

BRB No. 11-0790 BLA

JOYCE DEVINE)
(Widow of JAMES DEVINE))
)
 Claimant-Petitioner)
)
 v.)
)
 PEABODY COAL COMPANY)
) DATE ISSUED: 07/27/2012
 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 on Remand of Daniel F. Solomon,
Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, 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:

Claimant¹ appeals the Decision and Order on Remand (07-BLA-5959) of
Administrative Law Judge Daniel F. Solomon denying benefits on a claim filed pursuant
to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended*

¹ Claimant is the widow of the miner, who died on April 19, 2006. Director's
Exhibit 10.

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, involving a survivor's claim filed on October 16, 2006, is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with at least twenty-seven years of coal mine employment,² and found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, the administrative law judge 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.

In considering claimant's appeal, the Board noted that Congress had recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor 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 that he had a totally disabling respiratory impairment, there will be a rebuttable presumption that his death was due to pneumoconiosis.³ 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

In light of the potential applicability of the Section 411(c)(4) presumption, the Board vacated the administrative law judge's denial of benefits, and remanded the case for further consideration.⁴ *Devine v. Peabody Coal Co.*, BRB No. 09-0844 BLA (Aug.

² The miner's coal mine employment was in Kentucky. Director's Exhibit 1. 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).

³ Section 1556 of Public Law No. 111-148 also revived Section 422(l) of the Act, 30 U.S.C. §932(l), providing that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's claims for benefits were denied. Closed Miner's Claims 1, 2.

⁴ The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to

20, 2010) (unpub.). The Board instructed the administrative law judge, on remand, to determine whether claimant was entitled to invocation of the Section 411(c)(4) presumption and, if so, whether employer rebutted the presumption. *Id.*

On remand, the administrative law judge found that claimant worked for fifteen years in a surface mine with dust conditions substantially similar to those found in underground mines. However, the administrative law judge found that the evidence did not establish that the miner had a totally disabling respiratory impairment. Consequently, the administrative law judge found that claimant failed to invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 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). The administrative law judge, therefore, found that claimant was not entitled to benefits under 20 C.F.R. Part 718.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish that the miner had a totally disabling respiratory impairment, and, therefore, erred in finding that she did not invoke the Section 411(c)(4) presumption. Claimant further contends 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). 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. In a reply brief, claimant reiterates her previous contentions.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

coal mine dust exposure and cigarette smoking. *Devine v. Peabody Coal Co.*, BRB No. 09-0844 BLA (Aug. 20, 2010) (unpub.); *see* 20 C.F.R. §718.202(a)(4).

death if it hastens the miner's death. 20 C.F.R. §718.205(c); *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 24 BLR 2-257 (6th Cir. 2010).

Claimant initially contends that the administrative law judge erred in finding that the medical evidence did not establish the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁵ Claimant specifically contends that the administrative law judge erred in finding that the opinions of Drs. Taha and Rasmussen did not support a finding that the miner suffered from a totally disabling respiratory or pulmonary impairment. We disagree. The administrative law judge accurately noted that neither Dr. Taha nor Dr. Rasmussen opined that the miner was totally disabled from a respiratory standpoint during his lifetime. Decision and Order on Remand at 5; Claimant's Exhibits 1, 2; Employer's Exhibit 5. The administrative law judge further noted that neither physician made an assessment of the miner's impairment that would allow him to compare it with the miner's exertional requirements in order to assess whether the impairment rendered the miner totally disabled.⁶ *Id.* at 5-6; *see Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Moreover, we reject claimant's assertion that testimony from the miner's son is sufficient to support a finding of total disability.⁷ Lay testimony on the issue of total disability may be sufficient to establish that the miner was totally disabled due to pneumoconiosis only if there is no medical evidence on the issue. *See* 20 C.F.R. §718.204(d)(3). We also reject claimant's argument that the administrative law judge should have inferred that the miner was totally disabled based on the miner's death

⁵ Because claimant does not challenge the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁶ The administrative law judge permissibly found that Dr. Taha's testimony, that the miner was on a ventilator and needed oxygen before he died, was insufficient to permit an inference that the miner was totally disabled during his lifetime. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 5. The record contains evidence that the need for a ventilator and oxygen near the time of death is not indicative of a totally disabling respiratory impairment during the miner's lifetime. Dr. Fino testified that, while the use of a ventilator is evidence of a respiratory impairment, it is evidence of an "acute" respiratory impairment present at the time of the miner's death. Unmarked Employer's Exhibit at 26.

⁷ The miner's son testified that the miner had to give up recreational and household activities before his death.

certificate. The miner's death certificate does not address whether the miner suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 10. Because claimant raises no other contentions of error, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm his finding that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Claimant next 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). Claimant specifically argues that the administrative law judge erred in her consideration of the opinions of Drs. Taha and Rasmussen. We disagree. Because Dr. Taha only stated that it was "theoretically" possible that the miner might have lived longer had he not suffered from chronic obstructive pulmonary disease (COPD),⁸ the administrative law judge permissibly found that the doctor's opinion was equivocal on whether the miner's legal pneumoconiosis hastened his death, and was entitled to less weight. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order on Remand at 6; Claimant's Exhibit 1 at 15.

The administrative law judge also permissibly found that Dr. Rasmussen's opinion was insufficient to support a finding that the miner's legal pneumoconiosis hastened his death. The Sixth Circuit has held that pneumoconiosis may be found to have hastened a miner's death only if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). A physician who opines that pneumoconiosis hastened death through a "specifically defined process" must explain how and why it did so, and ordinarily ought to explain to what extent it did so, as expressed in a length of time. *Conley*, 595 F.3d at 303-04, 24 BLR at 2-266. In this case, Dr. Rasmussen concluded that legal pneumoconiosis, lung cancer and heart disease all contributed to the miner's death, and opined that legal pneumoconiosis hastened the miner's death.

⁸ Dr. Taha completed the miner's death certificate. Dr. Taha attributed the miner's death to respiratory failure due to lung cancer, and chronic obstructive pulmonary disease (COPD). Director's Exhibit 10. During a deposition, Dr. Taha opined that the miner's lung cancer was the main cause of death. Claimant's Exhibit 1 at 5. Dr. Taha further stated that it was "theoretically" possible that the miner might have lived longer had he not suffered from COPD. Claimant's Exhibit 1 at 15.

Employer's Exhibit 5 at 19-20, 23. However, the administrative law judge found that Dr. Rasmussen did not provide an adequate explanation as to how the miner's legal pneumoconiosis played a role in his death. Decision and Order on Remand at 6. Dr. Rasmussen did not explain how pneumoconiosis hastened the miner's death, other than to say that it reduced the miner's ability to withstand his lung cancer and heart disease. Employer's Exhibit 5 at 29-31. The administrative law judge, therefore, permissibly found that Dr. Rasmussen's opinion lacked the necessary specificity to establish that pneumoconiosis hastened the miner's death.⁹ See *Conley*, 595 F.3d at 303-04, 24 BLR at 2-267; *Williams*, 338 F.3d at 517-18, 22 BLR at 2-654-55 (holding that such an opinion did not establish that pneumoconiosis hastened death because "[o]ne can always claim . . . that if pneumoconiosis makes someone weaker, it makes them less resistant to some other trauma.").

Because claimant raises no other contentions of error, we affirm the administrative law judge's 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).¹⁰ We, therefore, affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.

⁹ Although Dr. Rasmussen indicated that the miner's COPD hastened his death, he could not quantify the term "hasten," noting that it might have been an hour or it might have been three months. Employer's Exhibit 5 at 23.

¹⁰ Drs. Simpao, Fino, and Caffrey also addressed the cause of the miner's death. Although Dr. Simpao opined that pneumoconiosis may have hastened the miner's death from lung cancer, the administrative law judge accorded less weight to his opinion because he found that it was conclusory. Decision and Order on Remand at 6; Director's Exhibit 13. Because claimant does not challenge the administrative law judge's basis for discrediting Dr. Simpao's opinion, this finding is affirmed. *Skrack*, 6 BLR at 1-711. Drs. Fino and Caffrey each opined that the miner's COPD did not cause, contribute to, or hasten, his death. Employer's Exhibits 3, 4; Unmarked Employer's Exhibits.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge