

BRB Nos. 11-0343 BLA
and 12-0076 BLA

MABEL SAMONS)
(o/b/o and Widow of CASEY SAMONS))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 01/27/2012
)
NATIONAL MINES CORPORATION)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (06-BLA-5820, 07-BLA-5332) of Administrative Law Judge Larry S. Merck denying benefits on claims 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). This case involves a miner's subsequent claim filed on March 14, 2003,² and a survivor's claim filed on July 21, 2005. After crediting the miner with at least thirty-one years of coal mine employment,³ the administrative law judge found that the autopsy and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. *See* 20 C.F.R. §725.309. The administrative law judge, therefore, considered the miner's 2003 claim on the merits.

In considering the merits of the miner's claim, the administrative law judge found that the autopsy and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge, however, found that the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits on the miner's claim.

With respect to the survivor's claim, the administrative law judge noted that, on March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted.⁴ In pertinent part, the amendments reinstated Section 411(c)(4) of the Act,

¹ Claimant is the surviving spouse of the miner, who died on July 9, 2005. Director's Exhibit 61.

² The miner's prior claim, filed on August 9, 1976, was finally denied on March 13, 1989, because the miner failed to establish any element of entitlement. Director's Exhibit 1.

³ The record reflects that the miner's coal mine employment was in Kentucky and Ohio. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

⁴ The recent amendments do not apply to the miner's claim, because it was filed before January 1, 2005. However, the recent amendments apply to the survivor's claim, which was filed after January 1, 2005. *See* Pub. L. No. 111-148, §1556(c).

30 U.S.C. §921(c)(4), which provides, *inter alia*, a rebuttable presumption that a miner died due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.⁵ Pub. L. No. 111-148, §1556(a), (c). Section 411(c)(4) further provides that, if the presumption is invoked, the burden of proof shifts to employer to establish that the miner did not have pneumoconiosis or that the miner's "respiratory or pulmonary impairment did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4).

Because the administrative law judge found that the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), he found that claimant failed to establish invocation of the Section 411(c)(4) presumption. The administrative law judge also found that the evidence did not 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 on the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability in the miner's claim and the survivor's claim. Claimant also argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) in the survivor's claim. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁶

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).

⁵ The amendments also revived Section 422(l) of the Act, 30 U.S.C. §932(l), which 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. Pub. L. No. 111-148, §1556(b), (c).

⁶ The administrative law judge's finding of at least thirty-one years of coal mine employment, and his findings pursuant to 20 C.F.R. §§725.309(d), 718.202(a)(2), (4), and 718.203(b), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Miner's Claim

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁷ The administrative law judge considered the medical opinions of Drs. Jurich, Baker, Simpao, Dahhan, and Fino.⁸ Drs. Jurich and Baker opined that the miner had a totally disabling respiratory impairment, and did not retain the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 9, 10, 35, 48; Claimant's Exhibit 3. Dr. Simpao also diagnosed a moderate pulmonary impairment. Director's Exhibit 7. On the other hand, Dr. Dahhan opined that the miner retained the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 44, 49 at 8-9. Dr. Fino found no evidence of a respiratory impairment, and opined that the miner retained the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 36, 40 at 13, 46.

The administrative law judge initially found that Dr. Simpao's opinion was entitled to "little probative weight" because the doctor failed to indicate whether the miner's moderate pulmonary impairment would prevent him from performing his usual coal mine employment. Decision and Order at 35. The administrative law judge next found that Dr. Baker's opinion was entitled to "little probative weight" because he did not specifically opine whether the miner retained the respiratory capacity to perform his previous coal mine employment. *Id.* at 37. Although the administrative law judge found that the opinions of Drs. Jurich, Fino, and Dahhan were well-reasoned and documented, he accorded greater weight to the opinions of Drs. Fino and Dahhan, that the miner did not suffer from a totally disabling respiratory impairment, based upon their superior

⁷ The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 33-35. Because these findings are unchallenged on appeal, they are affirmed. *Skrack*, 6 BLR at 1-711.

⁸ The administrative law judge noted that the parties submitted the same evidence in the miner's and survivor's claims, with the exception that Dr. Fino's opinion was designated solely for use in the miner's claim, while Dr. Caffrey's opinion was designated solely for use in the survivor's claim. Decision and Order at 35.

qualifications. *Id.* at 39. The administrative law judge, therefore, found that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Claimant argues that the administrative law judge erred in his consideration of the opinions of Drs. Simpao and Baker. We agree. The administrative law judge erred in not comparing Dr. Simpao's opinion, that the miner suffered from a moderate pulmonary impairment, with the exertional requirements of the miner's usual coal mine employment in order to assess whether that impairment rendered the miner totally disabled.⁹ See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000).

Dr. Baker opined that, because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Claimant's Exhibit 3. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, see *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the administrative law judge permissibly found that this aspect of Dr. Baker's opinion was insufficient to support a finding of total disability. Decision and Order at 37. However, the administrative law judge did not address other aspects of Dr. Baker's opinion. Dr. Baker noted that the miner's March 21, 2003 pulmonary function study showed a "moderate to severe small airway obstruction pattern with restriction." Claimant's Exhibit 3. Moreover, on a questionnaire dated February 6, 2009, Dr. Baker indicated that the miner's pulmonary impairment rendered him totally disabled. *Id.* The administrative law judge erred in not addressing these aspects of Dr. Baker's opinion.

Claimant also argues that the administrative law judge erred in not according greater weight to the opinion of Dr. Jurich, based upon his status as the miner's treating physician. Although Section 718.104 does not require an administrative law judge to accord greater weight to a treating physician's opinion, the terms of Section 718.204(d) require an administrative law judge to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the regulation requires an administrative law judge to take into consideration the nature of the relationship between the miner and the treating physician, the duration of the relationship, the frequency of treatment, and the extent of the treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation also provides that the treatment relationship may constitute substantial evidence in support of an administrative

⁹ On remand, the administrative law judge must identify the employment that was the miner's usual coal mine work, and identify the exertional requirements of that employment.

law judge's decision to give that physician's opinion controlling weight in appropriate cases, but the weight accorded must also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002) (the opinions of treating physicians get the deference they deserve based on their power to persuade).

In this case, although the administrative law judge found that Dr. Jurich's opinion regarding the extent of the miner's pulmonary impairment was well reasoned and documented,¹⁰ he did not apply the criteria set forth in Section 718.104(d)(1)-(4) to determine whether Dr. Jurich's opinion was entitled to controlling weight on the issue of total disability. Consequently, we vacate the administrative law judge's determination that claimant failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

On remand, the administrative law judge must reconsider Dr. Jurich's opinion in light of the criteria set forth at 20 C.F.R. §718.104(d), and reconsider whether the opinions of Drs. Simpao and Baker support a finding of total disability. When considering whether the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

If, on remand, the administrative law judge finds that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must weigh all the evidence together, both like and unlike, to determine whether claimant has established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (*en banc*).

If the administrative law judge finds that the miner was totally disabled, he must determine whether the evidence establishes that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

¹⁰ The administrative law judge found that Dr. Jurich, who is Board-certified in Family Practice, provided a well reasoned and documented opinion that the miner was totally disabled, based on his physical examinations of the miner over time, and the miner's pulmonary function studies. Decision and Order at 18, 37.

The Survivor's Claim

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or 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)-(3). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Claimant argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In regard to the cause of the miner's death, the administrative law judge considered the miner's death certificate, and the medical opinions of Drs. Jurich, Baker, Dahhan, and Caffrey. Dr. Paulus completed the miner's death certificate. Although Dr. Paulus attributed the miner's death to sepsis, he listed "black lung disease" as a contributor to the miner's death. Director's Exhibit 61. On a questionnaire, Dr. Jurich also indicated that the miner's pneumoconiosis contributed to his death. Director's Exhibit 60. Although Dr. Baker opined that the miner's death was primarily due to septicemia, he further indicated that the miner's pneumoconiosis contributed to the miner's death, explaining that:

[The miner's] respiratory impairment contributed to some extent in a non-definable percentage to his death. If he would have had an intact respiratory system, he could possibly have survived the systemic insult of septicemia. I feel [the miner's] death was related to, hastened, and contributed to by his pulmonary condition which is related to his coal dust exposure and associated pneumoconiosis.

Claimant's Exhibit 5.

Although Drs. Dahhan and Caffrey agreed that the miner's death was due to septicemia, they opined that that the miner's pneumoconiosis did not contribute to his death. Dr. Dahhan opined that the miner's death was not related to his pneumoconiosis, noting that pneumoconiosis occupied approximately five percent of the miner's lung at death, an amount "insufficient to cause a significant alteration in the respiratory reserve." Employer's Exhibit 2. Dr. Caffrey also opined that the miner's pneumoconiosis did not cause, contribute to, or hasten his death. Employer's Exhibits 1, 4.

In considering whether the evidence established that the miner's death was due to pneumoconiosis, the administrative law judge accorded little weight to the miner's death certificate because he found that Dr. Paulus did not provide any explanation for his findings. Decision and Order at 40. The administrative law judge also found that Dr. Jurich's opinion was not sufficiently reasoned. *Id.* at 40-41. The administrative law judge next found that Dr. Baker's opinion was insufficient to support a finding that the miner's death was due to pneumoconiosis. *Id.* at 42. Conversely, the administrative law judge found that the opinions of Drs. Dahhan and Caffrey, that the miner's pneumoconiosis did not contribute to his death, were well reasoned. *Id.* at 42-44. The administrative law judge, therefore, found that the evidence did not establish that miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Claimant argues that the administrative law judge erred in not considering the miner's autopsy report. We disagree. Although Dr. White, the autopsy prosector, diagnosed coal workers' pneumoconiosis, she did not address the cause of the miner's death. Director's Exhibit 62.

We also disagree with claimant's contention that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis. The administrative law judge permissibly determined that the miner's death certificate and Dr. Jurich's opinion were not sufficiently reasoned.¹¹ *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). Moreover, because Dr. Baker failed to set forth a "specifically defined process" that reduced the miner's life "by an estimable time," the administrative law judge properly found that Dr. Baker's opinion did not support a finding that the miner's death was due to pneumoconiosis. Decision and Order at 42; *see Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303, 24 BLR 2-257, 2-266 (6th Cir. 2010). The administrative law judge permissibly accorded greater weight to the opinions of Drs. Dahhan and Caffrey, that the miner's pneumoconiosis did not contribute to his death, because he found that they were well-reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Because it is supported by substantial evidence,¹² we affirm the administrative law

¹¹ The administrative law judge noted that Dr. Paulus provided no explanation for his findings on the miner's death certificate. Decision and Order at 40. The administrative law judge also accurately noted that Dr. Jurich failed to provide any rationale for his opinion that pneumoconiosis contributed to the miner's death. *Id.*

¹² Claimant accurately notes that the administrative law judge did not address Dr. DeLara's opinion that the miner's pneumoconiosis "significantly contributed [to] and hastened his demise." Claimant's Exhibit 1. However, because Dr. DeLara provided no basis for his opinion, it is insufficient to support a finding that the miner's death was due

judge's finding that the medical evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On remand, should the administrative law judge deny benefits in the miner's claim,¹³ he must reconsider whether claimant is entitled to invocation of the rebuttable presumption at Section 411(c)(4) in the survivor's claim.¹⁴

to pneumoconiosis. *See Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303, 24 BLR 2-257, 2-266 (6th Cir. 2010).

¹³ If the administrative law judge, on remand, awards benefits in the miner's claim, claimant is automatically entitled to benefits in the survivor's claim pursuant to amended Section 932(l). *See* 30 U.S.C. §932(l).

¹⁴ In the survivor's claim, the administrative law judge found that claimant was not entitled to invocation of the Section 411(c)(4) presumption because the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). However, in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) in the survivor's claim, the administrative law judge committed the same errors that he made in resolving this issue in the miner's claim. *See* Decision and Order at 35-39. Consequently, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv) in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge