

BRB No. 13-0268 BLA

PEGGY JEAN KING )  
(Widow of ARTHUR KING) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 ISLAND CREEK COAL COMPANY )  
 )  
 and )  
 ) DATE ISSUED: 03/06/2014  
 WELLS FARGO )  
 )  
 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 of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

George E. Roeder, III (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (2011-BLA-5222) of Administrative

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on January 25, 2010. Director's Exhibit 12.

Law Judge John P. Sellers, III, denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on March 24, 2010.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4), the administrative law judge credited the miner with over fifteen years of qualifying coal mine employment.<sup>2</sup> However, because the administrative law judge found that the evidence did not establish that the miner suffered from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant did not invoke the Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis. 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 that the medical opinion evidence established the existence of legal pneumoconiosis,<sup>3</sup> in the form of emphysema and chronic obstructive pulmonary disease (COPD) due to both coal mine dust exposure and cigarette smoking, pursuant to 20 C.F.R. §718.202(a)(4), but did not establish that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>4</sup> Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and, therefore, erred in finding that claimant did not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Claimant also 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(b). Employer responds in support of the administrative law judge's denial of benefits. The

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<sup>2</sup> The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. 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).

<sup>3</sup> "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).

<sup>4</sup> After the administrative law judge issued his decision, the Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The provisions that were applied by the administrative law judge at 20 C.F.R. §718.205(c) are now set forth at 20 C.F.R. §718.205(b). 78 Fed. Reg. at 59,114 (to be codified at 20 C.F.R. §718.205(b)).

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'Keefe 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; *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, the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable,<sup>5</sup> or the Section 411(c)(4) presumption is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(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(b)(6).

### **The Section 411(c)(4) Presumption**

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this survivor's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established.<sup>6</sup> 30 U.S.C. §921(c)(4).

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<sup>5</sup> The administrative law judge found that there is no evidence of complicated pneumoconiosis, and, therefore, found that claimant is not entitled to the Section 411(c)(3) irrebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304; Decision and Order at 19. Because this finding is not challenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>6</sup> The amendments also revived Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.

Claimant argues that the administrative law judge erred in finding that the evidence did not establish that the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Claimant initially contends that the administrative law judge erred in failing to find total disability, when the miner's pulmonary function and arterial blood gas studies "indicated problems." Claimant's Brief at 3-4. The administrative law judge properly found that the only pulmonary function study of record, conducted on August 14, 1986, was non-qualifying.<sup>7</sup> Decision and Order at 20; Director's Exhibit 15. Further, the administrative law judge accurately found that an arterial blood gas study conducted on August 14, 1986 was non-qualifying. *Id.* The administrative law judge permissibly gave no weight to the remaining arterial blood gas studies, which were conducted during the miner's final hospitalization from January 19, 2010 to January 25, 2010, as those studies were not "accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition."<sup>8</sup> 20 C.F.R. §718.105(d); Decision and Order at 9 n.5. The administrative law judge, in fact, noted that Drs. Selby and Basheda opined that the blood gas studies conducted during the miner's final hospitalization were not reliable evidence of a chronic respiratory or pulmonary condition, but instead reflected an acute respiratory condition near the time of the miner's death. Decision and Order at 20; Employer's Exhibits 2 at 20-21; 10 at 14-15, 48-49. Because substantial evidence supports the administrative law judge's findings that the pulmonary function study and blood gas

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30 U.S.C. §932(l). Claimant cannot benefit from this provision, as the miner's claim for benefits was denied. Director's Exhibit 1.

<sup>7</sup> A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

<sup>8</sup> Section 718.105(d) provides that:

If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death.

20 C.F.R. §718.105(d).

study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), those findings are affirmed.<sup>9</sup>

Claimant next argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Houser, Selby, and Basheda. Decision and Order at 20-21. Dr. Houser noted that he did “not have [any] pulmonary function data available,” but stated that he thought that it was “reasonable to assume that [the miner] had at least moderately severe if not severe emphysema.” Claimant’s Exhibit 1. Dr. Selby opined that the miner had a “severe respiratory impairment *acutely* causing his death from pneumonia superimposed on advanced emphysema.” Employer’s Exhibit 1 (emphasis added). Dr. Selby also noted that there was no historical or objective evidence that the miner suffered from any respiratory impairment when he worked as a coal miner. Employer’s Exhibit 1. Finally, Dr. Basheda opined that the miner “suffered no significant pulmonary impairment to prevent him from performing his coal mine work.” Employer’s Exhibit 9.

The administrative law judge discounted Dr. Houser’s opinion, and found that the opinions of Drs. Selby and Basheda did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant contends that the administrative law judge erred in finding that the opinions of Drs. Houser and Selby did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant’s Brief at 3-4. We disagree.

The administrative law judge permissibly found that Dr. Houser’s opinion, that the miner had “moderately severe if not severe emphysema,” was not persuasive, because it was not well documented.<sup>10</sup> See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-

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<sup>9</sup> Because there is no evidence of record that the miner suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 20.

<sup>10</sup> The administrative law judge found that it was unclear how Dr. Houser could diagnose “moderately severe if not severe emphysema” in the absence of any “pulmonary function data demonstrating the degree of any obstruction present.” Decision and Order at 21, 27. Additionally, because Dr. Houser failed to assess the existence or severity of a pulmonary or respiratory impairment, we note that the doctor’s diagnosis of moderate to severe emphysema is insufficient to support a finding of a totally disabling pulmonary impairment. See *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 21; Claimant's Exhibit 1. The administrative law judge also permissibly found that Dr. Selby's opinion, that the miner had a "severe respiratory impairment *acutely* causing his death from pneumonia," addressed only the miner's final week in the hospital and, therefore, did not support a finding that the miner was totally disabled by a respiratory impairment before that time. Decision and Order at 21; Employer's Exhibit 1 (emphasis added). Finally, the administrative law judge accurately found that Dr. Basheda's opinion does not support a finding of total disability. Decision and Order at 21; Employer's Exhibit 9. Therefore, we affirm, as supported by substantial evidence, 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). See *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Because we have affirmed the administrative law judge's finding that the evidence did not establish that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's determination that claimant failed to invoke the Section 411(c)(4) presumption. See 30 U.S.C. §921(c)(4).

### **Death Due to Pneumoconiosis**

Where the Section 411(c)(3) and 411(c)(4) presumptions do not apply, see 30 U.S.C. §921(c)(3), (4), claimant must affirmatively establish that pneumoconiosis was the cause or was a substantially contributing cause of the miner's death. See 20 C.F.R. §§718.1, 718.205(b)(1),(2). Claimant argues that the administrative law judge erred in finding that Dr. Houser's opinion did not establish that the miner's death was due to pneumoconiosis.

In considering whether the miner's death was due to pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Selby, Basheda, and Houser.<sup>11</sup> Dr. Selby, the miner's treating pulmonologist during his final hospitalization, explained that the miner was admitted because of generalized weakness, and was ultimately found to be suffering from sepsis, an infection in the bloodstream. Employer's Exhibit 2 at 5-6. Dr. Selby explained that the miner probably developed sepsis as a result of his age, as well as "his weakened condition due to gastric cancer and . . . chemotherapy." *Id.* at 6. Dr. Selby opined that the miner also suffered from pneumonia,

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<sup>11</sup> The administrative law judge also considered the miner's death certificate. The miner's death certificate, signed by Dr. Ballou, lists the cause of death as respiratory failure due to pneumonia. Director's Exhibit 12.

which could have caused the sepsis. *Id.* at 25. Dr. Selby was consulted in order to treat the miner's blood gas exchange abnormalities, which the doctor attributed to sepsis, pneumonia, and emphysema. *Id.* at 6. Dr. Selby, however, opined that all of the miner's gas exchange abnormalities were acute. *Id.* at 20. Dr. Selby attributed the miner's death to respiratory failure due to pneumonia. *Id.* at 7. Dr. Selby further opined that the miner's coal mine dust exposure did not cause, contribute to, or hasten, the miner's death. *Id.* at 14.

Dr. Basheda reviewed the miner's medical records, and opined that the miner "died from metastatic gastric cancer, probably complicated by the effects of chemotherapy." Employer's Exhibit 10 at 20. Dr. Basheda further explained that the miner developed neutropenia and septic shock, with multi-organ dysfunction syndrome. *Id.* Dr. Basheda opined that the miner's coal mine dust exposure did not cause, contribute to, or hasten, his death. *Id.*

Finally, Dr. Houser addressed the cause of the miner's death, stating that: The [miner's] emphysema complicated by pneumonia resulted in respiratory failure and ultimately caused his death. [An] article by Skillrod [sic] and [c]o-workers from the Mayo Clinic indicates, "We conclude that chronic obstructive pulmonary disease predisposes to death from any cause, and we observed as have others . . . , that time to death from any cause is highly associated with the degree of reduction in baseline FEV1.

Claimant's Exhibit 1 at 3.

The administrative law judge initially considered whether Dr. Houser's opinion established that "pneumoconiosis was the cause of the miner's death." 20 C.F.R. §718.205(b)(1). Contrary to claimant's contention, the administrative law judge permissibly determined that Dr. Houser's opinion, that the miner's legal pneumoconiosis (emphysema) was a direct cause of the miner's death, was not sufficiently reasoned.<sup>12</sup>

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<sup>12</sup> The administrative law judge found that Dr. Houser did not base his opinion of severe emphysema on objective data. Decision and Order at 27. Further, the administrative law judge explained that "Dr. Houser did not offer any real explanation why he believed that the [m]iner's emphysema, complicated by pneumonia, was the cause of the miner's death." *Id.* To the extent that Dr. Houser based his opinion on medical literature assessing the risk of lung cancer in patients with chronic obstructive pulmonary disease, the administrative law judge found that the doctor's reliance on the study was misplaced, as the miner in this case suffered from gastric cancer, not lung cancer. *Id.*

*See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Addison v. Director, OWCP*, 11 BLR 1-68 (1988). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b)(1).

The administrative law judge next considered whether the evidence established that the miner's pneumoconiosis was "a substantially contributing cause or factor leading to the miner's death." 20 C.F.R. §718.205(b)(2). Pneumoconiosis is a substantially contributing cause of death "if it hastens the miner's death." 20 C.F.R. §718.205(b)(6). However, 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 the extent to which it did so, as expressed in a length of time. *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04, 24 BLR 2-257, 2-266 (6th Cir. 2010).

Applying the foregoing standards, the administrative law judge permissibly found that Dr. Houser's general statement, that the miner's emphysema and COPD predisposed him to death, was "too vague and speculative"<sup>13</sup> to satisfy the requirement to explain how pneumoconiosis hastened death through a specifically defined process. Decision and Order at 27; *see Conley*, 595 F.3d at 303, 24 BLR at 2-266; *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Additionally, the administrative law judge reasonably questioned Dr. Houser's reliance upon the degree of reduction in the miner's baseline FEV1 to support his opinion, because Dr. Houser did not review any pulmonary function values, and thus was unaware of whether the miner's baseline FEV1 was reduced. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 27. Substantial evidence supports the administrative law judge's finding that Dr. Houser's opinion was not sufficiently reasoned and persuasive to establish that the miner's legal pneumoconiosis was "a substantially contributing cause or factor leading to the miner's death." 20 C.F.R. §718.205(b)(2); *see Rowe*, 710 at 255, 5 BLR at 2-103. Consequently, we affirm the

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<sup>13</sup> The administrative law judge found that "Dr. Houser's opinion that the [m]iner's underlying emphysema played a role in his death appears to be largely an assumption and fails to identify any specific mechanism whereby the [m]iner's emphysema played such a role." Decision and Order at 29. The administrative law judge further found that Dr. Houser's "statements regarding COPD predisposing one to death, even if true in the general sense, require further explanation and application to the specifics of the [m]iner's death . . . ." *Id.*

administrative law judge's determination that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b)(2).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge