

U.S. Department of Labor

Benefits Review Board  
P.O. Box 37601  
Washington, DC 20013-7601



BRB No. 16-0032 BLA

JOANNE BLACKBURN )  
(Widow of TOMMY BLACKBURN) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
TIMPER COAL COMPANY ) DATE ISSUED: 10/26/2016  
 )  
and )  
 )  
TRAVELERS INDEMNITY 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 Alice M. Craft,  
Administrative Law Judge, United States Department of Labor.

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

Clayton Daniel Scott (Porter, Schmitt, Banks & Baldwin), Paintsville,  
Kentucky, for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (2012-BLA-5764) of Administrative Law Judge Alice M. Craft, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on June 13, 2011. Adjudicating the claim pursuant to 20 C.F.R. Parts 718 and 725, the administrative law judge credited the miner with at least fifteen years of underground coal mine employment, based on employer's stipulation and claimant's testimony at the hearing. Addressing the merits, the administrative law judge found that the medical evidence was insufficient to establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2), and, therefore, she found that the rebuttable presumption of death due to pneumoconiosis, set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305, did not apply.<sup>2</sup> The administrative law judge further found that claimant did not establish that the miner had either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that the qualifying blood gas studies failed to establish the miner's total disability at 20 C.F.R. §718.204(b)(2)(ii) and invocation of the Section 411(c)(4) presumption. Employer

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<sup>1</sup> Claimant is the widow of the miner, Tommy Blackburn, who died on April 28, 2011. Director's Exhibit 4. The miner filed a claim for black lung benefits during his lifetime, on April 18, 1995. Director's Exhibit 1. Following adjudication of the claim and the denial of benefits, Administrative Law Judge Stephen L. Purcell denied the miner's request for modification on March 10, 2003. *Id.* The miner's subsequent appeal was withdrawn and, therefore, the case was dismissed by the Board. *Blackburn v. Timper Mining, Inc.*, BRB No. 03-0461 BLA (July 30, 2003) (unpub. Order).

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.<sup>3</sup>

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>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge determined that claimant was unable to invoke the fifteen-year rebuttable presumption because the evidence failed to establish that the miner suffered a total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 11-12. In considering the blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that the record contains two arterial blood gas studies, dated June 15, 2005 and September 29, 2008, both of which yielded qualifying values.<sup>5</sup> Decision and Order at 5, 12; Director's Exhibits 9, 10. The administrative law judge further determined that the qualifying blood gas studies were administered during the miner's hospitalizations for respiratory and/or cardiac problems. Decision and Order at 5, 12 n. 25. The administrative law judge correctly acknowledged that the regulatory provision applicable in this case states that blood gas tests performed during, or soon

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<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had more than fifteen years of qualifying coal mine employment, and that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii) and (iv). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>4</sup> The record indicates that the miner's last coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>5</sup> A "qualifying" blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values. See 20 C.F.R. §718.204(b)(2)(ii).

after, an acute respiratory or cardiac illness cannot be used to establish total disability.<sup>6</sup> *Id.*; 20 C.F.R. §718.204(b)(2)(ii), Appendix C. Therefore, contrary to claimant's argument, the administrative law judge properly considered the "circumstances surrounding the blood gas studies" and rationally concluded that the blood gas study evidence in this case was insufficient to establish total respiratory disability. Claimant's Brief in Support of Petition For Review at 2 (unpaginated); 20 C.F.R. §718.204(b)(2)(ii), Appendix C. Thus, we affirm the administrative law judge's finding that claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii).

As claimant has raised no additional challenges to the administrative law judge's findings in this case, we affirm the administrative law judge's finding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, claimant did not invoke the presumption at Section 411(c)(4). 20 C.F.R. §§718.105(d), 718.204(b)(2). *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

In order to establish entitlement to survivor's benefits, without the benefit of the presumption at Section 411(c)(4), claimant was required to prove that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; ); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39, 1-40-41 (1988). *See Trumbo*, 17 BLR at 1-87. Failure to establish any one of these elements precludes an award of benefits. As the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis, or that the miner's death was due to pneumoconiosis, are unchallenged on appeal, they are affirmed. *See Skrack*, 6 BLR at 1-711.

In light of our affirmance of the administrative law judge's findings that claimant was not entitled to invocation of the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or death due to pneumoconiosis at 20 C.F.R. §718.205(c), essential elements of entitlement under 20

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<sup>6</sup> 20 C.F.R. Part 718, Appendix C states, in relevant part, that blood gas tests "must not be performed during or soon after an acute respiratory or cardiac illness."

C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge