



BRB No. 19-0166 BLA

WANDA C. PHILLIPS	)	
(Widow of ROBERT C. PHILLIPS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY	)	
	)	DATE ISSUED: 01/31/2020
Employer-Respondent	)	
	)	
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 Morris D. Davis,  
Administrative Law Judge, United States Department of Labor.

Wanda C. Phillips, Lebanon, Virginia.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for  
employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel,<sup>2</sup> the Decision and Order Denying Benefits (2016-BLA-05377) of Administrative Law Judge Morris D. Davis on a survivor's claim filed on April 17, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

After crediting the miner with 19.24 years of coal mine employment,<sup>3</sup> the administrative law judge found the evidence did not establish the miner was totally disabled. 20 C.F.R. §718.204(b)(2). He therefore found claimant did not invoke the rebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(4) of the Act.<sup>4</sup>

Turning to whether claimant could affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge found the medical opinions and treatment records did not establish the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4). He further found, however, the autopsy

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<sup>1</sup> Claimant is the widow of the miner, who died on December 28, 2014. Director's Exhibit 9.

<sup>2</sup> Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on claimant's behalf that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

<sup>3</sup> The miner's coal mine employment occurred in Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction 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>4</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Section 422(l) of the Act also provides that a survivor of a miner who was 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. 30 U.S.C. §932(l) (2012). Claimant cannot benefit from Section 422(l), however, as the miner's lifetime claims for benefits were denied. Director's Exhibit 1.

evidence established clinical pneumoconiosis, 20 C.F.R. §718.202(a)(2), and claimant entitled to the presumption it arose out of the miner's coal mine employment. 20 C.F.R. §718.203(b). The administrative law judge concluded, however, the evidence did not establish the miner's death was due to clinical pneumoconiosis, 20 C.F.R. §718.205, and denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

When a claimant files an appeal without the assistance of counsel, the Board considers whether substantial evidence supports the Decision and Order Denying Benefits. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are 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).

#### **The Section 411(c)(4) Presumption — Total Disability**

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge correctly found the only pulmonary function study of record and the only blood gas study of record, both conducted on February 27, 2013,<sup>5</sup> non-qualifying.<sup>6</sup> 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 5-6; Employer's

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<sup>5</sup> In his September 9, 2016 medical report, Dr. Rosenberg referenced the results of a July 17, 2012 pulmonary function study. Employer's Exhibit 11 at 1-2. This study, however, is not found in the record.

<sup>6</sup> A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the applicable table values contained in Appendices B and C of 20

Exhibits 9, 10. He also correctly found no evidence of cor pulmonale with right-sided congestive heart failure in the record. Decision and Order at 16; 20 C.F.R. §718.204(b)(2)(iii).

The administrative law judge also considered the medical opinions of Drs. Higinbothom and Rosenberg regarding disability. 20 C.F.R. §718.204(b)(2)(iv). Dr. Higinbothom opined the miner had “black lung” and chronic obstructive pulmonary disease before he was diagnosed with the lung cancer that caused his death. Director’s Exhibit 10a. Although Dr. Higinbothom opined that the miner’s lungs were “compromised” before he was diagnosed with lung cancer, the administrative law judge permissibly found this statement insufficient to satisfy claimant’s burden to establish a totally disabling respiratory impairment. Decision and Order at 17; Director’s Exhibit 10a; *see Horn v. Jewell Ridge Coal Corp.*, 6 BLR 1-933, 1-938 (1984) (administrative law judge properly found no total disability where medical opinion did not address severity of impairment nor extent of physical limitations that impairment imposed).

The administrative law judge accurately noted that Dr. Rosenberg opined the miner’s February 27, 2013 pulmonary function study did not show any evidence of an impairment that would have prevented the miner from performing his usual coal mine employment.<sup>7</sup> Decision and Order at 17; Employer’s Exhibit 14 at 7. The administrative law judge also noted that Dr. Rosenberg opined no evidence suggested the miner’s minimal clinical pneumoconiosis and minimal emphysema caused a disabling respiratory impairment.<sup>8</sup> Decision and Order at 17; Employer’s Exhibit 14 at 18-19. The administrative law judge therefore found Dr. Rosenberg’s opinion did not support a finding of a totally disabling pulmonary impairment. *Id.* Consequently, the administrative law judge found the medical opinion evidence did not establish the miner was totally disabled. 20 C.F.R. §718.204(b)(2)(iv). Substantial evidence supports this determination. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence

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C.F.R. Part 718, respectively. A “non-qualifying” study yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

<sup>7</sup> Dr. Rosenberg also opined that the miner’s February 27, 2013 blood gas study showed normal gas exchange after exercise. *Id.* at 9.

<sup>8</sup> Although the administrative law judge noted that Dr. Rosenberg opined that the miner’s “cardiovascular problems” would likely have caused “respiratory impairment,” Decision and Order at 17; Employer’s Exhibit 14, Dr. Rosenberg did not characterize the extent of that impairment.

is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion).

Finally, weighing the totality of the probative medical evidence, the administrative law judge permissibly found claimant failed to establish the miner was disabled by a pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Because claimant failed to establish totally disability, we affirm the administrative law judge's finding she did not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.305(b)(1)(iii).

### **Part 718 Entitlement**

Where the Section 411(c)(3) and 411(c)(4) statutory presumptions do not apply, a claimant must 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 a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-980 (4th Cir. 1992).

Although the administrative law judge found the evidence established clinical pneumoconiosis<sup>9</sup> arising out of coal mine employment, he found the evidence did not establish legal pneumoconiosis. Decision and Order at 19. "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). A disease arising out of coal mine employment includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The administrative law judge found:

Although [the miner's] records include assessments of chronic airway obstruction, there is no evidence to suggest that it had any relationship to his history of coal mine dust exposure. Dr. Caffrey and Dr. Rosenberg did not attribute the emphysema found on autopsy to [the miner's] history of coal mine dust exposure. Thus, I find that [c]laimant has not established that [the miner] had legal pneumoconiosis.

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<sup>9</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).

Decision and Order at 19; *see* Director's Exhibits 10a, 11; Employer's Exhibits 2, 11-14. As the administrative law judge's finding that the medical evidence did not establish that the miner had legal pneumoconiosis is supported by substantial evidence,<sup>10</sup> it is affirmed.

The administrative law judge next determined no evidence establishes the miner's clinical pneumoconiosis was a substantially contributing cause of his death. Although the administrative law judge noted that Dr. Higinbothom opined the miner's "compromised" lungs "may have" delayed his obtaining treatment for his lung cancer, he accurately found his opinion does not support a finding the miner's clinical pneumoconiosis played any role in his death. *See Sparks*, 213 F.3d at 190 (to establish that pneumoconiosis is a "substantially contributing cause" of a miner's death, it must have hastened the miner's death); Decision and Order at 19; Director's Exhibit 10a. The administrative law judge further accurately noted that Dr. Caffrey opined the miner's clinical pneumoconiosis was too mild to have caused, contributed to, or hastened his death. Decision and Order at 20; Employer's Exhibit 13 at 29. Finally, the administrative law judge noted Dr. Rosenberg similarly opined that although the miner had a "very minimal degree" of clinical pneumoconiosis, it did not play any role in his death. Decision and Order at 19-20; Employer's Exhibit 14 at 18-19. No other evidence suggests clinical pneumoconiosis hastened the miner's death.<sup>11</sup> Thus, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis as supported by substantial evidence. 20 C.F.R. §718.205(b).

As claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions, and did not establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *Trumbo*, 17 BLR at 1-87-88.

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<sup>10</sup> Although Dr. Higinbothom diagnosed chronic obstructive pulmonary disease, he did not attribute the disease to the miner's coal mine dust exposure. Director's Exhibit 10a. Drs. Caffrey and Rosenberg specifically opined that the miner's emphysema and lung cancer were unrelated to coal mine dust exposure. Employer's Exhibits 12, 14.

<sup>11</sup> The death certificate lists the miner's cause of death as adenocarcinoma of the lung, with respiratory failure, sepsis, and diabetes listed as contributory factors. Director's Exhibit 9. Dr. Robertson, the autopsy prosector, opined that the miner's immediate cause of death was left ventricular myocardial ischemia/infarct. Director's Exhibit 11. He listed severe atherosclerotic coronary artery disease and extensive pulmonary adenocarcinoma (stage IV) as significant contributing factors. *Id.*

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

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge