

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0293-BLA

JANET M. KEMP)	
(Widow of ERNEST F. KEMP))	
)	
)	
v.)	
)	
BIRD COAL COMPANY)	
)	
and)	
)	
ISLAND CREEK COAL COMPANY)	DATE ISSUED: 06/12/2020
)	
Employer/Carrier-)	
Respondent)	
)	
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 Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits of (2018-BLA-05248) of Administrative Law Judge Natalie A. Appetta rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on January 26, 2017.

The administrative law judge found no evidence the miner had complicated pneumoconiosis and, therefore, claimant could not invoke the irrebuttable presumption the miner's death was due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. She further found claimant established the miner worked twenty-four years in underground coal mine employment but did not prove he was totally disabled. 20 C.F.R. §718.204(b)(2). Thus, claimant was unable to invoke the presumption the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2012). Considering entitlement to benefits without aid of any presumptions, the administrative law judge determined claimant established legal and clinical pneumoconiosis³ arising out of coal mine employment. 20 C.F.R. §§718.202(a)(2), (4), 718.203(b). The administrative law judge found, however, that claimant did not establish the miner's death was due to either forms of pneumoconiosis and denied benefits. 20 C.F.R. §718.205(b).

¹ Claimant is the widow of the miner, who died on November 9, 2016. Director's Exhibit 11. The miner filed one prior claim for benefits that was denied. Director's Exhibit 1. Because the miner was not receiving benefits at the time of his death or "determined to be eligible to receive benefits" on a claim filed prior to his death, claimant is not eligible for derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

² Under Section 411(c)(4) of the Act, claimant is entitled to a presumption the miner's death was due to pneumoconiosis if he 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 was totally disabled by a respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

³ 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). 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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

On appeal, claimant contends the administrative law judge erred in finding she did not establish the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision an order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 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, 362 (1965).

In a survivor's claim where the Section 411(c)(3) and 411(c)(4) presumptions are not invoked,⁵ a claimant must establish 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(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). 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); *Lango v. Director, OWCP*, 104 F.3d 573, 576 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006 (3d Cir. 1989). Failure to establish any one of these requisite elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Dr. Goldblatt conducted the miner's autopsy and diagnosed cardiomegaly, dilated cardiomyopathy, degenerative aortic valve disease, severe atherosclerotic coronary artery disease, severe atherosclerotic coronary artery disease, severe aortic atherosclerosis, pulmonary congestion, edema, bilateral serous pleural effusions, macronodular simple coal workers' pneumoconiosis, and pulmonary emphysema. Director's Exhibit 12. He opined "the mechanism of death is probable cardiomyopathy" and listed "macronodular simple

⁴ The miner's coal mine employment occurred in Pennsylvania. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁵ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish complicated pneumoconiosis or total disability and thus she is unable to invoke either the Section 411(c)(3) or Section 411(c)(4) presumptions. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

coal worker's pneumoconiosis and pulmonary emphysema" as contributing causes of death. *Id.* Dr. Goldblatt testified that the miner would have had impairment of lung function from coal mine dust exposure and that his underlying lung disease contributed to his death. Claimant's Exhibit 1 at 25.

Dr. Caffrey reviewed the miner's autopsy slides and opined the miner had "strictly a cardiac death" with no contribution from simple clinical coal workers' pneumoconiosis or pulmonary emphysema. Employer's Exhibit 6 at 43, 50-51. Dr. Rosenberg reviewed the autopsy report, Dr. Caffrey's report and the miner's medical records. He also opined the miner's death was caused solely by his heart disease with no contribution from simple clinical coal workers' pneumoconiosis or emphysema shown on the autopsy.⁶

The administrative law judge found Dr. Goldblatt's opinion "poorly documented" and unpersuasive. Decision and Order at 20. She gave some weight to Dr. Caffrey's opinion, although she noted he discussed some evidence that was not in the record. *Id.* She found Dr. Rosenberg's opinion reasoned and supported by "the objective testing of record" and the miner's treatment records. *Id.* Consequently, the administrative law judge found claimant failed to establish the miner's death was due to either clinical or legal pneumoconiosis. *Id.* at 21.

Claimant asserts that contrary to the administrative law judge's finding, Dr. Goldblatt's opinion is documented because he performed the miner's autopsy and prepared an extensive report of his pathological findings. Claimant's Brief at 4. Claimant contends the administrative law judge's rejection of Dr. Goldblatt's opinion is not adequately explained under the Administrative Procedure Act (APA).⁷ *Id.* We disagree.

Dr. Goldblatt's opined the miner's simple coal workers' pneumoconiosis and pulmonary emphysema would have caused shortness of breath and a decreased oxygen perfusion in the miner's blood which hastened his death from heart disease. Claimant's Exhibit 1 at 26. Contrary to claimant's APA challenge, the administrative law judge explained she found no objective tests supporting Dr. Goldblatt's opinion the miner had decreased oxygenation from his lung disease prior to his death. Decision and Order at 19-

⁶ The administrative law judge found claimant established legal pneumoconiosis based on Dr. Goldblatt's autopsy finding of pulmonary emphysema caused by smoking and coal mine dust exposure. Decision and Order at 15; Director's Exhibit 12.

⁷ The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

20. She also noted the miner's treatment records do not show he was treated for a respiratory disease and do not include descriptions of respiratory symptoms or complaints by the miner. *Id* at 20.

We consider claimant's arguments regarding Dr. Goldblatt to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding, as within her discretion, that Dr. Goldblatt's opinion is not sufficiently documented or persuasive to establish claimant's burden of proof. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986) (credibility determinations and weighing the evidence is a matter for the administrative law judge).

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element of entitlement.⁸ *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Thus, we affirm the administrative law judge's determination that claimant did not establish the miner's death was due to pneumoconiosis and, therefore, the denial of benefits. Decision and Order at 21; *see Lango*, 104 F.3d at 576; *Lukosevicz*, 888 F.2d at 1006; *Trent*, 11 BLR at 1-27.

⁸ Because we affirm the administrative law judge's discrediting of Dr. Goldblatt's opinion as within her discretion, we need not address claimant's contentions regarding the administrative law judge's weighing of Drs. Caffrey's and Rosenberg's opinions on death causation. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge