



BRB No. 17-0336 BLA

HAZEL FAYE HOSKINS)
(Widow of HOBART HOSKINS))
)
 Claimant-Petitioner)

v.)

APPOLO FUELS, INCORPORATED)
)
 and)

DATE ISSUED: 04/16/2018

NATIONAL UNION FIRE/CHARTIS)
)
 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 Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Hazel Faye Hoskins, Kettle Island, Kentucky.

H. Brett Stonecipher (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2015-BLA-05683) of Administrative Law Judge Adele Higgins Odegard rendered on a claim 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 survivor's claim filed on August 1, 2014. Director's Exhibit 3.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),² the administrative law judge credited the miner with thirty years of qualifying coal mine employment, but found that the evidence did not establish that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Therefore, the administrative law judge found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge also found that claimant could not invoke the irrebuttable presumption of total disability or death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). 20 C.F.R. §718.304.

Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(3) or Section 411(c)(4) presumption, the administrative law judge found that the medical opinion evidence did not establish the existence of legal

¹ Claimant is the widow of the miner, who died on May 23, 2014. Director's Exhibit 8. The miner filed a claim for benefits on October 14, 2009, which was denied by the district director on April 22, 2010, for failure to establish any of the elements of entitlement. The miner took no further action on that claim. Director's Exhibit 1 at 3-4, 70-71. Therefore, claimant is not entitled to benefits under Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §932(l).

² In a survivor's claim, Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge found, however, that the evidence established that the miner suffered from clinical pneumoconiosis,⁴ arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found, however, that the evidence did not establish that the miner's death was due to clinical pneumoconiosis. 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law.⁵ 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 Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis, or that a miner was totally disabled due to pneumoconiosis at the time of death, if the miner suffered from complicated pneumoconiosis. The administrative law judge accurately noted that the record contains no evidence of

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).

⁴ "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).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Director's Exhibit 1.

complicated pneumoconiosis. Decision and Order at 20. We therefore affirm the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption pursuant to 20 C.F.R. §718.304.

The Section 411(c)(4) Presumption

Under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and its implementing regulation, 20 C.F.R. §718.305, there is a rebuttable presumption that a miner's death was due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established.

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 of 20 C.F.R. Part 718; blood gas studies showing values equal to, or less than, those set forth in Appendix C of 20 C.F.R. Part 718; 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 prevented the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(i)-(iv). If total disability has been established under one or more subsections, the administrative law judge must weigh the evidence supportive of a finding of total disability against the contrary probative evidence to determine whether total disability has been established by a preponderance of the evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987).

The administrative law judge accurately found that the sole pulmonary function study of record is non-qualifying,⁶ and the record contains no blood gas studies and no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 10-11. We therefore affirm the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

The administrative law judge next considered the medical opinions of Drs. Dahhan and Broudy, pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that neither opinion is sufficient to establish total disability. Decision and Order at 14-15. Dr. Dahhan opined that before the miner's colon cancer spread to his lungs, he had no evidence of any functional pulmonary impairment; Dr. Dahhan did not address whether the

⁶ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

miner suffered from a disabling respiratory or pulmonary impairment after his cancer metastasized to his lungs.⁷ Employer's Exhibit 2 at 22-23.

Dr. Broudy initially stated that the miner "clearly . . . had respiratory impairment" because he died with pulmonary diseases such as bronchopneumonia and metastatic cancer to the lungs. Employer's Exhibit 3 at 2. After reviewing the treatment records from the miner's terminal hospitalization, however, Dr. Broudy opined that there was no indication that the miner developed a totally disabling respiratory impairment.⁸ Employer's Exhibit 4 at 18. The administrative law judge permissibly credited Dr. Broudy's opinion because it was supported by the available objective data, including the sole pulmonary function study of record. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 11.

Because there are no other medical opinions addressing whether the miner was totally disabled from a respiratory or pulmonary standpoint, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Weighing all of the relevant evidence together, the administrative law judge rationally determined that claimant failed to establish total disability under 20 C.F.R.

⁷ Rather, Dr. Dahhan stated that the miner did not have a disabling respiratory impairment related to coal dust. Employer's Exhibit 2 at 23.

⁸ The miner's hospitalization and treatment records from Pikeville Community Hospital document chronic obstructive pulmonary disease (COPD), pneumonia, bronchitic changes, pulmonary fibrosis, "pulmonary disease," and a history of "black lung" along with chronic severe kidney disease, heme disease, cardiac disease, gastrointestinal disease, endocrine disease and widely metastatic colon cancer, with lesions in the colon, liver, and kidneys. Decision and Order at 22-24; Director's Exhibit 11. On May 13, 2014, the miner was admitted to the hospital with "acute on chronic kidney disease." Decision and Order at 23; Director's Exhibit 11 at 1-2. His lungs and airways were "clear with diminished airflow and normal effort" and his pulmonary disease was "stable." *Id.* The miner remained in the hospital until May 23, 2014 when he died under palliative care. Decision and Order at 24; Director's Exhibit 11 at 5-6. In the final summary Dr. Morgan, his treating physician, noted that in addition to his many other diagnoses, the miner had "chronic disease with COPD, chronic hypoxemic respiratory failure and pulmonary fibrosis for which he had some intermittent moments of aspiration, tracheobronchitis and[,] as his mentation declined, his airway was compromised." Decision and Order at 24; *Id.* at 6.

§718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 15. Based on our affirmance of this finding, we further affirm the administrative law judge's determination that claimant could not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.305(b), (c)(2); Decision and Order at 15.

Pneumoconiosis as a Substantially Contributing Cause of Death

Where the Section 411(c)(3) and 411(c)(4) statutory presumptions are not invoked, claimant must affirmatively establish that pneumoconiosis was a substantially contributing cause of the miner's death. *See* 20 C.F.R. §§718.1, 718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause of death "if it hastens the miner's death." 20 C.F.R. §718.205(b)(6). Pneumoconiosis may be found to have hastened a miner's death, however, only if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). A physician who opines that pneumoconiosis hastened death through a "specifically defined process" must explain how and why it did so. *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04, 24 BLR 2-257, 2-266 (6th Cir. 2010).

The administrative law judge considered the miner's death certificate, the autopsy report, and the medical opinions of Drs. Dahhan and Broudy. The administrative law judge noted that only the death certificate, completed by Dr. Morgan, the miner's treating physician, attributed the miner's death to pneumoconiosis.⁹ Decision and Order at 27-28. Dr. Morgan listed colon cancer as the immediate cause of the miner's death, and listed bronchopneumonia and coal workers' pneumoconiosis as contributing causes of death.¹⁰

⁹ Dr. Nichols, who performed the autopsy, recorded that "[c]oal workers pneumoconiosis is present," but did not state that pneumoconiosis caused or contributed to the miner's death. Decision and Order at 27; Claimant's Exhibit 2 at 2-5; Director's Exhibit 9 at 1. Rather, Dr. Nichols stated that the immediate cause of the miner's death was bronchopneumonia, and that cardiomegaly, coronary atherosclerosis and metastatic colon cancer were contributors to death. *Id.* Dr. Dahhan opined that the miner died from bronchopneumonia, and that the clinical pneumoconiosis described in the autopsy report did not cause, contribute to, worsen, hasten, or bring on the miner's demise. Employer's Exhibits 1 at 3; 2 at 21. Dr. Broudy opined that the miner's death was due to "metastatic adenocarcinoma of the colon," unrelated to, and not contributed to by, clinical pneumoconiosis or coal dust exposure. Employer's Exhibits 3 at 3; 4 at 15-16.

¹⁰ In his final treatment note dated May 23, 2014, Dr. Morgan stated that the miner's "acute on chronic kidney disease . . . progressively worsened inducing an eventual uremic

Decision and Order at 24; Director's Exhibit 8. The administrative law judge found that Dr. Morgan provided no explanation for his opinion and also failed to state the extent to which the miner's pneumoconiosis caused his death. Further, the administrative law judge found that the autopsy report did not provide support for Dr. Morgan's conclusions. The administrative law judge, therefore, permissibly accorded the miner's death certificate no weight. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); Decision and Order at 28.

Because the administrative law judge properly discredited the only supporting evidence, we affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). We, therefore, affirm the denial of benefits.

death," but he did not address whether pneumoconiosis was a contributing factor. Director's Exhibit 11 at 5.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge