

BRB No. 13-0285 BLA

DORIS SLOAN)	
(Widow of GURSTLE L. SLOAN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DRUMMOND COMPANY,)	DATE ISSUED: 10/02/2014
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 on Remand and the Decision and Order on Remand, Upon Reconsideration of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Joan B. Singleton, Bessemer, Alabama, for claimant.

Will A. Smith (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and the Decision and Order on Remand, Upon Reconsideration (2007-BLA-06077) of Administrative Law Judge Adele H. Odegard, rendered on a survivor's claim filed on November 13, 2006,¹ pursuant

¹ Claimant is the widow of the deceased miner, Gurstle L. Sloan. Director's Exhibits 2, 12. Prior to his death, the miner filed three claims, each of which was denied.

to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In her initial Decision and Order Denying Benefits and subsequent Order Denying Claim, on Reconsideration, the administrative law judge found that claimant failed to establish that the miner suffered from pneumoconiosis and, therefore, was unable to prove that the miner's death was due to pneumoconiosis.

Claimant appealed, and the Board vacated the denial of benefits based on changes in the law, and remanded the case for consideration of whether claimant could invoke the rebuttable presumption that the miner's death was due to pneumoconiosis under amended Section 411(c)(4).² *Sloan v. Drummond Co.*, BRB No. 10-0448 BLA (Apr. 28, 2011) (unpub.).³ On remand, in accordance with the Board's instruction, the administrative law judge gave the parties the opportunity to submit additional evidence. In an Order dated January 9, 2012, the administrative law judge initially determined that the miner worked at least fifteen years in qualifying coal mine employment. In her Decision and Order on Remand dated August 24, 2012, the administrative law judge determined that claimant did not satisfy her burden to prove that the miner was totally disabled by a pulmonary or respiratory impairment and, thus, found that claimant failed to invoke the amended Section 411(c)(4) presumption. In addition, the administrative law judge found that the evidence did not establish that the miner had complicated pneumoconiosis or that his death was due to pneumoconiosis. Accordingly, benefits were denied.

See Sloan v. Drummond Co., BRB No. 10-0448 BLA, slip op. at 3 (Apr. 28, 2011) (unpub.).

² Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis, if she establishes that the miner worked fifteen or more years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those of an underground mine, and that he suffered from a totally disabling respiratory or pulmonary impairment. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. Amended Section 422(l) of the Act 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's death was due to pneumoconiosis. *See* 30 U.S.C. §932(l), as implemented by 20 C.F.R. §718.305. Because the miner was not eligible to receive benefits at the time of his death, claimant is not entitled to benefits under amended Section 422(l).

³ We incorporate the procedural history set forth in *Sloan v. Drummond Co.*, BRB No. 10-0448 BLA (Apr. 28, 2011) (unpub.).

On appeal, claimant maintains that the miner had complicated pneumoconiosis. Alternatively, she asserts that she is entitled to the benefit of the amended Section 411(c)(4) presumption. Employer responds, urging affirmance of the administrative law judge's denial of benefits.⁴ The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁵ 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).

I. Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner was suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of

⁴ Employer requests that the Board not consider "any evidence referenced in [c]laimant's brief that has not been previously considered in this claim. . . ." Employer's Response Brief and Motion to Strike at 3. The Board has advised claimant that we are not able to consider new or additional evidence, and that she has the right to request modification and submit her evidence to the district director. *See* 20 C.F.R. §802.301(b); *Sloan v. Drummond Co.*, BRB No. 13-0285 BLA (Apr. 4, 2014) (Order) (unpub.); *Sloan v. Drummond Co.*, BRB No. 13-0285 BLA (June 28, 2013) (unpub. Order). In rendering this decision, the Board has not considered any evidence referenced in claimant's brief that was not in the record before the administrative law judge.

⁵ Because the miner's coal mine employment was in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (en banc).

complicated pneumoconiosis. *See Pittsburg & Midway Coal Mining Co. v. Director, OWCP [Cornelius]*, 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered x-rays dated September 13, 2005 and February 21, 2005.⁶ The September 13, 2005 x-ray was read as negative for simple and complicated pneumoconiosis by Dr. Westerman, whose credentials are not of record.⁷ Director's Exhibit 15 (Miner's Claim).⁸ The February 21, 2005 x-ray was read as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis, by Dr. Loveless, who is dually qualified as a B reader and Board-certified radiologist. Claimant's Exhibit Submitted on Remand. In evaluating the x-ray evidence, the administrative law judge observed correctly that none of the x-ray evidence of record identified any abnormalities that were consistent with the regulatory definition of complicated pneumoconiosis. Decision and Order on Remand at 14. Therefore, we affirm her finding that claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Relevant to 20 C.F.R. §718.304(b), the administrative law judge considered the autopsy report of Dr. Okoye, who identified the following pathological findings: bilateral interstitial fibrosis involving all lobes of the lungs, bilateral severe pulmonary edema and congestion involving all lobes of the lungs, and bilateral severe pulmonary emphysema. Director's Exhibit 13. Dr. Okoye noted that "no pneumonic consolidation is grossly identified" and that "no gross tumor or granulomata formation" was identified. *Id.* Dr. Okoye further stated:

Multiple sections of the lung show extensive emphysematous changes with interstitial and pleural fibrosis. There is no histologic evidence of acute bronchopneumonia or tumor or malignancy or granulomata formation.

⁶ The administrative law judge indicated that x-ray readings contained in the treatment records did not mention pneumoconiosis, and she declined to weigh them as negative readings, as they were not interpreted under the ILO classification system for identifying the presence or absence of pneumoconiosis. Decision and Order on Remand at 11 n.14.

⁷ The administrative law judge noted that Dr. Barrett also read the September 13, 2005 film as negative for pneumoconiosis. Decision and Order on Remand at 12. The record reflects, however, that Dr. Barrett read the x-ray for quality purposes only, rather than for determining the existence of pneumoconiosis. *Id.*

⁸ The administrative law judge considered exhibits from the miner's last claim in reaching her findings on the survivor's claim.

These features are consistent with those seen in [c]oal [m]iner's lung disease. Sections of the hilar nodes show copious anthracotic pigmentation, but no evidence of tumor or malignancy.

Id.

The administrative law judge also considered Dr. Caffrey's report, based on his review of the miner's autopsy slides. Director's Exhibit 18. Dr. Caffrey diagnosed acute passive congestion with pulmonary edema and focal intra-alveolar hemorrhage; acute bronchiolitis and bronchopneumonia; moderate centrilobular emphysema; mild chronic bronchitis; a mild amount of anthracotic pigment in hilar lymph nodes, with two 1.5 millimeter micronodules; and a minimal to mild amount of anthracotic pigment identified within lung tissue. *Id.*

Contrary to claimant's assertion, in evaluating the autopsy evidence at 20 C.F.R. §718.304(b), the administrative law judge properly found that it did not mention the mass identified on the miner's CT scans, discussed *infra*, and that there was no finding of massive lesions or an opacity that satisfies the regulatory definition of complicated pneumoconiosis. Decision and Order on Remand at 14. Therefore, we affirm her finding that claimant failed to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(b).

With respect to 20 C.F.R. §718.304(c), the administrative law judge considered the CT scan evidence.⁹ She noted that the record contains an April 14, 2005 CT scan, which was interpreted by Dr. Holman, whose credentials are not of record, as showing a "1.5 [centimeter]" mass in the miner's right lower lobe. Director's Exhibit 15; Decision and Order on Remand at 14. Dr. Holman noted that, "differential considerations would include a hamartoma, however, neoplasm cannot be excluded." Director's Exhibit 15. He recommended a PET scan. *Id.* The administrative law judge concluded that claimant did not establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(c), because the evidence was insufficient to establish that the mass was due to pneumoconiosis. Based on her weighing of all the relevant evidence, the administrative law judge concluded that the miner did not have complicated pneumoconiosis and that claimant was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis.

⁹ There is no medical opinion evidence addressing whether the miner had complicated pneumoconiosis.

Claimant argues that the administrative law judge erred in failing to find that the mass identified in the CT scan was complicated pneumoconiosis.¹⁰ Director's Exhibits 13, 18. Contrary to claimant's contention, although cancer was ruled out as a possible etiology for the mass observed on the miner's CT scan, the administrative law judge was not required to find that it was complicated pneumoconiosis. The administrative law judge rationally found that there was insufficient evidence to show that the mass on the CT scan was caused by pneumoconiosis.¹¹ See *Cornelius*, 508 F.3d at 987- 989, 24 BLR at 2-94-96; *Melnick*, 16 BLR at 1-31. She observed correctly that the physician who read the CT scan "did not interpret the nodule as pneumoconiosis," but raised the possibility that it was either cancer or a benign growth. Decision and Order on Remand, Upon Reconsideration at 8. Because it is supported by substantial evidence, we affirm the administrative law judge's finding at 20 C.F.R. §718.304(c), and we further affirm her overall determination that claimant is not entitled to the irrebuttable presumption. See *Cornelius*, 508 F.3d at 987-989, 24 BLR at 2-94-96; *Melnick*, 16 BLR at 1-31.

II. Invocation of the Amended Section 411(c)(4) Presumption –Total Disability

The administrative law judge found that claimant was unable to invoke the amended Section 411(c)(4) presumption, that the miner's death was due to pneumoconiosis, because the evidence did not establish that the miner had a totally disabling respiratory or pulmonary impairment. Decision and Order on Remand, Upon Reconsideration at 5-7, 15. In the absence of contrary probative evidence, a miner's disability shall be established by pulmonary function studies showing values equal to, or less than, those set forth in Appendix B; blood gas studies showing values equal to, or less than, those set forth in Appendix C; evidence establishing cor pulmonale with right-sided congestive heart failure; or if a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge determined that claimant failed to establish total disability by any of the methods set forth at 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision

¹⁰ Dr. Caffrey opined that the miner did not have simple pneumoconiosis. The administrative law judge, however, found that his pathology findings of "anthracotic pigmentation" and two 1.5 millimeter micronodules satisfied the definition of clinical pneumoconiosis under the regulations. Decision and Order on Remand, Upon Reconsideration at 9.

¹¹ The administrative law judge also observed correctly that neither Dr. Okoye nor Dr. Caffrey identified any mass or lesion in the miner's lung that would correspond with the mass described by the CT scan evidence. Decision and Order on Remand at 13 n.19.

and Order on Remand at 6-10. The administrative law judge found that there are no pulmonary function tests; that the one arterial blood gas test of record was non-qualifying for total disability; and that there was no evidence that the miner had cor pulmonale with right-sided congestive heart failure. She also found that there was no specific reference to respiratory disability in the miner's treatment records and that, while the miner was "profoundly ill" before he died, there is no "medical opinion stating that the [m]iner was disabled from a pulmonary perspective." *Id.* at 9-10. Because claimant does not challenge the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), they are affirmed.¹² *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the miner was totally disabled because he had "end-stage" chronic obstructive pulmonary disease (COPD), was "too weak" to undergo pulmonary function testing in conjunction with his Department of Labor (DOL)-sponsored examination, and was admitted to the hospital where he was "administered Albuterol 2.5 every four hours to help his breathing." Claimant's Brief at 11, 8-9. The administrative law judge specifically discussed the factors cited by claimant and explained, however, why she did not consider them to be persuasive evidence that the miner had a respiratory or pulmonary impairment. The administrative law judge noted that the miner was admitted to the hospital in January 2006 due to gastrointestinal bleeding and was scheduled for a colon resection. She noted that, on the operative report dated January 24, 2006, the surgeon listed "end-stage" COPD among the miner's multiple conditions. Director's Exhibit 16. The administrative law judge permissibly gave little weight to the operative report, as she found that "it does not explain the basis for the conclusion regarding the [m]iner's pulmonary state." Decision and Order on Remand, Upon Reconsideration at 6; *see Crockett Collieries, Inc., v. Director, OWCP [Barrett]*, 478 F.3d 350, 355, 23 BLR 2-472, 2-482 (6th Cir. 2007), *Milburn Colliery Co. v. Hicks*, 138 F.3d 536, 21 BLR 2-341 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

With regard to the DOL-sponsored examination, the record indicates that in September 2005, the miner was unable to undergo a pulmonary function test with Dr. Westerman because the miner was "so weak he could not make it into the office without assistance from his wife." Decision and Order on Remand at 6, *quoting* Director's Exhibit 15 (Miner's Claim). A resting blood gas test was performed, but the miner's blood pressure was very low and he was unable to complete the exercise portion of that

¹² Claimant argues that she has established total disability based on the x-ray, autopsy, biopsy, and CT scan evidence. However, this evidence is relevant to the existence of pneumoconiosis and is not a method by which claimant may prove total disability. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv).

study. *Id.* Because the record showed that Dr. Westerman contacted the miner’s primary care physician, Dr. Smith, and was “advised that the [m]iner was in renal failure,” the administrative law judge permissibly found that there was insufficient evidence to support a conclusion that the reason the miner was too weak to undergo the pulmonary evaluation with Dr. Westerman was based on a respiratory or pulmonary impairment.¹³ Decision and Order on Remand at 8; Decision and Order on Remand, Upon Reconsideration at 5. Because the administrative law judge has discretion to determine the weight of the evidence and to draw her own inferences from the record, we affirm her determination. See *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Additionally, the administrative law judge noted that the discharge summary did not include the medication Albuterol, a bronchodilator, and that there was no evidence of record to show that the miner used a bronchodilator after leaving the hospital. Because the administrative law judge acted within her discretion in determining the credibility of the evidence and in finding that it was insufficient to prove that the miner had a totally disabling respiratory or pulmonary impairment,¹⁴ we affirm her finding that claimant is unable to invoke the amended Section 411(c)(4) presumption. See *Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Clark*, 12 BLR at 1-151.

¹³ The administrative law judge noted two statements from Dr. Smith “dated October and November 2005, [which] reflect that the [m]iner [was] ‘too ill and weak to travel’ and ‘physically unable to take a breathing test.’” Decision and Order on Remand at 8, *quoting* Director’s Exhibit 17. She found that “these statements do not directly address the [m]iner’s respiratory condition, and do not indicate the cause of the [m]iner’s weakness or inability to ‘take a breathing test.’” Decision and Order on Remand at 8. Because the weight to accord the evidence is within the discretion of the trier-of-fact, we affirm the administrative law judge’s conclusion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

¹⁴ Claimant testified that the miner was on home oxygen. The administrative law judge observed correctly that total disability may be established on the basis of lay testimony only when there is no medical or other relevant evidence on the issue. Decision and Order on Remand, Upon Reconsideration at 6. Because there is medical evidence addressing the issue of whether the miner was totally disabled, we affirm the administrative law judge’s determination not to consider claimant’s testimony pursuant to 20 C.F.R. §718.204(d)(3).

III. Death Due to Pneumoconiosis under 20 C.F.R. §718.205(b)

In order to establish entitlement to benefits on her survivor's claim, without the benefit of a presumption, claimant must establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(b)(1)-(4).¹⁵ 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); *see Bradberry v. Director, OWCP*, 117 F.3d 1361, 1365, 21 BLR 2-166, 2-176 (11th Cir. 1997).

The administrative law judge observed that the medical records in this case document that the miner was "seriously debilitated and terminally ill from multiple medical conditions for several months prior to his death," with his principal problem being "complications of coronary artery disease." Decision and Order on Remand, Upon Reconsideration at 13. The miner's death certificate was signed by Dr. Smith who listed colon cancer as the immediate cause of death, and also identified anemia, COPD, coronary artery disease with atrial fibrillation and congestive heart failure as contributing causes of death. Director's Exhibit 12. The autopsy of the miner's whole body was performed by Dr. Okoye, who the administrative law judge observed "did not identify colon cancer" as a cause of the miner's death or make any notation regarding the miner's colon resection. Decision and Order on Remand, Upon Reconsideration at 13 n.17; *see also* Director's Exhibit 13. Dr. Okoye reported only that the miner's death was caused by "coal miner's lung disease, with complications." Director's Exhibit 13.

The administrative law judge gave little weight to the death certificate because she found that Dr. Smith did not have a copy of the autopsy findings at the time that he prepared it. Decision and Order on Remand, Upon Reconsideration at 11. The administrative law judge also found that, while Dr. Smith noted COPD as a causative factor for the miner's death, he did not address whether that condition was due to coal dust exposure. *Id.* at 13. Consequently, contrary to claimant's argument, we affirm the

¹⁵ 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).

administrative law judge's finding that the death certificate, standing alone, is insufficient to establish that the miner suffered from legal pneumoconiosis or that his death was due to legal pneumoconiosis. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); Decision and Order on Remand, Upon Reconsideration at 11.

We also reject claimant's assertion that the administrative law judge erred in her consideration of Dr. Okoye's opinion. The administrative law judge permissibly accorded little weight to Dr. Okoye's opinion, as she found that he gave only a cursory statement and "provided no explanation for his conclusion" that the miner's death was due to pneumoconiosis. Decision and Order on Remand, Upon Reconsideration at 12. Furthermore, the administrative law judge noted correctly that Dr. Okoye did not discuss whether the miner's heart disease or colon cancer played any role in the miner's death. *Id.* at 12-13, 13 n.17. Because the administrative law judge acted within her discretion, we affirm her finding that Dr. Okoye's opinion is not well reasoned and does not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Bradberry*, 117 F.3d at 1365, 21 BLR at 2-176; *Clark*, 12 BLR at 1-151. We also affirm, as within her discretion, the administrative law judge's crediting of Dr. Russakoff's opinion, that the miner's death was caused by coronary artery disease, since she found that he was better informed of the miner's condition prior to death and had reviewed "the large body of evidence establishing the nature of the [m]iner's medical conditions as his health declined." Decision and Order on Remand, Upon Reconsideration at 13; *see Clark*, 12 BLR at 1-151. Consequently, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. 20 C.F.R. §718.205(b), and we affirm the denial of benefits in this survivor's claim.

Accordingly, the administrative law judge's Decision and Order on Remand and the Decision and Order on Remand, Upon Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge