

BRB No. 11-0431 BLA

JUANITA G. BREWSTER)
(Widow of CHARLIE J. BREWSTER))
)
Claimant-Petitioner)
)
v.)
)
U.S. STEEL MINING COMPANY) DATE ISSUED: 03/12/2012
)
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 Denying Benefits of Kenneth A. Krantz,
Administrative Law Judge, United States Department of Labor.

Juanita G. Brewster, Bland, Virginia, *pro se*.

Howard G. Salisbury, Jr. (Kay Castro & Chaney PPLC), Charleston, West
Virginia, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order
Denying Benefits (2009-BLA-05828) of Administrative Law Judge Kenneth A. Krantz

¹ Claimant is the widow of the miner, who died on February 23, 2008. Director's
Exhibit 13. The miner filed a claim for benefits on June 5, 2008. The claim was denied
by the district director on January 18, 2007, because the miner did not establish any of the
requisite elements of entitlement. Director's Exhibit 1. No further action was taken on
the miner's claim.

rendered on a survivor's claim 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). Claimant filed her survivor's claim on October 23, 2008. Director's Exhibit 2. The administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718 and the recent amendments to the Act.² Noting the parties' stipulation to at least eighteen years of coal mine employment, the administrative law judge, nonetheless, credited the miner with at least twenty-five years of coal mine employment, as supported by the evidence of record. Additionally, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), based on the parties' stipulation. The administrative law judge then found that the weight of the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Turning to the issue of the availability of the presumptions in establishing entitlement, the administrative law judge found that amended Section 411(c)(4), 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of death due to pneumoconiosis, could not be invoked in this case, as claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See* 30 U.S.C. §921(c)(4). Likewise, he found that the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3), 30 U.S.C. §921(c)(3), was not invoked because claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See* 30 U.S.C. §921(c)(3). Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits.³ Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter

² On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010 were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, if a miner has at least fifteen years of qualifying coal mine employment, and has a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

³ Ron Carson, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

stating that he will not file a substantive response to claimant's appeal.⁴

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law.⁵ 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).

In order to establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1985). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (3), or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). 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); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 1367, 21 BLR 2-166, 2-176 (11th Cir. 1997).

Section 411(c)(4)

Initially, we address the administrative law judge's finding that claimant was not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis pursuant to amended Section 411(c)(4). The administrative law judge found that the amended Section 411(c)(4) presumption was not invoked because, although claimant

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-five years of coal mine employment, and his acceptance of the parties' stipulation to the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), as these findings are not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ As the miner was last employed in the coal mining industry in Alabama, the Board will apply the law of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 4, 6.

established at least fifteen years of underground coal mine employment, the medical evidence failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). 30 U.S.C. §921(c)(4); Decision and Order at 21-22. In so finding, the administrative law judge properly determined that total disability was not established pursuant to Section 718.204(b)(2)(i)-(iii) because: the sole pulmonary function study was not credible, as it did not meet the 20 C.F.R. Part 718 quality standards; the only blood gas study was non-qualifying;⁶ and there was no evidence that the miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 21; Director’s Exhibit 9.

At Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Rasmussen and Tomashefski. The administrative law judge found that neither Dr. Rasmussen nor Dr. Tomashefski provided an opinion of total respiratory disability. Decision and Order at 22. Dr. Rasmussen, in a 2006 medical opinion from the miner’s claim, stated that it was “impossible to assess the patient’s pulmonary functional status because of his neuromuscular disease.”⁷ Director’s Exhibit 1. Dr. Tomashefski, who reviewed the miner’s autopsy slides and additional medical evidence from the record, did not address the issue of whether the miner was totally disabled at the time of his death.⁸ Employer’s Exhibit 2. Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that the medical opinion evidence was insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). 20 C.F.R. §718.204(b)(2)(iv); see *Black Diamond Coal Mining Co. v. Benefits Review*

⁶ A “qualifying” pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A “non-qualifying” study yields values that exceed the requisite table values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

⁷ Dr. Rasmussen’s examination of the miner on September 5, 2006, included a chest x-ray, a pulmonary function study and a resting blood gas study. Dr. Rasmussen opined that, because of the miner’s neuromuscular disease, he was not able to “assess the [miner’s] pulmonary functional status.” Director’s Exhibit 1.

⁸ In rendering his opinion, Dr. Tomashefski reviewed the miner’s autopsy slides and additional medical records. Employer’s Exhibit 2. However, the administrative law judge noted that, because a number of the documents relied on by Dr. Tomashefski were not in the record, he redacted Dr. Tomashefski’s discussion of these documents. Decision and Order at 16. Based on the admissible portions of his report, Dr. Tomashefski opined that the miner suffered from a progressive neurological condition, but the doctor did not provide an opinion regarding the miner’s respiratory condition. Employer’s Exhibit 2.

Board [Raines], 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985)(administrative law judge determines whether medical opinion evidence establishes total disability under Section 718.204(b)(2)(iv)); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc).

Because we affirm the administrative law judge's finding that the evidence was insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b), we also affirm the administrative law judge's finding that claimant failed to establish invocation of the Section 411(c)(4) presumption.⁹ See 30 U.S.C. §921(c)(4). Claimant must, therefore, establish entitlement to benefits under Part 718, without the benefit of the amended Section 411(c)(4) presumption.

Section 718.205(c)

In addressing the issue of death due to pneumoconiosis at Section 718.205(c), the administrative law judge set forth the relevant medical evidence, including the miner's death certificate, the autopsy report of Dr. Dennis, and the review of the autopsy slides by Drs. Bush and Tomashefski. The administrative law judge found that the weight of the evidence was insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c). With regard to the death certificate, which was signed by Dr. Polavarapu, the miner's treating physician, the administrative law judge found that it was the only "medical evidence" that included a statement that pneumoconiosis

⁹ We affirm the administrative law judge's finding that claimant did not establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c), 30 U.S.C. §921(c)(3). The administrative law judge properly found the x-ray evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a). 20 C.F.R. §718.304(a); Decision and Order at 20. Furthermore, there is no evidence in the record supportive of a finding of complicated pneumoconiosis pursuant to Section 718.304(c). 20 C.F.R. §718.304(c). Moreover, because the administrative law judge found that the conflicting autopsy reports of Drs. Dennis and Bush were in equipoise, claimant has not carried her burden of showing that Dr. Dennis's finding of progressive massive fibrosis was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b). 20 C.F.R. §718.304(b); see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

significantly contributed to the miner's death.¹⁰ Decision and Order at 18; Director's Exhibit 13. The administrative law judge further found that, while Dr. Dennis, the autopsy prosector, noted the presence of simple coal workers' pneumoconiosis (CWP), he concluded that the miner's death was due to bronchopneumonia and did not relate the miner's death to CWP.¹¹ Decision and Order at 18; Director's Exhibit 12. The administrative law judge, therefore, reasonably found that the death certificate was insufficient, standing alone, or in concert with Dr. Dennis's opinion, to establish that the miner's death was due to pneumoconiosis or substantially contributed to by pneumoconiosis, because Dr. Polavarapu did not provide any explanation for the conclusions he provided on the death certificate. See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-264 (4th Cir. 2000); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Decision and Order at 18-19.

¹⁰ The death certificate states that the immediate cause of the miner's death was:

[Part I] (A) Respiratory failure, due to (or as a consequence of):
(B) Progressive Massive Fibrosis.

[Part II]. With other significant conditions contributing to death but not resulting in the underlying causes given in Part 1: Pneumoconiosis, Parkinson's.

Director's Exhibit 13.

¹¹ Dr. Dennis, the autopsy prosector, found the presence of:

- (1). Pulmonary congestion and edema.
- (2). Pulmonary embolus.
- (3). Bronchopneumonia[,] extensive.
- (4). Anthracosilicosis with coal workers' pneumoconiosis, simple variety and progressive massive fibrosis with black pigment deposition, macular development, emphysematous changes and nodular proliferation of black pigment along with silica particle impregnation with resultant fibrosis.

Director's Exhibit 12. Dr. Dennis then concluded that the miner died a "pulmonary death with prominent bronchopneumonia. In addition the [miner] had findings of coal workers' pneumoconiosis, simple variety and progressive massive fibrosis and macular development along with black pigment deposition." *Id.*

With regard to the medical opinion evidence, the administrative law judge found that the weight of this evidence was likewise insufficient to establish that the miner's death was due to pneumoconiosis or substantially contributed to by pneumoconiosis pursuant to Section 718.205(c). The administrative law judge found that Dr. Dennis, the autopsy prosector, opined that the miner died a pulmonary death with prominent bronchopneumonia, and also noted the presence of simple CWP and progressive massive fibrosis in the autopsy slides. Decision and Order at 18; Director's Exhibit 12. However, the administrative law judge further noted that Dr. Dennis did not relate the simple CWP or progressive massive fibrosis to the miner's death. *Id.* The administrative law judge found that Dr. Bush, who reviewed the autopsy slides, opined that the cause of the miner's death was massive bronchopneumonia with aspiration pneumonia, and that, while the autopsy slides showed a very mild degree of simple CWP, it played no role in the miner's death.¹² Decision and Order at 18-19; Employer's Exhibit 1. Similarly, the administrative law judge found that Dr. Tomashefski, who reviewed the miner's autopsy slides and additional records, opined that the cause of the miner's death was aspiration pneumonia, due to an underlying cause of the miner's supranuclear palsy/Parkinson's disease, and that CWP did not cause, contribute to, or hasten the miner's death.¹³ Decision and Order at 18-19; Employer's Exhibit 2.

Within a reasonable exercise of his discretion, the administrative law judge accorded little weight to the opinion of Dr. Tomashefski, that the cause of the miner's death was aspiration pneumonia with an underlying cause of supranuclear palsy/Parkinson's disease, because Dr. Tomashefski relied on evidence not contained in the record in discussing the miner's neuromuscular condition and an inaccurate smoking

¹² Dr. Bush, reviewed the autopsy slides, and noted that the slides showed a very mild degree of simple coal workers' pneumoconiosis (CWP), but that progressive massive fibrosis was present. Employer's Exhibit 1. Based on his review of the autopsy slides, Dr. Bush opined that the cause of death was massive bronchopneumonia and that the degree and extent of the miner's coal dust disease was too limited to have been a cause of death or a hastening factor. *Id.*

¹³ Dr. Tomashefski reviewed autopsy slides and other medical evidence, and opined that aspiration pneumonia was the immediate cause of the miner's death with the underlying cause being the miner's supranuclear palsy/Parkinson's diseases, which lead to the aspiration pneumonia. Employer's Exhibit 2. Additionally, based on a finding of a few small pneumoconiotic micronodules, Dr. Tomashefski stated the miner had very mild simple coal workers' pneumoconiosis (CWP), but he did not have complicated CWP, and the doctor opined that the simple CWP was too mild to have caused him any respiratory impairment or respiratory symptoms or to have been a direct cause, or a contributory factor, in the miner's death. *Id.*

history. See *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); Decision and Order at 19-20; Employer's Exhibit 2. Additionally, the administrative law judge reasonably found that the opinions of Drs. Bush and Dennis were in equipoise, as the physicians are equally qualified, and came to different conclusions regarding the extent of the miner's pneumoconiosis, based on a review of the same fifteen autopsy slides. The administrative law judge, therefore, properly found that claimant failed to carry her burden of proof pursuant to Section 718.205(c). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 19. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish, by a preponderance of the evidence, that the miner's death was due to pneumoconiosis, or substantially contributed to by pneumoconiosis. 20 C.F.R. §718.205(c); *Bradberry*, 117 F.3d at 1367, 21 BLR at 2-178; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); Decision and Order at 20.

Accordingly, the administrative law judge's Decision and Order 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