



BRB No. 18-0044 BLA

CHRISTINE B. COOPER)
(Widow of RICHARD W. COOPER))

Claimant-Petitioner)

v.)

MANALAPAN MINING COMPANY,)
INCORPORATED)

DATE ISSUED: 11/09/2018

and)

AMERICAN MINING INSURANCE)
COMPANY)

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 Denying Benefits of Larry A. Temin,
Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for
employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2016-BLA-05508) of Administrative Law Judge Larry A. Temin, rendered on a survivor's claim filed on January 26, 2015, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).² The administrative law judge credited the miner with 20.255 years of underground coal mine employment, but determined that claimant did not establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge found that claimant could not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).³ He also found that because the evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Considering whether claimant could establish entitlement without the aid of the Section 411(c)(3) or Section 411(c)(4) presumption, the administrative law judge found that claimant established that the miner had simple, clinical pneumoconiosis⁴ arising out of coal mine

¹ Claimant is the widow of the miner, who died on June 10, 2014. Director's Exhibit 8.

² Section 422(*l*) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012). Because there is no indication in the record that the miner filed any claims for black lung benefits during his lifetime, claimant cannot benefit from this provision.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if claimant establishes that the miner worked at least fifteen years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those in an underground mine, and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

⁴ Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung

employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but did not establish that he had legal pneumoconiosis.⁵ The administrative law judge also found, however, that claimant did not prove that the miner's death was due to simple, clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and he denied benefits accordingly.

On appeal, claimant challenges the administrative law judge's weighing of the evidence on the issue of death causation.⁶ Employer/carrier responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a 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.⁷ 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).

tissue to that deposition caused by dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1).

⁵ 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).

⁶ Claimant also states that the administrative law judge “erred in failing to resolve that [she] invoked the [fifteen]-year presumption,” but other than citing to evidence in her favor, claimant does not identify any specific errors with regard to the administrative law judge's findings that she did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv). The Board must limit its review to contentions of error specifically raised by the parties. 20 C.F.R. §§802.211, 802.301; *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986). We therefore affirm the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption. Decision and Order at 22. Additionally, we affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not invoke the Section 411(c)(3) irrebuttable presumption and that she did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19 n.37, 29.

⁷ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

In a survivor's claim where the Section 411(c)(3) and 411(c)(4) presumptions are not invoked, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused or was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(b)(1), (2). 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 United States Court of Appeals for the Sixth Circuit has held that 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." *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04 (6th Cir. 2010); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514 (6th Cir. 2003). Failure to establish any one of the requisite elements of entitlement precludes an award of benefits in the survivor's claim. *See Trumbo*, 17 BLR at 1-87-88.

Here, the administrative law judge found that the evidence established the existence of simple, clinical pneumoconiosis arising out of the miner's coal mine employment, but did not establish the existence of legal pneumoconiosis. 20 C.F.R. §§718.202(a)(1), (4), 718.203(b); Decision and Order at 22-29. Relevant to whether clinical pneumoconiosis caused the miner's death, the administrative law judge considered the miner's death certificate, treatment records, and a letter from Mr. Abner, a physician's assistant.⁸

The administrative law judge noted that the death certificate was completed by a coroner, Mr. Bowling, and appeared to be based on the pathological findings listed in a post-mortem surgical pathology report.⁹ Director's Exhibit 8. The death certificate listed the cause of the miner's death as "acute suppurative pneumonia" due to, or as a

⁸ The administrative law judge noted that the opinions of Drs. Rosenberg and Tuteur do not aid claimant in satisfying her burden of proof, as they opined that the miner's clinical pneumoconiosis did not cause, contribute to, or hasten the miner's death from pneumonia. Decision and Order at 30-31; Director's Exhibit 17; Employer's Exhibits 2, 3.

⁹ In a June 17, 2014 surgical pathology report, Dr. Kulbacki reviewed lung tissue from a post-mortem "black lung biopsy" of the miner's right lung. Director's Exhibit 9. The final diagnoses were: "acute suppurative pneumonia"; "small scattered silicotic nodules, compatible with anthrosilicosis (mixed dust exposure)"; and "peribronchial lymph node with silicotic nodules and a modest amount of anthracotic debris." *Id.* Dr. Kulbacki did not offer an opinion on the cause of the miner's death. *Id.*

consequence of “small scattered silicotic nodules compatible with anthracosilicosis (mixed dust exposure), peribronchial lymph node with silicotic nodules, and a modest amount of anthracotic debris.” *Id.*

Contrary to claimant’s argument, we see no error in the administrative law judge’s decision to give little weight to the death certificate. The administrative law judge rationally found that the death certificate is conclusory and does not explain how clinical pneumoconiosis hastened the miner’s death through a “specifically defined process.” Decision and Order at 30, *quoting Conley*, 595 F.3d at 303-04.¹⁰ We therefore affirm the administrative law judge’s finding that the death certificate is “insufficient to meet claimant’s burden of proof.” Decision and Order at 30; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

The administrative law judge also rationally rejected Mr. Abner’s opinion relevant to the cause of the miner’s death. In an undated letter, Mr. Abner stated:

[The miner] was a pleasant fifty-seven-year-old gentleman under my care for his medical needs until the time of his death in June 2014. [He] suffered from numerous health issues, including but not limited to[,] Type II Diabetes Mellitus, Hypertension, Hyperlipidemia, Ascites, elevated liver enzymes, Thrombocytopenia, Black Lung, Pleural Fibrosis and Congestive Heart Failure.

It is my medical opinion that Black Lung contributed to[,] or hastened[,] [the miner’s] [d]eath.

Director’s Exhibit 10.

In weighing Mr. Abner’s opinion, the administrative law judge noted that there is “no evidence to suggest that Mr. Abner examined or treated [the miner] near the end of his

¹⁰ The administrative law judge found that the miner’s hospital and treatment records did not discuss the cause of the miner’s death. Decision and Order at 30; Director’s Exhibits 11, 12, 14-16; Claimant’s Exhibit 1; Employer’s Exhibits 4-6. As claimant does not challenge the administrative law judge’s findings with regard to those records, they are affirmed. *See Skrack*, 6 BLR at 1-711. Similarly, the administrative law judge finding that Dr. Simpao’s report did not discuss the cause of the miner’s death is unchallenged, and we therefore affirm it. *Id.*; Decision and Order at 30; Claimant’s Exhibit 3.

life or reviewed any of the post-mortem evidence.”¹¹ Decision and Order at 20. The administrative law judge rationally found that Mr. Abner’s opinion was “too conclusory and vague” and that he “failed to explain or identify any ‘specifically defined process’ or any particular way in which he believed [the miner’s] clinical pneumoconiosis affected or hastened [the miner’s] decline in health.” *Id.* at 30, quoting *Conley*, 595 F.3d at 303-04; see *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

It is the administrative law judge’s function to weigh the evidence, draw appropriate inferences, and determine the credibility of the evidence. See *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). We therefore affirm the administrative law judge’s permissible finding that Mr. Abner’s opinion was not “well-documented or well-reasoned.” Decision and Order at 20; see *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155. Because we affirm the administrative law judge’s discrediting of Mr. Abner’s opinion, we reject claimant’s assertion that the administrative law judge erred in not giving Mr. Abner’s opinion controlling weight.¹² See 20 C.F.R. §718.104(d); *Williams*, 338 F.3d at 513 (“the opinions of treating physicians get the deference they deserve based on their power to persuade.”).

Claimant’s general assertions that the evidence is sufficient to establish that the miner’s death was due to pneumoconiosis amount to a request that the Board reweigh the evidence, which we are not empowered to do.¹³ *Anderson v. Valley Camp of Utah, Inc.*,

¹¹ The administrative law judge noted that Mr. Abner treated the miner for primarily non-respiratory issues, and that the treatment records from Corbin Family Health Center where Mr. Abner worked did not contain any chest x-rays, pulmonary function studies, or arterial blood gas studies. Decision and Order at 20. The records from Corbin Family Health Center indicate that the miner was last seen by Mr. Abner on April 12, 2014, for fatigue and gastrointestinal complaints. Director’s Exhibit 14.

¹² Relevant to 20 C.F.R. §718.104(d), the administrative law judge noted that “while Mr. Abner may have treated the [m]iner for a significant duration of time and with adequate frequency to gain an understanding of the [m]iner’s overall condition, he is not a physician, and it does not appear that the nature and extent of his treatment provided him with relevant and superior understanding of the [m]iner’s respiratory condition.” Decision and Order at 20.

¹³ We also reject claimant’s assertion that the administrative law judge “may have” selectively analyzed the medical evidence, as claimant does not identify any specific errors in support of her assertion. Claimant’s Brief at 5; see *Cox*, 791 F.2d at 446-47.

12 BLR 1-111, 1-113 (1989). Because the administrative law judge provided valid reasons for his credibility determinations, we affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(b).¹⁴ See *Conley*, 595 F.3d at 303-304; *Williams*, 338 F.3d at 518; *Crisp*, 866 F.2d at 185. Thus, we affirm the administrative law judge's finding that claimant is not entitled to survivor's benefits. See *Trumbo*, 17 BLR at 1-87-88.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

¹⁴ Because claimant did not establish that the miner had legal pneumoconiosis, she is unable to prove that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b).