



BRB No. 19-0246 BLA

LINDA PHELPS)
(Widow of CHARLES E. PHELPS))
)
Claimant-Petitioner)

v.)

B R & D ENTERPRISES INCORPORATED)
)
and)

KENTUCKY EMPLOYERS MUTUAL)
INSURANCE)
)
Employer/Carrier-)
Respondents)

DATE ISSUED: 04/08/2020

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 Lauren C. Boucher,
Administrative Law Judge, United States Department of Labor.

Linda Phelps, Middlesboro, Kentucky.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for
employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES,
Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order Denying Benefits (2017-BLA-06141) of Administrative Law Judge Lauren C. Boucher on a survivor's claim filed on September 24, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting the miner with at least thirty years of underground coal mine employment³ based on the parties' stipulation, the administrative law judge found claimant did not establish complicated pneumoconiosis. Therefore claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). The administrative law judge also found claimant did not establish the miner was totally disabled by a respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and thus did not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.⁴ Turning to whether claimant could establish entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative

¹ Claimant is the widow of the miner, who died on January 6, 2015. Director's Exhibit 12.

² On claimant's behalf Diane Jenkins, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Board review the administrative law judge's decision, but Ms. Jenkins is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

³ The record reflects the miner's most recent coal mine employment occurred in Kentucky. Decision and Order at 4 n.4; Hearing Transcript at 14. 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).

⁴ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if claimant establishes the miner had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(l) of the Act also provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012). Claimant cannot benefit from Section 422(l) because the miner withdrew his only claim for benefits. Director's Exhibit 1.

law judge found claimant did not establish legal pneumoconiosis, but established clinical pneumoconiosis. 20 C.F.R. §718.202(a). She further found claimant did not establish the miner's death was due to clinical pneumoconiosis, 20 C.F.R. §718.205, and thus denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

As claimant filed this appeal without the assistance of counsel, the Board considers whether substantial evidence supports the Decision and Order Denying Benefits. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 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).

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner's death was due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

Although the record contains x-ray readings, the administrative law judge correctly found no radiologist read an x-ray as positive for complicated pneumoconiosis. Decision and Order at 5 n.5; Director's Exhibits 14, 15; Employer's Exhibit 12. Thus we affirm her finding that claimant cannot establish complicated pneumoconiosis by x-ray evidence. 20 C.F.R. §718.304(a).

She next considered biopsy and autopsy evidence. 20 C.F.R. §718.304(b). The United States Court of Appeals for the Sixth Circuit has held that a claimant may establish the existence of complicated pneumoconiosis if biopsy or autopsy evidence establishes massive lesions or, in the alternative, nodules a physician identifies as complicated pneumoconiosis that would appear as greater than one centimeter on x-ray. *See Gray*, 176 F.3d at 387-91.

Dr. Manning conducted a needle biopsy of a lesion he indicated was “highly suggestive of malignancy.” Director’s Exhibit 14 at 65-67; Employer’s Exhibit 1. The administrative law judge correctly found this biopsy report does not establish complicated pneumoconiosis because Dr. Manning did not diagnose massive lesions or nodules of complicated pneumoconiosis that would appear as greater than one centimeter on x-ray. *See Gray*, 176 F.3d at 387-91; Decision and Order at 8, 21; Employer’s Exhibit 11. Dr. Patel performed an autopsy of the miner. Director’s Exhibit 13. On gross examination he identified “moderate to severe amounts of subpleural anthracotic pigment,” a “0.7 [centimeter] tan nodule,” a number of “pigmented macules” measuring between 0.3 and 1.5 centimeters, “parenchymal fibrosis” measuring between 2.5 and 3 centimeters, and a “matted anthracotic and calcified subcarinal lymph node” measuring 5.0 x 3.0 x 1.5 centimeters. *Id.* On microscopic examination he identified coal workers’ pneumoconiosis macules measuring between 0.3 to 1.5 centimeters. *Id.* The administrative law judge permissibly found Dr. Patel’s autopsy report does not establish complicated pneumoconiosis because the doctor did not diagnose massive lesions or indicate any of the macules or nodules he identified were consistent with complicated pneumoconiosis that would appear as greater than one centimeter in diameter on x-ray. *See Gray*, 176 F.3d at 387-91; Decision and Order at 7-8, 21; Director’s Exhibit 13. Thus we affirm her finding that the biopsy and autopsy evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(b).

The administrative law judge next weighed the CT scans, the medical opinions, and the miner’s treatment records. 20 C.F.R. §718.304(c); Decision and Order at 8-21. Specifically, she considered eleven chest CT scans performed between February 14, 2013, and December 27, 2014, found a number of “interpreting physicians noted the presence of nodules and densities in [m]iner’s lungs,” but correctly determined none of the physicians diagnosed complicated pneumoconiosis. Decision and Order at 15; *see* Director’s Exhibits 14, 15. She noted the record includes the medical opinions of Drs. Rosenberg and Tuteur and correctly concluded neither doctor diagnosed complicated pneumoconiosis. Decision and Order at 18, 22; Director’s Exhibit 16; Employer’s Exhibits 8-10.

She evaluated the miner’s treatment records from Lexington Veterans Affairs Medical Center and Middlesboro Area Regional Hospital. Director’s Exhibits 14, 15. These records include Dr. Doherty’s November 7, 2013 treatment note. Director’s Exhibit 14 at 14. He indicated “[s]erial chest CT scans” of the miner taken in “February, August, and most recently November of 2013 show old granulomatous disease and some areas of fibrosis consistent with his occupational exposure.” *Id.* Although the scans revealed “[s]everal stable small nodules,” Dr. Doherty was concerned with a “1.12 [centimeter] spiculated nodule in the [right lower lung] that enlarged to 1.7” centimeters on a November 1, 2013 CT scan. *Id.* The administrative law judge rationally found this observation alone insufficient to establish complicated pneumoconiosis because the doctor did not indicate

whether the nodule would appear as greater than one centimeter in diameter on x-ray or as a massive lesion by autopsy or biopsy. *See Gray*, 176 F.3d at 387-91; Decision and Order at 21, 22; Director’s Exhibits 14, 15; Employer’s Exhibit 12. Further, she found the treatment records also include “several references to ‘nodular densities,’ ‘mild fibrosis,’ ‘fibrotic changes,’ opacities, and even a medical history of coal workers’ pneumoconiosis,” but rationally found “these records do not address complicated pneumoconiosis, nor do they reflect a reasoned and documented diagnosis of pneumoconiosis because they do not identify the bases for such a diagnosis.” Decision and Order at 21; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Nor did the doctors who diagnosed the densities or nodules indicate they would appear as greater than one centimeter in diameter on x-ray or as a massive lesion by autopsy or biopsy. *See Gray*, 176 F.3d at 387-91; Decision and Order at 21. Thus we affirm her finding that the CT scan, medical opinion, and treatment record evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(c). Because it is supported by substantial evidence, we affirm her finding that claimant cannot invoke the irrebuttable presumption of death due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 22.

The Section 411(c)(4) Presumption — Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge first weighed two pulmonary function studies taken on February 14, 2013, and March 3, 2014, contained in the treatment records. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 23-24. The February 14, 2013 pulmonary function study produced qualifying⁵ values before the administration of a bronchodilator, but non-qualifying values post-bronchodilator. Director’s Exhibit 14 at 32. The March 3,

⁵ A “qualifying” pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A “non-qualifying” study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

2014 study was non-qualifying both before and after the administration of a bronchodilator. Director's Exhibit 14 at 31. The technician who administered the February 14, 2013 study indicated the miner did "not appear [to give] much effort . . . despite much instruction and encouragement." *Id.* at 32. The technician recorded the best results because the study did not "produce acceptable and reproducible spirometry data." *Id.* Dr. Rosenberg reviewed the February 14, 2013 study and stated the flow-volume and volume-time curves did not reveal complete effort. Director's Exhibit 16 at 3. In light of these statements, the administrative law judge permissibly found the miner's poor effort rendered the February 14, 2013 study not reliable and entitled to no weight.⁶ *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 23-24. As the record otherwise contains no other qualifying pulmonary function studies, we affirm her finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 23-24.

The administrative law judge correctly found the record in the survivor's claim contains no arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iii); Decision and Order at 23 n.12.

The administrative law judge next considered the medical opinions of Drs. Tuteur and Rosenberg. 20 C.F.R. §718.204(b)(2)(iv). Dr. Tuteur opined the miner was totally disabled "prior to death." Employer's Exhibit 10 at 5. He indicated this "disability was due to multiple ongoing medical problems, not the least of which [was] recurrent upper gastrointestinal dysfunction with gastroesophageal reflux, difficulty swallowing[,] and recurrent aspiration." *Id.* Further, he noted the miner "developed advance[d] adenocarcinoma of the lung (T3N2) that was resected in January 2014 and over time was associated with diffuse metastases to [the] stomach, bone, and meninges." *Id.* The administrative law judge permissibly found Dr. Tuteur did not adequately address whether the miner was totally disabled by the "lung malignancy," standing alone, or in combination with the other non-lung related conditions. Decision and Order at 25-26; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; 20 C.F.R. §718.204(b)(1). Further, assuming Dr. Tuteur did opine the miner was totally disabled by a "lung malignancy," the administrative law judge permissibly found his opinion not well-reasoned because he "did not explain how the [m]iner's lung malignancy would preclude performance of his coal mine employment." *Id.*

⁶ Although the quality standards apply only to evidence developed for a claim and are inapplicable to treatment records, *J.V.S. [Stowers] v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008), the administrative law judge must still be persuaded a study is "reliable" for "it to form a basis for a finding of fact on an entitlement issue." 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

In addition, Dr. Rosenberg opined the miner was not totally disabled based on the pulmonary function studies. Director's Exhibit 16; Employer's Exhibit 8. The administrative law judge permissibly credited this opinion because it was in accord with her assessment that the pulmonary function studies do not establish total disability. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 25. Consequently, substantial evidence supports the administrative law judge's finding that the medical opinion evidence does not establish the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Finally, weighing the totality of the probative medical evidence, the administrative law judge permissibly found claimant failed to establish the miner was disabled by a pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2); Decision and Order at 26-27. Because claimant failed to establish total disability, we affirm the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.305(b)(1)(iii).

Part 718 Entitlement

In a survivor's claim where no statutory presumptions are invoked, claimant must establish the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(b)(1), (2). A miner's death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of his death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 302-03 (6th Cir. 2010); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003).

The administrative law judge found claimant established the miner had clinical pneumoconiosis, but not legal pneumoconiosis.⁷ Decision and Order at 27-30. With respect to legal pneumoconiosis, the administrative law judge correctly found the CT scan, biopsy, and autopsy evidence all contain diagnoses of lung diseases and impairments, but no physician opined any of these conditions arose out of the miner's coal mine

⁷ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

employment. 20 C.F.R. §718.201(b); Decision and Order at 30; Director’s Exhibits 13-15; Employer’s Exhibit 12. She noted the treatment records included references to the miner’s “respiratory impairments (such as [chronic obstructive pulmonary disease] and bronchitis)” and references to his coal mine employment history, but permissibly found no physician adequately explained how the miner’s coal mine dust exposure caused any respiratory impairments. Decision and Order at 30; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. She also correctly found Drs. Tuteur and Rosenberg did not diagnose legal pneumoconiosis. Decision and Order at 30; Director’s Exhibit 16; Employer’s Exhibits 8-10. Consequently, substantial evidence supports the administrative law judge’s finding that the evidence does not establish the miner had legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

With respect to the cause of the miner’s death, the administrative law judge correctly noted the miner’s death certificate and the opinions of Drs. Rosenberg and Tuteur attribute his death to lung cancer and not pneumoconiosis. Decision and Order at 31-32; Director’s Exhibits 13, 16; Employer’s Exhibits 8-10. Although Dr. Patel’s autopsy report listed coal workers’ pneumoconiosis as a cause of death, the administrative law judge permissibly discredited this evidence because she found it was not adequately explained. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 32; Director’s Exhibit 13. As the record otherwise contains no other evidence addressing the cause of the miner’s death, we affirm her finding that claimant did not establish the miner’s death was due to pneumoconiosis, 20 C.F.R. §718.205(b). As claimant failed to establish the miner’s death was due to pneumoconiosis, a requisite element of entitlement in a survivor’s claim, we affirm the denial of benefits. *See Trumbo v. Director, OWCP*, 17 BLR 1-85, 1-87-88 (1993).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge