

BRB No. 11-0490 BLA

SUSAN CHANDLER, Surviving Spouse)
of CHARLES CHANDLER)
)
 Claimant-Petitioner)
)
 v.)
)
 HOBET MINING LLC) DATE ISSUED: 04/10/2012
)
 and)
)
 ARCH COAL, INCORPORATED)
)
 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 on Remand Denying Survivor Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Susan Chandler, Richwood, West Virginia, *pro se*.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand Denying Survivor Benefits (2007-BLA-5986) of Administrative Law Judge Richard A. Morgan rendered on a claim filed pursuant to the provisions of the Black

Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act). Claimant filed her survivor's claim on June 13, 2006.¹ Director's Exhibit 2.

When this case was initially before the administrative law judge, the administrative law judge credited the parties' stipulation that the miner had at least twenty-one years of coal mine employment. The administrative law judge found that neither the existence of pneumoconiosis nor death due to pneumoconiosis was established pursuant to 20 C.F.R. §§718.202(a), 718.205(c), and, therefore, denied benefits on May 6, 2009. Claimant appealed. While the case was pending before the Board, the Act was amended to revive Section 411(c)(4) of the Act, which provides, in pertinent part, a presumption that the miner's death was due to pneumoconiosis.² Under Section 411(c)(4), if the miner had at least fifteen years of qualifying coal mine employment, and the evidence establishes that the miner had a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's death was not due to pneumoconiosis. 30 U.S.C. §921(c)(4). In light of the potential applicability of the revived presumption, the Board vacated the administrative law judge's denial of benefits pursuant to 20 C.F.R. Part 718, and remanded the case for consideration under Section 411(c)(4). The Board further directed the administrative law judge to allow the parties an opportunity to open the record, submit evidence, or substitute evidence to address the change in law. *Chandler v. Hobet Mining LLC*, BRB No. 09-0660 BLA (July 23, 2010) (unpub.).

On remand, the administrative law judge considered the case under Section 411(c)(4) and found that claimant was not entitled to the presumption because she did not establish that the miner had at least fifteen years of "qualifying," namely, underground or substantially similar, coal mine employment and the evidence did not establish that the miner had a totally disabling respiratory impairment pursuant to Section 718.204(b). Turning to 20 C.F.R. Part 718, the administrative law judge found that the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

¹ The Board affirmed the denial of the miner's August 15, 2001 claim on July 27, 2006. *Chandler v. Hobet Mining, Inc.*, BRB No. 06-0175 BLA (July 27, 2006)(unpub.). The miner's claim was denied by Administrative Law Judge Daniel L. Leland because he failed to establish the existence of pneumoconiosis or total respiratory disability.

² On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted.

On appeal, claimant contends generally that the administrative law judge erred in denying benefits, by finding that the evidence failed to establish that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in response to the appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is rational, supported by substantial evidence, and consistent with applicable law. In determining that total pulmonary or respiratory disability was not established at Section 718.204(b), the administrative law judge properly found that the miner's pulmonary function and blood gas studies did not establish total disability because they were non-qualifying. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order on Remand at 10. The administrative law judge also properly found that total respiratory disability was not established pursuant to Section 718.204(b)(2)(iii), as there was no evidence that the miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

Turning to the medical opinion evidence, the administrative law judge properly found that it did not establish total *respiratory* or *pulmonary* disability pursuant to Section 718.204(b)(2)(iv), because none of the doctors found that the miner had a totally disabling *respiratory* or *pulmonary* impairment. See *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Gee v. W.G. Moore and Sons*, 9 BLR 104 (1986); Decision and Order at 8. Additionally, the administrative law judge properly found that the opinions of Drs. Hippensteel, Rosenberg, Oesterling and Caffrey were the most probative opinions of record, and entitled to the greatest weight, based on their various Board-certifications and expertise.⁴ *Milburn Colliery Co. v. Hicks*, 138 F.3d 524,

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

⁴ The administrative law judge credited the opinion of Dr. Hippensteel, who is Board-certified in critical care medicine and internal medicine with a sub-specialty in

21 BLR 2-323 (4th Cir. 1998); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order on Remand at 7.

In conclusion, the administrative law judge properly found that the evidence failed to establish that the miner was totally disabled pursuant to Section 718.204(b). As the administrative law judge properly found that the evidence failed to establish total *respiratory* or *pulmonary* disability, he properly found that claimant was not entitled to invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.⁵ 30 U.S.C. §921(c)(4). That finding is, accordingly, affirmed.

pulmonary disease, and the opinion of Dr. Rosenberg, who is Board-certified in occupational medicine and internal medicine with a sub-specialty in pulmonary disease, because they opined that the miner did not have a disabling pulmonary impairment. Employer's Exhibits 2, 11. Additionally, the administrative law judge credited the opinion of Dr. Caffrey, who is Board-certified in anatomical and clinical pathology, because he found that there was no relationship between the miner's coal dust exposure and his coronary artery disease and subsequent myocardial infarction, and who found that the minimal amount of coal dust in the miner's lungs did not cause respiratory or pulmonary disability. Decision and Order on Remand at 7; Employer's Exhibit 7. Similarly, the administrative law judge credited the opinion of Dr. Oesterling, who is Board-certified in anatomical and clinical pathology, as well as nuclear medicine, who found that the "minimal" anthracotic pigmentation in the lung pleura and lymph nodes would not have altered the miner's lung function, and found that the miner had "significant heart disease." Decision and Order on Remand at 7; Employer's Exhibit 7.

Regarding the opinion of Dr. Shumate, who was the miner's treating physician, and found that pneumoconiosis and chronic obstructive pulmonary disease "did place more strain on [the miner's] heart" and was "at least partially responsible for the miner's overall health[.]" Decision and Order on Remand at 6; Director's Exhibit 18, the administrative law judge properly accorded Dr. Shumate's opinion little weight because he relied on another doctor's diagnosis of pneumoconiosis and respiratory disease, which was not supported by underlying records or testing. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1986)(en banc).

⁵ Because the administrative law judge properly found that the miner was not totally disabled, a finding necessary to establish invocation of the Section 411(c)(4) presumption of the Act, 30 U.S.C. §921(c)(4), we need not address the administrative law judge's finding that claimant also failed to establish that the miner had the requisite fifteen years of "qualifying" coal mine employment to invoke the presumption. *See* 30 U.S.C. §921(c)(4); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge next considered whether claimant established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).⁶ In finding that the evidence did not establish death due to pneumoconiosis, the administrative law judge properly credited the opinions of both Dr. Oesterling and Dr. Caffrey, who found that the miner died from a myocardial infarction due to severe cardiovascular disease and specifically stated that the miner's "death was unrelated to his coal mine employment or coal dust exposure," Decision and Order on Remand at 9, and the opinions of Drs. Hippensteel and Rosenberg, who found that the miner's death was completely unrelated to his coal mine employment or coal dust exposure, based on their superior credentials. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Dillon*, 11 BLR at 1-114. The administrative law judge properly accorded little weight to the opinion of Dr. Shumate, "that pneumoconiosis placed more strain on the miner's heart" because it was refuted by the opinion of Dr. Rosenberg, that there was simply no evidence that "impaired lung function was secondarily impairing [the miner's] cardiac function." See *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 9. Based on this evidence, therefore, the administrative law judge properly found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The administrative law judge's finding pursuant to Section 718.205(c) is, therefore, affirmed.

⁶ In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see also *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge