



BRB Nos. 19-0222 BLA  
and 19-0223 BLA

CAROL MCCARTY, o/b/o and	)	
Widow of PATRICK L. MCCARTY)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COONEY BROTHERS COAL COMPANY	)	DATE ISSUED: 03/31/2020
	)	
and	)	
	)	
SOMERSET CASUALTY INSURANCE	)	
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 [Miner's] Benefits and Decision and Order Denying [Survivor's] Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying [Miner's] Benefits and the Decision and Order Denying [Survivor's] Benefits (2017-BLA-05683 and 2017-BLA-06150) of Administrative Law Judge Drew A. Swank filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on May 2, 2016, and a survivor's claim filed on March 2, 2017. The Board consolidated the appeals for purposes of decision only.

The administrative law judge determined the miner only had 12.87 years of coal mine employment. Thus, the administrative law judge found claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis in the miner's claim or the rebuttable presumption of death due to pneumoconiosis in the survivor's claim pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).<sup>2</sup>

Addressing whether claimant established entitlement without the Section 411(c)(3)<sup>3</sup> or Section 411(c)(4) presumptions, the administrative law judge found the miner established legal pneumoconiosis but not clinical pneumoconiosis.<sup>4</sup> 20 C.F.R.

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<sup>1</sup> Claimant is the widow of the miner, who died on January 20, 2017, while his miner's claim was pending. MC Director's Exhibit 12. She is pursuing the miner's claim on behalf of his estate, in addition to her survivor's claim.

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis, or that his death was due to pneumoconiosis, in cases where the claimant establishes fifteen or more years in underground coal mine employment or comparable 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.

<sup>3</sup> Because there is no evidence of complicated pneumoconiosis in the record, claimant could not invoke the Section 411(c)(3) presumption in either claim. 30 U.S.C. §921(c)(3) (2012).

<sup>4</sup> "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial

§§718.202(a), 718.203(b). He further found the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), but did not establish total disability causation at 20 C.F.R. §718.204(c) and denied benefits in the miner's claim. In the survivor's claim, the administrative law judge found claimant failed to establish the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 and denied benefits.

On appeal, claimant challenges the administrative law judge's determination in the miner's claim that the miner was not totally disabled due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has not filed a response brief.<sup>5</sup>

The Board's scope of review is defined by statute. The administrative law judge's decisions and orders must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.<sup>6</sup> 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 Miner's Claim**

To establish entitlement to benefits under 20 C.F.R. Part 718, a claimant must prove that he has pneumoconiosis; his pneumoconiosis arose out of coal mine employment; he has a totally disabling respiratory or pulmonary impairment; and his totally disabling impairment is due to pneumoconiosis. 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 an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v.*

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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).

<sup>5</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had 12.87 years of coal mine employment and that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a) and total respiratory disability at 20 C.F.R. §718.204(b)(2). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Miner's Claim (MC) Decision and Order at 4, 13, 15-18.

<sup>6</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's coal mine employment occurred in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 3.

*Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

### **Total Disability Causation**

Claimant argues the administrative law judge erred in finding the miner's total disability was not due to pneumoconiosis. *See* 20 C.F.R. §718.204(c). To establish this element, claimant must prove that pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). The administrative law judge considered Dr. Zlupko's opinion, finding the miner's coal dust exposure contributed to his total disability, and Dr. Fino's opinion, which did not specifically address disability causation. MC Decision and Order at 18-20; MC Director's Exhibit 14; MC Employer's Exhibit 1. The administrative law judge discredited Dr. Zlupko's opinion because it was inadequately reasoned and documented and found Dr. Fino's opinion did not aid claimant in meeting her burden. MC Decision and Order at 19. He therefore concluded claimant failed to establish disability causation. *Id.* at 19-20; *see* 20 C.F.R. §718.204(c).

Contrary to claimant's contention, the administrative law judge did not discredit Dr. Zlupko's opinion based on the application of an incorrect standard,<sup>7</sup> but instead provided valid reasons for finding his diagnoses inadequately reasoned. *See* Claimant's Brief at 3-4; MC Decision and Order at 18-20. The administrative law judge acknowledged Dr. Zlupko listed coal dust exposure as the cause of the miner's obstructive and restrictive

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<sup>7</sup> Contrary to claimant's argument, the administrative law judge accurately stated claimant "must prove that the miner's pneumoconiosis is a 'substantially contributing cause' of his total disability." 20 C.F.R. §718.204(c)(1); MC Decision and Order at 18. Further, he noted the regulations define "substantially contributing cause" as:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1); MC Decision and Order at 18.

impairments<sup>8</sup> but permissibly found his opinion was not well documented or well-reasoned because he did not provide any explanation for his conclusion. MC Decision and Order at 19; *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); MC Director's Exhibit 14. Thus, the administrative law judge reasonably determined it was not sufficient to establish total disability causation. MC Decision and Order at 19; *see Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734 (3d Cir. 1989).

In addition, contrary to claimant's argument, we also affirm the administrative law judge's finding that "Doctor Fino's opinions . . . do nothing to assist Claimant in proving that the miner's pneumoconiosis caused or contributed to his total pulmonary disability" because it is rational and supported by substantial evidence. MC Decision and Order at 19; *Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997); Claimant's Brief at 4-5. Dr. Fino *explicitly* attributed claimant's COPD entirely to smoking and *only assumed* legal pneumoconiosis was present. MC Employer's Exhibit 1. As the administrative law judge permissibly found, "the undersigned cannot infer a relationship between the miner's legal coal workers' pneumoconiosis and his total disability absent credible evidence establishing such a relationship." MC Decision and Order at 19; *Soubik*, 366 F.3d at 234; *Mancia*, 130 F.3d at 584.

We affirm, therefore, the administrative law judge's determination claimant failed to establish total disability due to pneumoconiosis. 20 C.F.R. §718.204(c); *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); MC Decision and Order at 19-20. As claimant has failed to prove total disability causation, an essential element of entitlement under 20 C.F.R. Part 718, an award of benefits is precluded. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

### **Survivor's Claim**

Because we have affirmed the denial of benefits in the miner's claim, claimant is not derivatively entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C.

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<sup>8</sup> Dr. Zlupko examined the miner on June 22, 2016, and diagnosed clinical and legal pneumoconiosis and a severe functional respiratory impairment due to coal dust exposure. MC Director's Exhibit 14.

§932(l) (2012).<sup>9</sup> Claimant did not raise any specific allegations of error concerning the administrative law judge's determination that the miner's death was not due to pneumoconiosis under 20 C.F.R. §718.205(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Survivor's Claim Decision and Order at 13-16. Thus, we affirm the denial of benefits.

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<sup>9</sup> Under Section 422(l), the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012).

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

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge