

BRB No. 06-0689 BLA

EVA A. DUNKIN	)	
(Widow of ALBERT E. DUNKIN)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 06/15/2007
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Miner's and Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

I. John Rossi, West Des Moines, Iowa, for claimant.

Michelle S. Gerdano (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Miner's and Survivor's Benefits of Administrative Law Judge Thomas M. Burke rendered in claims (2004-BLA-1 and 2004-BLA-5002) filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>1</sup> The

---

<sup>1</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726

administrative law judge credited the miner with seven (7) years, three (3) months and twenty-two (22) days of qualifying coal mine employment, and adjudicated the miner's claim, filed on November 3, 1999, and claimant's survivor's claim, filed on June 4, 2001, pursuant to the regulatory provisions at 20 C.F.R. Part 718.<sup>2</sup> The administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), but failed to establish the existence of either simple or complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.304, 718.203(c), disability causation pursuant to 20 C.F.R. §718.204(c), or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied in both claims.

On appeal, claimant challenges the administrative law judge's findings regarding the length of the miner's coal mine employment and his denial of benefits in both claims. Claimant additionally argues that if Dr. Jewett's uncontradicted medical opinion is discounted as not being credible, the Director, Office of Workers' Compensation Programs (the Director), has not satisfied his statutory duty to provide the miner with a complete pulmonary evaluation, consistent with *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984), and *Cline v. Director, OWCP*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1990).<sup>3</sup> The Director responds, urging affirmance of the denial of benefits in both claims.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of*

---

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup> Claimant, the miner's widow, is pursuing the miner's claim on his behalf.

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Eighth Circuit, as the miner's last coal mine employment occurred in Iowa. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

*Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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).

Claimant initially contends that the administrative law judge erred in accepting the district director's incorrect computation of 7 years, 3 months and 22 days of qualifying coal mine employment that was based on a formula utilizing a Bureau of Labor Statistics table of average earnings for miners, in conjunction with the miner's Social Security Administration (SSA) records. Claimant asserts that the district director misapplied the formula for the years 1947 and 1958, and maintains that, under the regulations and controlling precedent of the United States Court of Appeals for the Eighth Circuit, the miner's SSA records document at least ten years of qualifying coal mine employment in the years 1942, 1943, 1947, 1948, 1949, 1950, 1951, 1956, 1957, 1958 and 1959. Specifically, claimant argues that the district director's determination does not comport with the 125-day rule set forth at 20 C.F.R. §725.101(a)(32), as the miner was not credited with a full year of employment for those years in which two or three quarters of earnings were posted, and the miner did not receive credit for all quarters in which at least \$50 of earnings were reported. Claimant's arguments have merit.

In *Yauk v. Director, OWCP*, 912 F.2d 192, 12 BLR 2-339 (8th Cir. 1989), the Eighth Circuit interpreted the 125-day rule at 20 C.F.R. §718.301(b) (2000)<sup>4</sup> as requiring that a miner who establishes at least 125 working days of coal mine employment in a calendar year be credited with one year of qualifying employment. In applying the 125-day rule, the court indicated that the miner should have been credited with one year of employment for every calendar year in which SSA records documented at least two quarters of coal mine employment, and one-half of a year for every calendar year in

---

<sup>4</sup> As amended, this regulation provides that 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(b). While Section 725.101(a)(32) is applicable to the miner's claim which was pending on the effective date of the revised regulations, see 20 C.F.R. §725.2, any of its provisions that conflict with Eighth Circuit precedent may not be retroactively applied. See *Nat'l Mining Ass'n v. U.S. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002).

which SSA records showed one quarter of coal mine employment. *Id.* As the instant case arises within the jurisdiction of the Eighth Circuit, and as the administrative law judge merely accepted the district director's calculations, we vacate the administrative law judge's finding of 7 years, 3 months and 22 days of coal mine employment, and remand the case for the administrative law judge to address claimant's arguments, determine whether the *Yauk* formula is applicable under the facts of this case, and recalculate the length of the miner's coal mine employment. *See* 20 C.F.R. §§718.301, 725.101(a)(32).

Turning to the merits of entitlement, claimant contends that the administrative law judge should not have adjudicated the issue of the existence of pneumoconiosis in the miner's claim. We agree. The administrative law judge acknowledged that pneumoconiosis was not listed as a contested issue on Form CM-1025, and that the parties stipulated to the presence of pneumoconiosis. Decision and Order at 3; [Miner] Director's Exhibit 20. The issues considered by the administrative law judge are generally restricted to those identified by the district director. 20 C.F.R. §§725.455(a), 725.463(a); *see Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985); *Stidham v. Cabot Coal Co.*, 7 BLR 1-97 (1984); *Simpson v. Director, OWCP*, 6 BLR 1-49 (1983). Moreover, stipulations of fact are binding upon the parties and the trier-of-fact, and prevent the stipulated issue from being contested at any stage of the proceedings. *See* 20 C.F.R. §725.463; *Nippes v. Florence Mining Co.*, 12 BLR 1-108 (1985)(McGranery, J., dissenting). Consequently, the existence of simple pneumoconiosis is established in the miner's claim, and we vacate the administrative law judge's findings to the contrary at 20 C.F.R. §718.202(a)(1)-(4). If, on remand, the administrative law judge determines that at least ten years of qualifying employment are established, claimant is entitled to invocation of the presumption at 20 C.F.R. §718.203(b) that the miner's pneumoconiosis arose out of coal mine employment.

However, we reject claimant's argument that the administrative law judge erred in adjudicating the issue of whether the miner had complicated pneumoconiosis. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption that a miner who is suffering or has suffered from complicated pneumoconiosis is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that he was totally disabled due to pneumoconiosis at the time of his death. 20 C.F.R. §718.304. The district director's Final Memorandum of Informal Conference indicated that, despite an x-ray reading of a Size A large opacity, the irrebuttable presumption was not applicable because the medical evidence did not link the miner's pneumoconiosis to dust exposure in coal mine employment and the miner failed to establish the requisite ten years of coal mine employment to trigger the presumption of causality at 20 C.F.R. §718.203(b), *see* [Miner] Director's Exhibit 16. Moreover, the record does not contain an express stipulation that complicated

pneumoconiosis was present. Thus, the administrative law judge properly considered this issue.

We also reject claimant's argument that Dr. Navani's x-ray reading of a Size A large opacity automatically triggered invocation of the irrebuttable presumption at Section 718.304. When conflicting evidence is presented, the administrative law judge must examine all of the evidence on this issue, weigh all the different categories of evidence under Section 718.304(a)-(c) together pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), and then resolve the conflicts and make a finding of fact. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). In the present case, the administrative law judge accurately reviewed the conflicting evidence and determined that only Dr. Navani found Category 1 changes and a Size A opacity consistent with pneumoconiosis on a film taken on November 30, 1999, but the physician indicated that "pleuro-parenchymal changes described are more likely to be due to asbestosis rather than [coal workers' pneumoconiosis]." [Miner] Director's Exhibit 12; Decision and Order at 7. Dr. Christenson interpreted the same film as showing no changes consistent with pneumoconiosis, noting that "interstitial changes could all be related to cancer therapy." [Miner] Director's Exhibit 10, 11; Decision and Order at 7. The administrative law judge further determined that the miner's hospital records reflected that the mass observed on x-ray was small cell carcinoma of the lungs, as confirmed by the oncology report of Dr. Brown; that large opacities consistent with pneumoconiosis were not documented on the remaining x-rays of record; that a post-chemotherapy computerized tomography scan dated December 21, 1999 was negative except for the presence of emphysema; and that Dr. Witte's autopsy report listed a malignant neoplasm in the left lung, emphysema and mild anthracotic pigmentation as final anatomic diagnoses. Decision and Order at 7-10; [Survivor] Director's Exhibits 5, 6. As Dr. Navani's x-ray findings were inconclusive, the administrative law judge reasonably concluded that a preponderance of the evidence established that the Size A opacity was a manifestation of the miner's lung cancer and did not represent complicated pneumoconiosis. Decision and Order at 7-10; *see generally Melnick*, 16 BLR at 1-33. Thus, we affirm the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption at Section 718.304, as supported by substantial evidence.

Claimant next maintains that Dr. Jewett's medical opinion, that the miner's disabling impairment was sixty percent attributable to smoking and forty percent attributable to coal dust exposure, must either be accepted as establishing entitlement in the miner's claim, or the Director must obtain a reliable report in accordance with 20 C.F.R. §725.406. The administrative law judge credited Dr. Jewett's opinion to find total respiratory disability established at Section 718.204(b)(2)(iv), but discounted the opinion on the issue of disability causation at Section 718.204(c) because the physician relied on a "significantly inaccurate coal mine employment history." Decision and Order at 12.

As the administrative law judge's length of coal mine employment findings on remand may affect his analysis on the reliability of Dr. Jewett's opinion, we vacate the administrative law judge's findings at Section 718.204(c). *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*). On remand, the administrative law judge must reassess Dr. Jewett's opinion and determine whether it is sufficient to establish that the miner's pneumoconiosis was a contributing cause of the miner's totally disabling respiratory impairment. *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990), *rev'd on other grds*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995).

Lastly, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). We disagree. The administrative law judge permissibly discounted the death certificate signed by Dr. Auxter, listing "Black Lung" as a significant condition contributing to the miner's death from a cerebral vascular accident, as there was no evidence that the physician possessed relevant qualifications or personal knowledge of the miner's condition from which to determine the cause of death, and the autopsy findings did not support Dr. Auxter's conclusion that pneumoconiosis was a contributing cause of death. Decision and Order at 13; [Survivor] Director's Exhibit 4; *see Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). As substantial evidence supports the administrative law judge finding that complicated pneumoconiosis was not established, and that the record contained no other evidence that could establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c), we affirm his denial of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order Denying Miner's and Survivor's Benefits is affirmed in part, vacated in part, and this case is remanded for further consideration of the miner's claim consistent with this opinion.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge