

BRB No. 11-0236 BLA

KATHLEEN HANSBURY	)	
(Widow of MICHAEL F. HANSBURY)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY,	)	DATE ISSUED: 11/29/2011
INCORPORATED	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-05507) of Administrative Law Judge Theresa C. Timlin, with respect to a survivor's claim filed on September 12, 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> The administrative law

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<sup>1</sup> Claimant is the widow of a miner, Michael F. Hansbury, who died on February 6, 2008. Director's Exhibit 7. There is no indication that the miner filed a black lung claim during his lifetime. Therefore, 30 U.S.C. §932(l) is not applicable to the current claim.

judge credited the miner with twenty-four years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), did not apply since the evidence did not establish that the miner's work as a heavy machine operator at a strip mine was performed in conditions substantially similar to underground mining. The administrative law judge determined that claimant established that the miner had clinical pneumoconiosis arising from his coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b), but did not establish that pneumoconiosis was a substantially contributing cause of the miner's death at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in not applying the presumption at amended Section 411(c)(4), as the evidence establishes that the miner's surface work was similar to underground coal mine employment. In addition, claimant asserts that the medical opinion evidence establishes that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

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>2</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, in which the rebuttable presumption at 30 U.S.C. §921(c)(4) is not applicable, 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.

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<sup>2</sup> The record reflects that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

## **I. Application of Amended Section 411(c)(4)**

### **A. The Administrative Law Judge's Findings**

The administrative law judge acknowledged that the miner had more than fifteen years of coal mine employment, but noted that the evidence showed that the miner worked above ground as a heavy machine operator. Decision and Order at 7. In addition, the administrative law judge found that the only evidence concerning the miner's work conditions was claimant's testimony that the miner was "very dirty" when he came home from work. *Id.*, quoting Hearing Transcript at 9. Therefore, the administrative law judge determined that claimant did not establish that the miner's work was performed in conditions substantially similar to underground mining and, therefore, the presumption at Section 411(c)(4) did not apply.<sup>3</sup> Decision and Order at 7.

### **B. Arguments on Appeal**

Claimant asserts that the administrative law judge erred in finding that the miner did not have at least fifteen years of qualifying coal mine employment, "as the record evidence establishes that [the miner's] work was similar to coal mining and was dusty." Claimant's Brief at 4. Claimant's contention is without merit.

While claimant bears the burden of establishing comparable conditions, claimant does not have to present evidence of the conditions prevailing in an underground mine. *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988). Rather, claimant is required to show that the miner was exposed to sufficient coal mine dust during his employment. *Id.* The administrative law judge must render factual findings by comparing the surface mining conditions established by claimant to the conditions known to prevail in underground mines. *Id.* In this case, the administrative law judge rationally found that claimant did not establish coal dust conditions similar to those in an underground mine, as claimant only indicated that the miner was "very dirty"

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<sup>3</sup> Amended Section 411(c)(4) of the Act provides, in relevant part, that a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that his or her death is due to pneumoconiosis. 30 U.S.C. §921(c)(4).

when he returned home from his job at the strip mine. Based on claimant's testimony, and the lack of additional evidence in the record, the administrative law judge acted within her discretion in concluding that claimant did not establish that the miner was exposed to a sufficient amount of coal mine dust to establish the requisite similarity between the miner's coal mine dust exposure in surface mining and dust conditions underground. Hearing Transcript at 9; see *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); see also *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Because claimant established less than fifteen years of qualifying coal mine employment, one of the prerequisites necessary to invoke the amended Section 411(c)(4) presumption, we affirm the administrative law judge's finding that the presumption is not available to claimant in this case.

## **II. 20 C.F.R. §718.205(c)**

### **A. The Administrative Law Judge's Findings**

The administrative law judge noted that Dr. Abdul-Al listed the miner's immediate cause of death as lung cancer on the death certificate and did not list anthracosilicosis as an immediate or significantly contributing cause of death. Decision and Order at 11. In addition, the administrative law judge found that Dr. Abdul-Al did not mention, in his treatment records, that he ever diagnosed anthracosilicosis. *Id.* Therefore, the administrative law judge gave very little weight to Dr. Abdul-Al's opinion, that anthracosilicosis was a substantially contributing cause of the miner's death, as he did not "explain the discrepancy between the death certificate and his later medical opinion." *Id.*

The administrative law judge also found that the opinion of Dr. Law, that anthracosilicosis was a substantially contributing cause of death, was entitled to little weight because it was not well-documented, well-reasoned, or consistent with the treatment records. Decision and Order at 10. The administrative law judge indicated that the records of Dr. Law's treatment of the miner's lung cancer did not contain any reference to limitations in treatment options attributable to anthracosilicosis or chronic obstructive pulmonary disease. *Id.* The administrative law judge also noted that, in Dr. Law's report containing her statement regarding the cause of the miner's death, she did not identify the limitations or explain how her prescribed treatment would have differed in the absence of such limitations. *Id.* Further, the administrative law judge determined that, although Dr. Law opined that anthracosilicosis was a substantially contributing cause of the miner's respiratory failure, she did not identify the basis for her opinion. *Id.*

The administrative law judge stated that none of the treatment records reflected a diagnosis of black lung disease, nor was it discussed when evaluating treatment options for the miner. Decision and Order at 10. The administrative law judge explained that, although both Drs. Abdul-Al and Law attributed the miner's death to pneumoconiosis,

neither opinion was supported by the medical evidence, nor were they sufficiently well-reasoned to satisfy claimant's burden of proof. *Id.* at 11. Consequently, the administrative law judge determined that she could not conclude that pneumoconiosis caused, or substantially contributed to, the miner's death. *Id.* As a result, she found that claimant did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) and denied benefits. *Id.*

## **B. Arguments on Appeal**

Claimant argues that the administrative law judge erred in rejecting the opinions of Drs. Abdul-Al and Law at 20 C.F.R. §718.205(c), because they are well-supported by the record evidence and because “[c]ourts have long recognized the status to be accorded to a treating physician.” Claimant’s Brief at 13. Claimant asserts that the administrative law judge erred in giving less weight to Dr. Abdul-Al’s opinion because Dr. Abdul-Al clearly found that the miner’s anthracosilicosis was a substantial contributing factor of his death. In addition, claimant contends that it was “irrational” for the administrative law judge to require Dr. Law’s radiation and chemotherapy records to include treatment for black lung. *Id.* at 14. Claimant indicates that, in preparing her report, Dr. Law based her opinion on the entire medical picture of the miner and her treatment of the miner up to the time of his death. Claimant notes that she offered the only medical evidence of record and argues that the administrative law judge’s “rejection of the evidence in this matter . . . places a highly burdensome and unduly harsh requirement on the [c]laimant not contemplated by the Act or [r]egulations.” *Id.* at 15.

Claimant’s contentions have merit, in part. In determining that the medical opinions of Drs. Abdul-Al and Law were insufficient to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c), the administrative law judge did not apply relevant case law from the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises. The Third Circuit has published a number of decisions concerning the proper application of 20 C.F.R. §718.205(c). Relevant to the administrative law judge’s discrediting of Dr. Abdul-Al’s opinion, the court has indicated that, in light of the inherently cursory nature of a death certificate, the existence of a discrepancy between the death certificate and a subsequent medical opinion does not necessarily detract from the credibility of the medical opinion. *Mancia v. Director, OWCP*, 130 F.3d 579, 587-88, 21 BLR 2-214, 2-230-32 (3d Cir. 1997). Similarly, the administrative law judge’s decision to accord little weight to the opinions of Drs. Abdul-Al and Law, because they did not identify the basis for their diagnoses of anthracosilicosis, does not acknowledge the Third Circuit’s view, that such an action may be inappropriate when, as in this case, the administrative law judge found that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a). *Hill v. Director, OWCP*, 562 F.3d 264, 271-72, 24 BLR 2-77, 2-82 (3d Cir. 2009). The court has also suggested that an administrative law judge may credit, as reasoned and documented, a

physician's opinion concluding that pneumoconiosis was a contributing cause of the miner's death due to a respiratory illness, when the record establishes that the miner experienced oxygen insufficiency prior to his demise and the physician identifies pneumoconiosis as a contributing cause of the insufficiency. *Hill*, 562 F.3d at 272-73, 24 BLR at 2-83.

Because the administrative law judge did not indicate that she had considered the opinions of Drs. Abdul-Al and Law in light of relevant Third Circuit law, we vacate the denial of benefits, therefore, and remand this case to the administrative law judge for reconsideration of whether the opinions of Drs. Abdul-Al and Law satisfy claimant's burden to establish that pneumoconiosis was a contributing cause of the miner's death under 20 C.F.R. §718.205(c), in accordance with Third Circuit precedent.

When weighing the medical opinion evidence on remand, the administrative law judge "may draw [her] own inferences," and "reject as insufficiently reasoned any medical opinion that reaches a conclusion contrary to objective clinical evidence without explanation." *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The administrative law judge must also determine whether the opinions of Drs. Abdul-Al and Law are entitled to determinative weight, based on their status as treating physicians, pursuant to 20 C.F.R. §718.104(d). Contrary to claimant's contention, however, the administrative law judge is not required to accord additional weight to their opinions, merely because they were the miner's treating physicians. Under 20 C.F.R. §718.104(d)(5) and Third Circuit case law, an administrative law judge must consider the credibility of a treating physician's opinion in light of its reasoning and documentation, in the context of the record as a whole. 20 C.F.R. §718.104(d)(5); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

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 proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge