

BRB No. 12-0597 BLA

MARGARET M. HANCHERICK )  
(Widow of ALEX HANCHERICK) )  
 )  
 )  
v. )  
 )  
HELVETIA COAL COMPANY ) DATE ISSUED: 08/14/2013  
 )  
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 Denying Benefits of Thomas M. Burke,  
Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5200) of  
Administrative Law Judge Thomas M. Burke, rendered on a request for modification of  
the denial of a survivor's claim filed on October 11, 2005, pursuant to the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).<sup>1</sup> The administrative law judge found that employer stipulated to at least thirty-four years of coal mine employment and that the record supported a finding that all thirty-four years were underground. The administrative law judge further found that the miner suffered from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge determined, therefore, that claimant invoked the presumption that the miner's death was due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>2</sup> The administrative law judge further found, however, that employer rebutted the presumption by establishing that the miner did not have pneumoconiosis and that pneumoconiosis did not cause, contribute to, or hasten, the miner's death. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in determining that employer rebutted the presumed fact that the miner suffered from pneumoconiosis. Employer responds, urging affirmance of the denial of benefits.<sup>3</sup> The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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<sup>1</sup> Claimant is the widow of the miner, who died on July 20, 1999. Director's Exhibits 2, 9. Claimant's application for survivor's benefits was denied by Administrative Law Judge Daniel L. Leland in a Decision and Order issued on December 17, 2007. Director's Exhibit 41. Judge Leland determined that claimant failed to establish that the miner suffered from pneumoconiosis and that his death was due to pneumoconiosis. *Id.* Claimant filed her request for modification on December 9, 2008. Director's Exhibit 42.

<sup>2</sup> In pertinent part, amended Section 411(c)(4) provides that a miner's death is presumed to be due to pneumoconiosis if it is established that he or she had fifteen or more years of underground coal mine employment, or 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), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

<sup>3</sup> Employer also suggests that claimant's appeal of the Decision and Order issued on July 13, 2012 was untimely, if the Board was correct in acknowledging that it received the appeal on August 17, 2012. However, the Board's acknowledgement letter referred to a second notice of appeal, which was filed by claimant's counsel. The initial notice of appeal was submitted by claimant, without the assistance of counsel, and was received by the Board on August 13, 2012. This notice of appeal was timely filed, as it was received within thirty days of July 18, 2012, the date on which the administrative law judge's Decision and Order became effective. 20 C.F.R. §§725.478, 725.479(a), 802.205(a).

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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate 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(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). For survivors' claims in which the rebuttable presumption at 30 U.S.C. §921(c)(4) is not applicable, or has been rebutted, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or if the survivor establishes invocation of the irrebuttable presumption of death due to pneumoconiosis. 20 C.F.R. §§718.205(c)(2), (4), 718.304. 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In the present case, the issue on appeal is whether the administrative law judge properly found that employer rebutted the presumption of death due to pneumoconiosis, such that an award of benefits was precluded. In order to rebut the amended Section 411(c)(4) presumption, the party opposing entitlement must establish either that the miner did not have pneumoconiosis, or that his death did not arise from his coal mine employment. *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305). The administrative law judge found that the preponderance of the x-ray readings, biopsy reports, treatment records, and physicians' opinions established that the miner did not suffer from pneumoconiosis. Decision and Order at 21-22. The administrative law judge additionally determined that, "even assuming that the miner did have coal worker's pneumoconiosis, the evidence of record supports a finding that the miner's death was the result of immunosuppression related to rheumatoid arthritis and Felty's syndrome, the development of multiple pneumonias, and eventual respiratory failure." *Id.* at 22-23. In rendering this finding, the administrative law judge accorded

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<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Living Miner's Director's Exhibit 2.

greatest weight to Dr. Renn's opinion, that the miner's death was unrelated to coal dust exposure, because "he specifically link[ed] the miner's treatment records with his findings better than any other physician of record." *Id.* at 23.

Claimant argues that the administrative law judge "improperly discredited the evidence provided by the treating physician," Dr. Tatarko, who "diagnosed coal workers' pneumoconiosis and Caplan's syndrome." Claimant's Brief in Support of Petition for Review at 2. Claimant asserts that "[t]his err[or] precludes the [e]mployer from meeting its burden of proof of lack of pneumoconiosis." *Id.* at 3. Claimant additionally contends that, because the administrative law judge improperly discredited the positive x-ray readings for pneumoconiosis, "[e]mployer has failed to rebut the presumption as there had been positive findings of pneumoconiosis." *Id.*

Although claimant challenges the administrative law judge's determination that employer established rebuttal by disproving the existence of pneumoconiosis, claimant does not identify any errors in the administrative law judge's finding that employer rebutted the amended Section 411(c)(4) presumption by proving that the miner's death was not due to pneumoconiosis. The Board's limited scope of review requires that a party challenging the Decision and Order below address that Decision and Order with specificity, and demonstrate that substantial evidence does not support the result reached, or that the Decision and Order is contrary to law. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119-20 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

In light of claimant's failure to identify any error in the administrative law judge's rebuttal finding on death causation, the Board has no basis upon which to review this portion of the administrative law judge's decision. *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. We affirm, therefore, the administrative law judge's finding that employer rebutted the amended Section 411(c)(4) presumption by establishing, by a preponderance of the evidence, that pneumoconiosis was not a causal factor in the miner's death. *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. We further affirm the denial of benefits, based on the administrative law judge's corollary finding that "the evidence of record fails to demonstrate . . . that the miner's death was due to pneumoconiosis," an essential element of entitlement in this survivor's claim. Decision and Order at 24; *see Anderson*, 12 BLR at 1-113.

Accordingly, the administrative law judge's Decision and Order Denying Benefits 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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BETTY JEAN HALL  
Administrative Appeals Judge