



BRB No. 17-0066 BLA

BERNICE BOWLING	)	
(Widow of VERNON BOWLING)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/31/2017
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Bernice Bowling, East Bernstadt, Kentucky.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2014-BLA-05792) of Administrative Law Judge John P. Sellers, III,

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<sup>1</sup> Claimant is the widow of the miner, Vernon Bowling, who died on May 13, 2012. Director's Exhibit 13. The miner filed a federal black lung claim during his lifetime that was finally denied. Director's Exhibit 1. Accordingly claimant is not

rendered on a survivor's claim filed on September 3, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with eleven years of underground coal mine employment. Because claimant established fewer than fifteen years of coal mine employment, the administrative law judge found that claimant was unable to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). Considering whether claimant was able to establish entitlement without the benefit of the Section 411(c)(4) presumption, the administrative law judge determined that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant generally challenges the administrative law judge's denial of her survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, urging affirmance of the administrative law judge's Decision and Order.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and are consistent with applicable law.<sup>2</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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entitled to automatic survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), as there is no indication in the record that the miner was determined to be eligible to receive benefits at the time of his death.

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

## **I. Invocation of the Section 411(c)(4) Presumption**

The administrative law judge's determination as to the length of the miner's coal mine employment is relevant to whether claimant can invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Claimant bears the burden of proof to establish the number of years the miner worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984).

On the employment history form, claimant alleged only that the miner worked eleven years in coal mine employment, from 1974 to August 1985. Director's Exhibit 4. The administrative law judge correctly found that the miner's Social Security Administration (SSA) earnings records and employment records supported a finding that the miner worked approximately eleven years in coal mine employment from 1974 to 1985.<sup>3</sup> Decision and Order at 3; Director's Exhibits 6, 9, 10. The administrative law judge also correctly found that while claimant indicated that the miner "worked at an 'underground utility' at Fisher Construction Company from 1969 until 1974, there is no evidence establishing that the work the [m]iner performed there was coal mine work." Decision and Order at 3; *see* Director's Exhibit 4.

Because substantial evidence supports the administrative law judge's finding that the miner worked "approximately eleven years in underground coal mine employment," it is affirmed. Decision and Order at 3. As claimant established fewer than fifteen years of coal mine employment, we affirm the administrative law judge's determination that claimant is unable to invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b).

## **II. Entitlement Under 20 C.F.R. Part 718**

To establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must demonstrate that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, where the statutory presumptions in

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<sup>3</sup> The administrative law judge noted that the district director found eleven years of coal mine employment and the prior administrative law judge who denied the miner's claim also found eleven years of coal mine employment. Decision and Order at 2-3; Director's Exhibits 1 at 40, 48.

Section 411(c)(3)<sup>4</sup> and (c)(4) are not applicable, death will be considered due to pneumoconiosis if claimant establishes, by a preponderance of the evidence, that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 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); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49 (6th Cir. 2003); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

The administrative law judge properly found that claimant's evidence in this case consisted of the miner's death certificate and "extensive treatment records." Decision and Order at 6. The administrative law judge correctly determined that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), as the two x-rays contained in the miner's treatment records did not identify pneumoconiosis. Decision and Order at 6; Director's Exhibits 17, 18. The administrative law judge also properly found, pursuant to 20 C.F.R. §718.202(a)(4), that, "none of the [m]iner's treating physicians provided an opinion that the [m]iner suffered from pneumoconiosis."<sup>5</sup> Decision and Order at 6. Thus, we affirm the administrative law judge's finding that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a).<sup>6</sup>

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<sup>4</sup> Because there is no evidence of record that the miner had complicated pneumoconiosis, the administrative law judge correctly found that claimant is not entitled to the Section 411(c)(3) irrebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304; Decision and Order at 9.

<sup>5</sup> The miner was treated by Dr. Chaney from January 1999 to April 11, 2012, for chronic bronchitis, cough, and chronic obstructive pulmonary disease. Director's Exhibit 16. Dr. Chaney indicated that the miner was a smoker, but Dr. Chaney did not specifically address the etiology of the miner's respiratory condition. Hospital records, spanning from March 2007 to October 18, 2010, include diagnoses of bronchitis and obstructive lung disease, but do not address the cause of the diseases. Director's Exhibits 17, 18.

<sup>6</sup> The administrative law judge properly found that claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), as there is no biopsy or autopsy evidence in the record, and that claimant is not eligible for any of the presumptions available to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 6.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). As claimant failed to establish the existence of pneumoconiosis, she is unable to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b)(2).<sup>7</sup> *See Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49; *Brown*, 996 F.2d at 816, 16 BLR at 2-93. We therefore affirm the administrative law judge's finding that claimant is not entitled to survivor's benefits.

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<sup>7</sup> We note, however, that the administrative law judge properly found that the only evidence of record addressing the cause of the miner's death is the death certificate, which listed the sole cause of the miner's death as myocardial infarction. Decision and Order at 7; Director's Exhibit 13.

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

JONATHAN ROLFE  
Administrative Appeals Judge