at 39.

⁷ In addition, the administrative law judge noted that Dr. Ashley "had concluded that he would have to defer to the more expert pulmonologists with regard to some matters and he did not have the records of the miner's terminal admission in forming his conclusion." Decision and Order at 38.

⁸ In particular, the administrative law judge noted that Dr. Oesterling, the best qualified pathologist, carefully examined the prosector's "histologic slides," and "pointed out how 'markedly narrow' the prosector's report was." Decision and Order at 39.

The administrative law judge provided rational explanations for discounting the opinions of Drs. Gaziano, Rasmussen, Ashley and Jelic.⁹ *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-276-76. Because claimant does not otherwise challenge the specifics of the administrative law judge's weighing of the medical evidence and his finding that claimant has not carried her burden of establishing that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c), we affirm the administrative law judge's denial of benefits in the survivor's claim. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf*, 10 BLR at 1-120.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁹ We need not consider claimant's contention regarding the opinion of Dr. Spagnolo, who opined that coal workers' pneumoconiosis did not contribute to the miner's death, as the administrative law judge properly discounted the opinions of the physicians, which could, if credited, establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).