

BRB No. 11-0581 BLA

PAULINE BROWN)	
(Widow of JACK H. BROWN))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 05/03/2012
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Pauline Brown, London, Kentucky, *pro se*.

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order (09-BLA-5490) of Administrative Law Judge Christine L. Kirby denying benefits on a 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). This case involves a survivor's claim filed on July 14, 2008. In a Proposed Decision and Order dated November 13, 2008, the district director denied benefits. Claimant thereafter requested modification, which the

¹ Claimant is the surviving spouse of the miner, who died on June 26, 2008. Director's Exhibit 15.

district director denied on February 2, 2009. Claimant then requested a formal hearing before the Office of Administrative Law Judges. The administrative law judge scheduled a hearing for August 11, 2010, and provided the parties with notice of the recent amendments to the Act. Claimant later filed an unopposed motion seeking a decision on the record, and waiving her right to a hearing. The administrative law judge granted claimant's motion on August 26, 2010.

In a Decision and Order dated March 17, 2011, the administrative law judge credited the miner with 14.75 years of coal mine employment.² The administrative law judge further found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). 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). The administrative law judge, therefore, found that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification, and denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.³ 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).

² The record reflects that 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 (1989) (en banc).

³ We note that the administrative law judge was not required to consider whether the evidence was sufficient to establish modification of the district director's denial of claimant's survivor's claim. The Board has held that an administrative law judge is not required to make a preliminary determination regarding whether a claimant has established a basis for modification of the district director's denial of benefits before reaching the merits of entitlement. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

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); *Neely 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 death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

On March 23, 2010, while claimant's claim was pending before the administrative law judge, Congress 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 Section 411(c)(4), if a claimant establishes that a 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 the miner had a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis.⁴ 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); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, BLR (6th Cir. 2011).

Length of Coal Mine Employment

Because it is relevant to whether claimant can invoke the amended Section 411(c)(4) presumption, we initially address whether the administrative law judge's finding regarding the length of the miner's coal mine employment is supported by substantial evidence. Claimant bears the burden of proof in establishing the length of the miner's coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-

⁴ The recent amendments also revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner, who was eligible to receive benefits at the time of his or her death, is automatically entitled to survivor's benefits without having to establish that the miner died due to pneumoconiosis. 30 U.S.C. §932(l). However, because the miner was not receiving benefits at the time of his death, claimant is not eligible for benefits under the automatic entitlement provisions of amended Section 422(l).

12, 2-16 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The administrative law judge is given great latitude in the computation of years of coal mine employment and, as such, her calculation of years of coal mine work will be upheld, when based on a reasonable method of computation and supported by substantial evidence in the record considered as a whole. *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Caldrone v. Director, OWCP*, 6 BLR 1-575, 1-578 (1983).

In her consideration of the length of the miner's coal mine employment, the administrative law judge recognized that Administrative Law Judge Clement J. Kichuk, in his consideration of the miner's earlier claim, credited the miner with 14.75 years of coal mine employment. Decision and Order at 4. The administrative law judge noted that Judge Kichuk based his coal mine employment finding on the miner's Social Security records, because the miner testified that he could not remember how long he had worked at any coal mine jobs between 1952 and 1960. *Id.* After noting that the district director, in considering claimant's survivor's claim, credited the miner with thirteen years of coal mine employment from 1971 to 1985, the administrative law judge made her own finding regarding the length of the miner's coal mine employment:

In her brief, Claimant states that she believes that her husband easily worked more than fifteen years in the mines, but concedes that there may not be adequate supporting documentation. (Cl. Br. at 5-6). She does not give any specific dates or name[s] of mines where the miner worked, or offer any additional documentation. Based on the documentation of record, I find that [c]laimant has established the miner worked 14.75 years in the coal mines.

Decision and Order at 4.

Although the administrative law judge did not explicitly identify the method she utilized in computing the miner's 14.75 years of coal mine employment, it appears that she adopted the method employed by Judge Kichuk in his adjudication of the miner's claim, i.e., she credited the miner with each quarter-year in which his Social Security Earnings Statement revealed earnings of at least \$50.00 in coal mine employment. Thus, the administrative law judge credited the miner with a total of 59 quarters of coal mine employment.⁵ However, the administrative law judge did not explain why she did not

⁵ Based on the miner's Social Security Earnings Statement, the administrative law judge appears to have credited the miner with one quarter of coal mine employment in 1952, one quarter of coal mine employment in 1961, one quarter of coal mine employment in 1962, and a total of fifty-six quarters of coal mine employment from 1971 to 1985. Director's Exhibit 9.

credit the miner with additional coal mine employment not documented by his Social Security records.

At the hearing held by Judge Kichuk, the miner testified that he had worked in and around coal mines for twenty-one to twenty-two years, since 1951.⁶ October 28, 1987 Hearing Tr. at 15. In addition to the coal mine employment documented by his Social Security records, the miner testified that he worked at underground coal mines for Oven Fork Coal Company from 1952 to 1953, and for Homer Lewis Coal Company from 1956 to 1958. Hearing Tr. at 18. At the hearing, the miner testified regarding the length of his coal mine employment with Oven Fork Coal Company:

[T]o be truthful, I really don't know, I'm not really sure how long, you know, that I worked. It might have been a year, it might have been six months or it might have been a year and a-half, I just, it's been a long time and I just, I just really don't remember that close, you know.

Hearing Tr. at 43.

Given that the miner provided a range of times in which he worked for Oven Fork Coal Company, his testimony supports a finding that he worked as a coal miner for some period of time for Oven Fork Coal Company from 1951 to 1952. The administrative law judge failed to explain why she did not credit the miner with any coal mine employment for his work with Oven Fork Coal Company. Similarly, the administrative law judge failed to explain why she did not credit the miner with any coal mine employment with Homer Lewis Coal Company from 1956 to 1958.

Moreover, the miner, in completing an employment history form, listed coal mine employment with Oven Fork Coal Company from 1952 to 1953, and with Homer Lewis Coal Company from 1956 to 1958. Director's Exhibit 1. Claimant similarly completed an employment history form in her survivor's claim, noting that the miner worked from August of 1955 to March of 1957 as a coal miner for Henry Lewis Coal Company.⁷ The administrative law judge did not address the relevance of this evidence.

⁶ The miner also testified that he worked for Cornett Brothers Coal Company in 1955 and 1956. Hearing Tr. at 18. The administrative law judge, however, appears to have credited the miner with two quarters of coal mine employment with Cornett Brothers Coal Company, based on the miner's Social Security records. See Director's Exhibit 9.

⁷ Claimant appears to have mistakenly identified Homer Lewis Coal Company as Henry Lewis Coal Company.

Because she did not explain why she provided the miner with no credit for his coal mine employment with Oven Fork Coal Company and Homer Lewis Coal Company, the administrative law judge's finding regarding the length of the miner's coal mine employment does not comport with the requirements of the Administrative Procedure Act (APA), specifically, 5 U.S.C. §557(c)(3)(A), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding regarding the length of the miner's coal mine employment, and remand the case for further consideration of this issue.

If the administrative law judge, on remand, credits the miner with fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, she must determine whether the evidence establishes that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). If so, claimant would be entitled to invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4). If claimant invokes the Section 411(c)(4) presumption, the administrative law judge must then determine whether the Director has rebutted the presumption.

Section 718.205(c)

In the interest of judicial economy, we will address 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). In addressing the cause of the miner's death, the administrative law judge considered the miner's death certificate. Dr. Morris completed the miner's death certificate, listing colon cancer as the immediate cause of death, with chronic obstructive pulmonary disease (COPD) and respiratory failure as underlying causes contributing to death. Director's Exhibit 15. In a one-page follow-up letter, Dr. Morris opined that "pneumoconiosis was a contributor to the COPD which prohibited the miner from receiving aggressive treatment for his colon cancer and ultimately leading to his death." Director's Exhibit 31. The administrative law judge permissibly found that Dr. Morris's opinion was not sufficiently reasoned because the doctor did not explain the basis for her opinion that pneumoconiosis prevented the miner from receiving aggressive treatment for his colon cancer.⁸ *See Director, OWCP v. Rowe*,

⁸ The administrative law judge noted that the miner's treatment records reveal that the miner underwent colon surgery in March of 2008. Decision and Order at 11; Director's Exhibit 19.

710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 11.

In a one-page report, Dr. Vaezy opined that the miner's "terminal respiratory failure seemed to be due to his 'chronic obstructive pulmonary disease' that in turn was mostly due to smoking, but certainly worker's pneumoconiosis played a significant role in his symptoms, terminal respiratory failure and . . . demise." Claimant's Exhibit 1. Because Dr. Vaezy did not provide an explanation for attributing the miner's death to his pneumoconiosis, the administrative law judge permissibly found that his opinion regarding the miner's cause of death was conclusory, and not sufficiently reasoned. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 9.

Because there is no other evidence in the record that addresses the cause of the miner's death, 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).⁹

On remand, the administrative law judge must consider whether claimant is entitled to invoke the Section 411(c)(4) presumption. Should the administrative law judge find invocation, she must determine whether the Director has rebutted the presumption. If the administrative law judge finds that claimant cannot invoke the presumption, or that the Director has rebutted the presumption, the administrative law judge must deny benefits, as we have affirmed her finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

⁹ Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §§718.205(c)(3), 718.304.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge