

BRB No. 10-0243 BLA

BUENA V. PHILLIPS	)	
(Widow of GEORGE W. PHILLIPS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTLAND-ELKHORN COAL	)	
CORPORATION	)	DATE ISSUED: 11/29/2010
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Errata Decision and Order Denial of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Errata Decision and Order Denial of Benefits (2009-BLA-05110) of Administrative Law Judge Daniel F. Solomon with respect to a survivor's claim filed on January 14, 2008, 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).<sup>1</sup> Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation that the miner had at least twenty-two years of coal mine employment. The administrative law judge found that claimant did not establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c), an essential element of entitlement, so it was not necessary to address any of the other requisite elements. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive response to claimant's appeal.

By Order dated September 13, 2010, the Board gave the parties the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Phillips v. Kentland Elkhorn Coal Corp.*, BRB No. 10-0243 BLA (Sept. 13, 2010)(unpub. Order). The Director contends that the recent amendments to the Act are applicable, as the present claim was filed after January 1, 2005, and the miner was credited with at least twenty-two years of coal mine employment. The Director maintains, therefore, that if the Board either affirms or vacates the denial of benefits, then the case must be remanded to the administrative law judge for consideration of whether claimant is entitled to the rebuttable presumption of death due to pneumoconiosis, set forth in the amended version of Section 411(c)(4), 30 U.S.C. §921(c)(4).<sup>2</sup> The Director

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<sup>1</sup> Claimant is the widow of the miner, George W. Phillips, who died on December 18, 2007. Director's Exhibit 9. The miner filed a claim for benefits on June 25, 1973, which was denied by the district director on October 17, 1979, because the miner did not establish the existence of pneumoconiosis or that he was totally disabled by the disease. Director's Exhibit 1. There is no evidence in the record that the miner took any further action on this claim after it was denied.

<sup>2</sup> Relevant to this survivor's claim, Section 411(c)(4) provides that, if a miner had at least fifteen years of underground coal mine employment, or qualifying work in a surface mine, and the evidence establishes that the miner had 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), *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)).

further asserts that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, in compliance with the evidentiary limitations at 20 C.F.R. §725.414. However, without advocating for reversal, the Director indicates that if the Board reverses the denial of benefits, on the ground that claimant proved that the miner's death was due to pneumoconiosis, remand would not be required.

Employer concedes that, given the filing date of the survivor's claim, the amendments may affect this case, but argues that, in light of the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis, the presumption of death due to pneumoconiosis has already been rebutted. Employer contends that, because it prevailed on the merits, retroactive application of the amendments would constitute a significant violation of its right to due process. Employer also argues that it will suffer substantial and irreparable prejudice should the Board vacate and remand the case for consideration under Section 411(c)(4). Employer requests that the Board affirm the administrative law judge's findings under 20 C.F.R. §718.205(c) or transfer liability to the Black Lung Disability Trust Fund.

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.<sup>3</sup> 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or if claimant establishes invocation of the irrebuttable presumption of death due to pneumoconiosis. 20 C.F.R. §§718.205(c)(2), (4), 718.304. Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Piney Mountain Coal Co. v. Mays*, 176

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<sup>3</sup> The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4; Hearing Transcript at 13. 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*).

F.3d 753, 21 BLR 2-587 (4th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-901 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

### **I. Application of the Amendments to the Act**

After review of the parties' responses to the Board's Order, we are persuaded that the Director is correct in maintaining that the recent amendments to the Act apply in this case, based on the filing date of the survivor's claim. We therefore vacate the denial of benefits and remand this case to the administrative law judge for consideration of whether claimant has invoked the rebuttable presumption of death due to pneumoconiosis set forth in the amended version of Section 411(c)(4), 30 U.S.C. §921(c)(4). If the administrative law judge determines that claimant has invoked the presumption, he must determine whether employer has established rebuttal.

On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). The submission of any additional evidence must be in compliance with the evidentiary limitations set forth in 20 C.F.R. §725.414 and if evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Because the administrative law judge has not yet considered this claim under the amendments to Section 411(c)(4), however, we decline to address, as premature, employer's argument that the retroactive application of Section 411(c)(4) to this claim would result in a due process violation and that liability should be transferred to the Black Lung Disability Trust Fund.

### **II. Claimant's Allegations of Error on Appeal**

We must also address claimant's argument that the administrative law judge erred in concluding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c), as the validity of the administrative law judge's finding will be relevant if claimant does not establish entitlement based on the Section 411(c)(4) presumption on remand. The administrative law judge noted that claimant relies on the death certificate completed by Dr. Gibson, the miner's treating physician, to establish her entitlement. The administrative law judge found that while Dr. Gibson, an "alleged" treating physician, listed pneumoconiosis as a significant

contributing condition,<sup>4</sup> there was “no showing that Dr. Gibson had any special knowledge that the [m]iner had pneumoconiosis or that it led to his death.”<sup>5</sup> Errata Decision and Order at 4; Director’s Exhibit 9. The administrative law judge specifically found that claimant did not prove that pneumoconiosis contributed to, or hastened, the miner’s death pursuant to 20 C.F.R. §718.205(c)(2), (c)(5), noting that pneumoconiosis only hastens death if it does so “through a specifically defined process that reduces the miner’s life by an estimable time.” Errata Decision and Order at 4-5, *quoting Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 650 (6th Cir. 2003). The administrative law judge concluded, therefore, that claimant failed to satisfy her burden to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Errata Decision and Order at 5. Accordingly, the administrative law judge denied benefits. *Id.*

On appeal, claimant argues that the administrative law judge erred in finding that she did not establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant asserts specifically that the administrative law judge was required to credit Dr. Gibson’s opinion, based on his status as the miner’s treating physician.

This contention is without merit, as the administrative law judge acted within his discretion as fact-finder in determining that Dr. Gibson’s identification of pneumoconiosis, as a significant condition contributing to the miner’s death, was insufficient to satisfy claimant’s burden under 20 C.F.R. §718.205(c). The administrative law judge rationally found that Dr. Gibson’s opinion, as expressed on the death certificate, was entitled to little weight because he did not identify the basis for his conclusion and did not explain the relationship between coal dust exposure and the miner’s death. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Errata Decision and Order at 5. Thus, because the administrative law judge found that Dr. Gibson’s opinion regarding the cause of the miner’s death was not explained, the administrative law judge was not required to credit Dr. Gibson’s opinion, based solely upon his status as a treating physician. *See* 20 C.F.R. §718.104(d)(5);

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<sup>4</sup> Dr. Gibson identified pneumonia due to chronic obstructive pulmonary disease as the immediate cause of death, and listed “coal pneumoconiosis,” arteriosclerotic disease and hypertension as “other significant conditions contributing to death but not resulting in the underlying cause” of death. Director’s Exhibit 9.

<sup>5</sup> The administrative law judge indicated that he was unable to identify any specific medical records pertaining to Dr. Gibson’s treatment of the miner. Errata Decision and Order at 4.

*Williams*, 338 F.3d at 513, 22 BLR at 2-646. We affirm, therefore, the administrative law judge's finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).<sup>6</sup>

Accordingly, the administrative law judge's Errata Decision and Order Denial of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

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

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<sup>6</sup> We decline to address claimant's argument, that the administrative law judge erred in stating that the immediate cause of the miner's death was an overdose of his diabetes medication, because we have affirmed his finding that claimant failed to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor in the miner's death. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).