

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0225 BLA

DOROTHY P. GLASSCOCK)
(Widow of MERLE D. GLASSCOCK))
)
Claimant-Petitioner)
)
v.)
)
CONSOLIDATED COAL COMPANY)
)
and)
) DATE ISSUED: 01/17/2017
CONSOL ENERGY, INCORPORATED)
)
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 Drew A. Swank,
Administrative Law Judge, United States Department of Labor.

Dorothy P. Glasscock, Mannington, West Virginia, *pro se*.

Lee Jones and Denise Hall Scarberry (Jones, Walters, Turner & Shelton

PLLC), Pikeville, Kentucky, for employer.¹

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2014-BLA-5461) of Administrative Law Judge Drew A. Swank, rendered on a survivor's claim filed on April 25, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act).² The administrative law judge determined that claimant was unable to invoke the rebuttable presumption of death due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),³ based on his finding that the miner had less than fifteen years of coal mine employment.⁴ The administrative law judge further determined that while the evidence was sufficient to establish that the miner had legal pneumoconiosis, claimant

¹ Subsequent to the filing of employer's response brief, Mr. Lee Jones filed a letter with the Board on September 12, 2016, requesting that he be allowed to withdraw as counsel for employer.

² Claimant is the widow of the miner, Merle D. Glasscock, who died on March 2, 2013. Director's Exhibit 18.

³ Under Section 411(c)(4), the miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

⁴ Section 422(l) of the Act, 30 U.S.C. §932 (l) (2012), provides that the 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. In this case, the miner filed eight applications for federal black lung benefits from 1984 through 2012, each of which was finally denied. Director's Exhibits 1-8. As the miner was not determined to be eligible to receive benefits at the time of his death, claimant is not eligible for benefits pursuant to 30 U.S.C. §932(l).

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

On appeal, claimant generally challenges the denial of her claim. Employer responds, urging affirmance of the administrative law judge's findings and the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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).

I. Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment

Claimant bears the burden of establishing the length of the miner's coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-86 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985). The presumptions set forth in 20 C.F.R. §718.305 apply only if the miner worked in one or more coal mines for the number of years required to invoke the presumption. The length of the miner's coal mine work history must be computed as provided by 20 C.F.R. §725.101(a)(32). *See* 20 C.F.R. §718.301. In turn, 20 C.F.R. §725.101(a)(32) defines how to count a year. To the extent the evidence permits, the beginning and ending dates of all periods of employment must be ascertained. The dates and length of employment may be established by any credible evidence. 20 C.F.R. §725.101(a)(32)(ii). The Board will uphold the administrative law judge's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Maggard v. Director, OWCP*, 6 BLR 1-285, 1-286 (1983).

In calculating the miner's length of coal mine employment, the administrative law judge noted that the district director found that the miner had eight years of coal mine employment. Decision and Order at 4. He also noted that the miner was determined to have 8.73 years of coal mine employment by Administrative Law Judge Thomas M. Burke, pursuant to a Decision and Order dated July 20, 2012, rendered in conjunction with the miner's last denied claim. *Id.* Further, the administrative law judge found that

the miner's employment records⁵ and the miner's Social Security Administration (SSA) itemized statement of earnings supported a finding of eight years of coal mine employment. *Id.* The administrative law judge concluded that claimant established at least eight years of coal mine employment but less than the fifteen years necessary to invoke the presumption.

On the Employment History Form CM-911a, completed by the miner in his prior claim and submitted by claimant in this survivor's claim, the miner indicated that he worked underground and at a preparation plant for employer from the "1960's through 1977." Director's Exhibit 12. On the form, the miner also indicated that he was a "shaft driller" for "William Shaft," worked at a preparation plant for "Fairmont Industry" and worked underground for "Air Replacement." *Id.* Claimant testified at the hearing and indicated that the miner worked in coal mine employment from the mid 1960's until the end of the 1970's. Hearing Transcript at 13.

The SSA records show that the miner worked for employer for one quarter of a year in 1969, and for thirty-two quarters from 1970 through 1977, for a total of eight and one-quarter years of coal mine employment. Director's Exhibit 13. The SSA records do not provide a quarterly breakdown of the miner's earnings with employer in 1978, but list annual earnings of \$1,480.03 for that year. *Id.* In addition to his work for employer, the SSA records indicate that the miner worked for three quarters, from 1964-1967, with Air Placement Cement Company, which may be the "Air Replacement" company referenced by the miner on the Employment History Form CM-911a. Director's Exhibit 12. In 1967, the miner worked for two quarters with Industrial Contracting of Fairmont, West Virginia and two quarters with Williamson Industries Incorporated of Fairmont, West Virginia.⁶ Director's Exhibit 13.

Even counting the additional quarters worked with Air Placement Cement Company, Industrial Contracting of Fairmont, West Virginia, and Williamson Industries Incorporated of Fairmont, West Virginia, as coal mine employment, the maximum number of years of coal mine employment that could be credited to the miner based on

⁵ The supervisor of human resources for employer completed a form indicating that the miner worked from September 25, 1969 to August 14, 1977. Director's Exhibit 12.

⁶ It is not clear from the record whether these companies constitute "Fairmont Industry," as referenced by the miner on his Employment History Form CM-911a. Director's Exhibit 15. There are no earnings listed in the Social Security Administration records for a company called "William Shaft."

the SSA records is eleven years. Accordingly, based on our review, we affirm the administrative law judge's finding that claimant established at least eight years of coal mine employment, but less than the fifteen years necessary to invoke the Section 411(c)(4) presumption. *See Muncy*, 25 BLR at 1-27; Decision and Order at 4.

II. Death Causation- 20 C.F.R. §718.205(b)

Finding that the Section 411(c)(3)⁷ and 411(c)(4) statutory presumptions did not apply, the administrative law judge considered whether claimant established that the miner's death was due to pneumoconiosis. A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92 (4th Cir. 1992). Failure to establish any one of the required elements precludes entitlement. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

In considering whether claimant satisfied her burden of proving that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(b), the administrative law judge weighed the miner's death certificate and the medical reports of Drs. Franyutti, Rizkalla, Caffrey and Fino. Decision and Order at 19-21; Director's Exhibits 18-23, 33, 37-38; Claimant's Exhibit 1; Employer's Exhibits 3, 5, 9, 13-14. Dr. Patel prepared the miner's death certificate and listed arteriosclerotic heart disease and chronic obstructive

⁷ Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *see E. Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). We affirm the administrative law judge's finding that, because there is no evidence from which to conclude that the miner had complicated pneumoconiosis, claimant is not entitled to the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 19.

pulmonary disease as the immediate cause of death.⁸ Director's Exhibit 18. Dr. Franyutti conducted the autopsy and diagnosed, *inter alia*, moderate simple coal workers' pneumoconiosis and "marked interstitial fibrosis with anthrasic pigmentations," but did not offer an opinion on the cause of the miner's death. Director's Exhibit 19. The administrative law judge also noted that "[n]o resume, curriculum vitae or other list of qualifications was provided for Dr. Franyutti." Decision and Order at 19. The administrative law judge concluded that the death certificate and autopsy report were insufficient to satisfy claimant's burden of proof. *Id.* at 20.

The administrative law judge next noted that Dr. Rizkalla reviewed the autopsy slides and prepared a report dated September 3, 2015. Decision and Order at 20; Claimant's Exhibit 1. Although Dr. Rizkalla diagnosed coal workers' pneumoconiosis, he stated that "it would be difficult to determine the cause of death from examination of the lungs/hilar lymph nodes without the examination of the heart and coronary artery vessels." Claimant's Exhibit 1. Drs. Caffrey and Fino specifically opined that the miner did not have coal workers' pneumoconiosis or any coal dust-related lung disease and that coal dust exposure did not cause, contribute to, or hasten, the miner's death. Director's Exhibits 33, 37-38; Employer's Exhibits 9, 13-14.

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if the evidence does not establish a requisite element of entitlement. *See Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Based on our review of the administrative law judge's Decision and Order and the record evidence, we find no error in the administrative law judge's determination that claimant failed to satisfy her burden of proof in this case. The administrative law judge correctly stated that "not a single report or expert . . . attributed the miner's coal mine work, coal dust exposure, or coal workers' pneumoconiosis as causing, substantially contributing to, or hastening his death." Decision and Order at 21. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish that the

⁸ The miner's treatment records from Monongalia General Hospital, Fairmont General Hospital and Dr. Patel, include a diagnosis of chronic obstructive pulmonary disease (COPD), but there is no medical opinion indicating that coal dust substantially contributed to the development of the miner's COPD, or that coal dust exposure significantly aggravated the miner's COPD. Director's Exhibits at 20-23; Employer's Exhibits 3, 5-6. Because the record does not contain evidence to establish that the miner's COPD constitutes legal pneumoconiosis under 20 C.F.R. §718.201, the death certificate identifying COPD as a cause of death is insufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.205(b).

miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *See Trumbo*, 17 BLR at 1-87-88.

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