



BRB No. 19-0425 BLA

KATHY D. WHITEHEAD)	
(Widow of RICKY R. WHITEHEAD))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PERRY COUNTY COAL CORPORATION)	DATE ISSUED: 09/18/2020
)	
Employer-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 in Survivor’s Claim of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for Claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer.¹

¹ After filing its response brief in this case, Employer’s counsel filed a Motion to Withdraw as Counsel of Record, informing the Benefits Review Board that due to Cambrian Coal Group’s Chapter 11 Bankruptcy, Employer, as one of its affiliates, no longer has sufficient assets to satisfy this claim. The Black Lung Disability Trust Fund advised the Board it accepts liability for this claim and the payment of benefits, if any. Director’s Response Brief at 1 n.1.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Peter B. Silvain, Jr.'s Decision and Order Denying Benefits in Survivor's Claim (2017-BLA-05521) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on January 4, 2016.²

The administrative law judge credited the Miner with 21.76 years of underground coal mine employment, but found Claimant did not invoke the Section 411(c)(4) presumption of death due to pneumoconiosis because she failed to establish he had a totally disabling respiratory or pulmonary impairment at the time of his death.³ Evaluating whether Claimant established entitlement to benefits without the presumption, the administrative law judge found she did not establish the Miner's death was due to pneumoconiosis and denied benefits.

On appeal, Claimant contends the administrative law judge erred in finding the Miner was not totally disabled and, therefore, in finding she did not invoke the Section 411(c)(4) presumption. Claimant also contends the administrative law judge erred in finding the Miner's death was not due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing the case should be

² Claimant is the widow of the Miner, who died on May 12, 2015. Director's Exhibit 13. Administrative Law Judge Daniel J. Roketenetz denied the Miner's claim on July 20, 2004. Director's Exhibit 1. On May 20, 2005, the Board affirmed the denial of benefits. *Whitehead v. Shamrock Coal Co., Inc.*, BRB No. 04-0885 (May 20, 2005) (unpub.). Thus, Claimant is not eligible for automatic survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he 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) (2018); 20 C.F.R. §718.305.

remanded because the administrative law judge did not consider all of the Miner's relevant treatment records in finding he was not totally disabled.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and 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 (1965).

Invocation of 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. 20 C.F.R. §718.204(b)(1). Total disability may be established by qualifying pulmonary function studies or arterial blood gas studies,⁵ 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 found the pulmonary function studies do not support a finding of total disability⁶ and there is no evidence of cor pulmonale with right-sided

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 5; Hearing Transcript at 22.

⁵ A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

⁶ The administrative law judge did not address the results of a September 28, 2012 pulmonary function study contained in the Miner's treatment records from St. Joseph-London Hospital. Director's Exhibit 16. Any error is harmless, however, as the study was non-qualifying. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

congestive heart failure.⁷ 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 26-27. He also determined there were no blood gas studies of record. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 26. He noted “the only treatment records of record are those contained in [Director’s Exhibits 25, 26, and 27]” because they were the only ones “designated” as such. *Id.* at 10; *see* Director’s Exhibits 25-27. Considering these treatment records in conjunction with the medical opinions, he found they do not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 27. Weighing the evidence as a whole, the administrative law judge found Claimant did not establish the miner was totally disabled at the time of his death. *Id.* at 27.

Claimant and the Director contend that the administrative law judge failed to properly consider the Miner’s hospital and treatment records on the issue of total disability. Claimant’s Brief at 2; Director’s Brief at 3-4. We agree.

The administrative law judge correctly noted none of the Miner’s treating physicians opined he was totally disabled from a respiratory or pulmonary standpoint. Decision and Order at 27. An administrative law judge may nevertheless find a miner was totally disabled if the hospital and treatment records provide sufficient information from which to conclude he was unable from a respiratory standpoint to perform his usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *Poole v. Freeman Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board*, 758 F.2d 1532, 1534 (11th Cir. 1985) (a physician need not phrase his or her opinion specifically in terms of “total disability”); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

Further, all hospital and treatment records relating to a miner’s respiratory or pulmonary condition, including clinical studies performed during hospitalization or treatment, are admissible into evidence and need not be specifically designated by the parties. *J.V.S. [Stowers] v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78 (2008) (noting 20 C.F.R. §725.414(a)(4) requires the admission of any medical record relating to the miner’s respiratory or pulmonary condition without regard to the limits set forth elsewhere in 20 C.F.R. §725.414); *see* Director’s Brief at 3. As the Director generally asserts, Director’s Exhibits 15-21 also contain treatment records potentially relevant to the issue of total disability.⁸ Director’s Brief at 3; *see* Director’s Exhibits 15-21. Moreover,

⁷ We affirm, as unchallenged, the administrative law judge’s finding that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25-27.

⁸ The Director specifically states the hospital records from St. Joseph-London Hospital “describe the [M]iner’s serious respiratory difficulties in the year before his

the St. Joseph-London Hospital records include a March 15, 2014 qualifying blood gas study, which the administrative law judge did not consider when concluding Claimant did not establish total disability based on the blood gas study evidence. Director’s Exhibit 16; *see* Decision and Order at 26.

Because the administrative law judge did not fully consider these records relevant to the issue of total disability, we vacate his findings at 20 C.F.R. §718.204(b)(2)(ii), (iv), and his overall conclusion that the preponderance of the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2). *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We therefore vacate his determination that Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits, and remand the case for further consideration. 30 U.S.C. §921(c)(4).

Entitlement under 20 C.F.R. Part 718 – Death Due to Pneumoconiosis

If Claimant is unable to invoke the Section 411(c)(4) presumption, she must establish by a preponderance of the evidence that the Miner’s death was due to pneumoconiosis.⁹ *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); *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).

We reject Claimant’s general assertion that the administrative law judge “did not . . . articulate [a] sufficient reason to decline [Dr. Weakley-Jones’s] opinion as to pneumoconiosis being the cause of death.” Claimant’s Brief at 2. The Board must limit its review to contentions of error that the parties specifically raise. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf*

death” and include a pulmonary function study revealing a severe reduction in diffusion and significant worsening airflow, a CT scan revealing emphysema and bilateral lower lobe airspace disease, a qualifying blood gas study, and diagnoses of pneumonia and chronic obstructive pulmonary disease. Director’s Brief at 3-4; *see* Director’s Exhibit 16.

⁹ The administrative law judge found the miner had legal pneumoconiosis and accepted Employer’s concession that he had clinical pneumoconiosis. Decision and Order at 3 n.12, 32; Employer’s Post-Hearing Brief at 2.

v. Director, OWCP, 10 BLR 1-119, 1-120-21 (1987). Because Claimant does not identify any specific error with regard to the administrative law judge's determination that Dr. Weakley-Jones's opinion is conclusory and insufficient to establish pneumoconiosis was a substantially contributing cause of the Miner's death, we affirm his finding.¹⁰ Decision and Order at 34.

As Claimant raises no additional allegations of error, we affirm the administrative law judge's finding that she did not satisfy her burden to prove the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b); *see Shuff*, 967 F.2d at 979-80; *Trumbo*, 17 BLR at 1-87-88.

Remand Instructions

Because benefits are precluded under 20 C.F.R. §718.205(b), the issue on remand is whether Claimant is entitled to benefits under Section 411(c)(4). The administrative law judge should address whether the March 15, 2014 blood gas study contained in the Miner's hospitalization and treatment records is sufficiently reliable to support a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). He must also address whether the hospital and treatment records, when considered in conjunction with any other relevant evidence and the exertional requirements of the Miner's usual coal mine work, establishes that he was totally disabled at the time of his death. The administrative law judge must then weigh the supporting and contrary evidence together and determine whether Claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2). If Claimant establishes total disability and therefore invokes the Section 411(c)(4) presumption, the administrative law judge must then consider whether the Director has rebutted it. *See* 20 C.F.R. §718.305(d)(2). If the administrative law judge finds the evidence does not establish total disability, however, he may reinstate the denial of benefits. In rendering his findings of fact and conclusions of law, the administrative law

¹⁰ In addition, there is no merit to Claimant's general assertion that "the administrative law judge did not discuss the autopsy report by Dr. Weakley-Jones," which Claimant designated as a medical opinion. Claimant's Brief at 2. The administrative law judge reviewed Dr. Weakley-Jones's findings and considered them relative to the issues of total disability, pneumoconiosis, and death causation. Decision and Order at 16-17, 27, 30-32, 34-35. He accurately found Dr. Weakley-Jones did not provide an opinion as to the extent of the Miner's respiratory impairment prior to his death, credited her opinion on the existence of pneumoconiosis, but discredited it on the cause of the Miner's death. *Id.*; *see* Director's Exhibit 14.

judge must set forth the reasons for his findings consistent with the Administrative Procedure Act.¹¹ *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

¹¹ 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).

Accordingly, the administrative law judge's Decision and Order Denying Benefits in Survivor's Claim is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge