



BRB No. 17-0196 BLA

JANICE SIZEMORE	)	
(o/b/o HARRY SIZEMORE, deceased)	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 12/11/2017
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Charleston, West Virginia, for claimant.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (2012-BLA-05139)

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<sup>1</sup> Claimant, the widow of the miner, is pursuing this claim on behalf of the miner’s

of Administrative Law Judge Theresa C. Timlin, rendered on a claim filed on June 16, 2004<sup>2</sup> 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 subsequent claim that is now being considered pursuant to the miner's request for modification, and is before the Board for the second time.<sup>3</sup>

In a Decision and Order issued on April 23, 2009, Administrative Law Judge Thomas M. Burke found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Director's Exhibit 87. Considering the claim on the merits, however, Judge Burke denied benefits because the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* Upon review of the miner's appeal, the Board affirmed Judge Burke's finding that the evidence did not establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718. *Sizemore v. E. Associated Coal Corp.*, BRB No. 09-0597 BLA, slip op. at 4-5 (Apr. 30, 2010) (unpub.). Therefore, the Board affirmed the denial of benefits. *Id.*

The miner timely requested modification on December 21, 2010. Director's Exhibit 97. However, the miner died on June 16, 2012, while his claim was pending. Director's Exhibits 111, 113.

In a Decision and Order issued on January 4, 2017, Administrative Law Judge Theresa C. Timlin (the administrative law judge) accepted the stipulations of the Director, Office of Workers' Compensation Programs (the Director),<sup>4</sup> that the miner had

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estate. Director's Exhibit 116.

<sup>2</sup> The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim, based on its filing date. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(a).

<sup>3</sup> The Board set forth the full procedural history of this case in its prior decision. *Sizemore v. E. Associated Coal Corp.*, BRB No. 09-0597 BLA, slip op. at 2 n.1 (Apr. 30, 2010) (unpub.).

<sup>4</sup> By Order dated March 17, 2016, the administrative law judge granted the request of the Director, Office of Workers' Compensation Programs, to dismiss Eastern Associated Coal Corporation as the responsible operator and substitute the Black Lung Disability Trust Fund as the party liable for the payment of any benefits awarded.

17.2 years of coal mine employment<sup>5</sup> and was totally disabled by a respiratory or pulmonary impairment. The administrative law judge found that the new autopsy evidence and medical opinion evidence submitted on modification demonstrated a change in conditions under 20 C.F.R. §725.310, by establishing that the miner had clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),(4).<sup>6</sup> However, the administrative law judge found that the medical opinion evidence did not establish that the miner had legal pneumoconiosis<sup>7</sup> at 20 C.F.R. §718.202(a)(4), or that his total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in weighing the medical opinion evidence on the issue of legal pneumoconiosis and total disability due to pneumoconiosis. The Director responds, urging affirmance of the denial of benefits.

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. 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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3,

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<sup>5</sup> The record reflects that the miner's last coal mine employment was in West Virginia. Director's Exhibit 78 at 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>6</sup> "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).

<sup>7</sup> "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

### **Legal Pneumoconiosis**

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen, Rosenberg, and Zaldivar. Decision and Order at 14-17. Dr. Rasmussen diagnosed the miner with legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and emphysema due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 14. Drs. Rosenberg and Zaldivar opined that the miner did not have legal pneumoconiosis, but suffered from COPD due solely to smoking. Employer's Exhibits 4, 5.

The administrative law judge found that Dr. Rasmussen's opinion was not well-reasoned or documented. Decision and Order at 17. The administrative law judge first noted that, because Dr. Rasmussen's opinion was ten years older than the other medical opinions, it did not take into account the miner's autopsy evidence.<sup>8</sup> *Id.* Additionally, the administrative law judge found that Dr. Rasmussen did not adequately explain the basis for his conclusion that the miner's COPD and emphysema were significantly related to coal mine dust exposure. Therefore, the administrative law judge accorded Dr. Rasmussen's opinion "little weight,"<sup>9</sup> Decision and Order at 17, and concluded that the medical opinion evidence did not support a finding of legal pneumoconiosis.

Claimant argues that the administrative law judge erred in rejecting Dr. Rasmussen's opinion. Claimant asserts that the administrative law judge impermissibly

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<sup>8</sup> The administrative law judge found, earlier in her opinion, that the autopsy evidence did not support a finding of legal pneumoconiosis. Decision and Order at 13. Specifically, the administrative law judge noted that the pathologists who reviewed the miner's autopsy slides commented on "the paucity of coal mine dust present in the slides," and she noted further that no pathologist opined that coal mine dust caused or contributed to any of the miner's respiratory impairments. *Id.*

<sup>9</sup> The administrative law judge additionally noted that "the contrary opinions of Drs. Zaldivar and Rosenberg suppl[ied] additional reasons for discrediting Dr. Rasmussen's opinion," because both physicians explained how the miner's autopsy findings demonstrated that the miner did not have legal pneumoconiosis. Decision and Order at 17-18.

required Dr. Rasmussen to establish that coal mine dust exposure was the only cause of the miner's impairment. Claimant's Brief at 8-9 (unpaginated).

Contrary to claimant's argument, the administrative law judge did not reject Dr. Rasmussen's opinion based on a finding that it did not meet the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2), (b). Decision and Order at 17. Rather, the administrative law judge permissibly found that Dr. Rasmussen's opinion was not well-reasoned because Dr. Rasmussen "merely cit[ed] to medical literature linking coal mine dust exposure to lung impairment," without "explain[ing] how those studies support[ed] his conclusion that [the miner's] specific condition [was] reasonably attributable to his exposure to coal mine dust."<sup>10</sup> Decision and Order at 17; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Therefore, we reject claimant's argument, and affirm the administrative law judge's determination that claimant did not establish that the miner suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

### **Total Disability Due to Pneumoconiosis**

To establish that the miner was totally disabled due to pneumoconiosis, claimant must establish that pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment.<sup>11</sup> 20 C.F.R. §718.204(c)(1). The "cause or causes of a miner's total disability shall be established by

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<sup>10</sup> The administrative law judge noted that Judge Burke discounted Dr. Rasmussen's opinion for the same reason, and that the Board affirmed Judge Burke's credibility determination. Decision and Order at 17 n.16; *Sizemore*, BRB No. 09-0597 BLA, slip op. at 4-5.

<sup>11</sup> Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

means of a physician's documented and reasoned medical report." 20 C.F.R. §718.204(c)(2).

The administrative law judge found that Dr. Rasmussen's opinion did not establish that the miner was totally disabled due to clinical pneumoconiosis, because Dr. Rasmussen was equivocal as to whether the miner had clinical pneumoconiosis. Decision and Order at 22-23. Further, the administrative law judge accorded little weight to Dr. Rasmussen's opinion that the miner was totally disabled due to legal pneumoconiosis, because the administrative law judge found that the evidence did not establish that the miner had legal pneumoconiosis.<sup>12</sup> *Id.*

Claimant argues that the administrative law judge erred in discrediting Dr. Rasmussen's disability causation opinion. Claimant's Brief at 8-9 (unpaginated). We disagree. A review of the record reflects that Dr. Rasmussen did not address whether clinical pneumoconiosis was a substantially contributing cause of the miner's total disability, as Dr. Rasmussen opined that the miner did not have clinical pneumoconiosis. Director's Exhibit 14. Further, the administrative law judge reasonably found that Dr. Rasmussen's opinion did not establish that legal pneumoconiosis was a substantially contributing cause of total disability for the same reasons she gave in discrediting Dr. Rasmussen's opinion that the miner had legal pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Therefore, we affirm the administrative law judge's finding that claimant did not establish that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Because claimant failed to establish that the miner's total disability was due to pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits.<sup>13</sup> *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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<sup>12</sup> The administrative law judge also found that the contrary opinions of Drs. Rosenberg and Zaldivar were better reasoned, and outweighed Dr. Rasmussen's opinion. Decision and Order at 23.

<sup>13</sup> Therefore, we need not address claimant's argument that the administrative law judge erred in crediting the contrary opinions of Drs. Rosenberg and Zaldivar. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge