BRB Nos. 13-0542 BLA
and 13-0543 BLA

JANICE L. TAYLOR (Widow of and on behalf of JOHN R. TAYLOR)	)	
Claimant-Petitioner	)	
v.	)	
AL HAMILTON CONTRACTING COMPANY	)	DATE ISSUED: 04/29/2014
and	)	
OLD REPUBLIC GENERAL INSURANCE CORPORATION	)	
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 Benefits in Miner's and Survivor's Claims of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

James R. Schmitt (Schmitt & Coletta), Carnegie, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand Denying Benefits in Miner's and Survivor's Claims (2009-BLA-5046 and 2009-BLA-5047) of Administrative Law Judge Richard A. Morgan, rendered pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time, and we incorporate the procedural history set forth in *Taylor v. Al Hamilton Contracting Co.*, BRB Nos. 11-0641 and 11-0869 BLA (May 11, 2011) (unpub.). The Board previously vacated Administrative Law Judge Michael P. Lesniak's award of benefits in the miner's and the survivor's claims because Judge Lesniak failed to properly address employer's request to file a supplemental controversion and its Motion to Remand the case to the district director. *Id.*

On remand, Judge Lesniak reopened the record to allow the parties to submit additional evidence relevant to amended Section 411(c)(4), 30 U.S.C. §921(c)(4). Judge Lesniak subsequently retired and the case was assigned to Administrative Law Judge Richard A. Morgan (the administrative law judge). On August 8, 2013, the administrative law judge issued a Decision and Order on Remand, which is the subject of the current appeal. Based on the filing date of the miner's claim, the administrative law judge considered claimant's entitlement under amended Section 411(c)(4) of the Act.[2] The administrative law judge credited the miner with eighteen years of surface coal mine employment, based on a stipulation of the parties, and further determined that the miner worked in dust conditions substantially similar to those of an underground coal mine. However, the administrative law judge also found that the evidence was insufficient to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment. Accordingly, the administrative law judge concluded that claimant did not invoke the amended Section 411(c)(4) presumption, and that an award of benefits in the miner's claim was precluded under 20 C.F.R. Part 718, for failure to establish total disability. With respect to the survivor's claim, the administrative law judge determined

[1] Claimant is the widow of the miner, John R. Taylor, who filed a claim for benefits on August 25, 2005. Living Miner's Claim (LMC) Director's Exhibit 2. While his case was pending, the miner died on June 17, 2007. Claimant filed her survivor's claim on November 16, 2007. Survivor's Claim Director's Exhibits, 2, 11. The claims were consolidated by the district director. LMC Director's Exhibit 40.

[2] Amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. *See* 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).[3] Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant contends that the administrative law judge erred in classifying the miner's job as an equipment operator as "light labor." In addition, claimant generally contends that "the findings of claimant's and employer's doctors would have prevented [claimant] from working as an equipment operator from his lung condition." Claimant's Brief at 4. Employer/carrier (employer) responds, urging affirmance 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. The administrative law judge's Decision and Order must be affirmed 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).

I. The Miner's Claim – Total Disability

A miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability shall be established by pulmonary function studies showing values equal to, or less than, those in Appendix B; blood gas studies showing values equal to, or less than, those set forth in Appendix C; evidence establishing cor pulmonale with right-sided congestive heart failure; or if a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge found that the five pulmonary function studies of record, dated October 17, 2005, March 20, 2006, August 1, 2006, February 6, 2007, and May 31, 2007, were non-qualifying for total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 9-10. He noted that two resting arterial blood gas studies were

[3] The Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The language previously found at 20 C.F.R. §718.205(c) is now set forth in 20 C.F.R. §718.205(b). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[4] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as the miner's last coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); LMC Director's Exhibit 3.

non-qualifying, but that the miner's exercise arterial blood gas study dated, October 17, 2005, was qualifying for total disability. *Id*. at 10. The administrative law judge observed that, "it is appropriate to give more weight to an exercise study, which may be more probative of a miner's impairment if his job requires significant physical exertion." *Id*.

In considering the weight to accord to the qualifying exercise arterial blood gas study, the administrative law judge considered the record evidence regarding the physical demands of claimant's last coal mining job as an equipment operator. Decision and Order at 10-11. The administrative law judge stated:

> On his CM-913 form, [the] miner recorded that his last coal mining position was that of an equipment operator. He stated that this job required running the bulldozer, backfilling, tarring coal, and cleaning the top-surface. He also noted that this job required sitting for 8 hours a day and standing for 1; he did not report any lifting or carrying requirements. The record does not contain further discussion regarding the exertional requirements of the miner's last job. As such, I find that [the] miner's last coal mining position required only light labor.

Id. at 11. The administrative law judge concluded that the arterial blood gas study results did not establish total disability "by a preponderance of the evidence, considering that the resting tests were non-qualifying, and that the miner's last coal mining position did not require heavy exertion." *Id*. at 10.

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that the opinions of Drs. Zlupko and Hale, that the miner was totally disabled, were insufficient to establish total disability because it was unclear if Dr. Zlupko understood the physical requirements of claimant's job and Dr. Hale's diagnosis was inconsistent with his interpretation of the objective tests and was poorly reasoned. Decision and Order at 11. The administrative law judge also noted that the opinions of Drs. Goodman and Castle did not assist claimant in establishing total disability, as they opined that the miner was not totally disabled by a respiratory or pulmonary impairment. *Id*. at 12. Weighing all of the evidence together, the administrative law judge found that claimant failed to establish that the miner was totally disabled and did not invoke the amended Section 411 (c)(4) presumption. *Id*.

Claimant alleges that the miner was required to "climb, crawl, bend and lift" in his job as an equipment operator. Claimant's Brief at 4. She states that the miner was "subject to vibration, banging, driving the machine on uneven ground, being thrown around and [was] required to clean and maintain equipment." *Id*. Thus, claimant asserts that the administrative law judge erred in classifying the miner's job as "light labor."

It is claimant's burden to establish the exertional requirements of the miner's usual coal mine employment, which then provides a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988*); Cregger v. U. S. Steel Corp.,* 6 BLR 1-1219 (1984). Claimant's brief does not cite to any evidence contained in the record to support her argument regarding the physical requirements of the miner's job. Further, claimant alleges no specific error committed by the administrative law judge in evaluating *the record evidence* and determining that the physical demands of the miner's last coal mine employment were light labor. The Board must limit its review to contentions of error that are specifically raised by the parties.[5] *See* 20 C.F.R. §§802.211, 802.301; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that "the miner's last coal mining job required only light labor." Decision and Order at 11. Thus, we affirm the administrative law judge's determination to give less weight to the exercise arterial blood gas study and his finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). In addition, while claimant generally contends that the medical opinion evidence is sufficient to establish total disability, she fails to identify any specific error committed by the administrative law judge in rendering his credibility determinations. *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. We therefore affirm the administrative law judge's findings that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] Because claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant is unable to invoke the presumption at amended Section 411(c)(4). Furthermore, as the evidence does

[5] On August 26, 2013, claimant wrote a letter to the Board, requesting review of the denial of benefits in both claims. Claimant's attorney also filed a notice of appeal with the Board on September 6, 2013. The notice of appeal was acknowledged by the Board and a briefing schedule was set. Because claimant is represented by counsel and is not appearing *pro se*, the Board's review is limited to the arguments raised in the petition for review and brief filed by claimant's counsel, and the response brief filed by employer. *See* 20 C.F.R. §§802.211, 802.212, 802.220.

[6] We affirm as unchallenged on appeal, the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because there is no evidence of record that claimant has cor pulmonale with right-sided congestive heart failure, claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

not establish total disability, we affirm the denial of benefits in the miner's claim pursuant to 20 C.F.R. Part 718.[7] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

II. The Survivor's Claim

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that 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, 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Death will be considered due to pneumoconiosis where pneumoconiosis was the cause of the miner's death; where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or the death was caused by complications of pneumoconiosis; or where the presumption set forth at 20 C.F.R. §§718.304 or 718.305 is applicable. 20 C.F.R. §718.205(b). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Because claimant does not raise any error with regard to the administrative law judge's determination that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), we affirm the denial of benefits in the survivor's claim.[8] *See Sarf*, 10 BLR 1-120; *Fish*, 6 BLR 1-109.

[7] Because claimant was unable to invoke the amended Section 411(c)(4) presumption in the miner's claim, she was required to prove that miner had pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that the miner was totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Because claimant failed to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, an award of benefits in the miner's claim is precluded.

[8] Amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), provides that a 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 that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §932(*l*), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305). Because the miner was not awarded benefits, based on his claim, claimant is not eligible for benefits pursuant to amended Section 422(*l*).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits in Miner's and Survivor's Claims is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge