

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0007 BLA

VICKIE J. VANOVER)
(Widow of CHARLES VANOVER))
)
Claimant-Petitioner)

v.)

DATE ISSUED: 10/30/2018

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent)

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William T. Barto,
Administrative Law Judge, United States Department of Labor.

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

Jennifer L. Feldman (Kate S. O'Scannlain, Solicitor of Labor; Kevin
Lyskowski, Acting 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, GILLIGAN and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2014-BLA-05013) of
Administrative Law Judge William T. Barto, rendered on a survivor's claim filed on
November 2, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended,

30 U.S.C. §§901-944 (2012) (the Act).¹ The administrative law judge credited the miner with less than fifteen years of coal mine employment,² and thus 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).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 the evidence did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that his death was due to pneumoconiosis under 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner suffered from pneumoconiosis that hastened his death. The Director, Office of Workers' Compensation Programs,⁴ responds in support of the administrative law judge's denial of benefits.

¹ Claimant is the widow of the miner, who died on May 20, 2012. Director's Exhibit 19. There is no indication in the record that the miner was awarded benefits on a federal black lung claim. Claimant therefore is not entitled to automatic survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012).

² The administrative law judge noted that claimant did not allege more than fifteen years of coal mine employment, and that the district director determined that the miner had 1.87 years of coal mine employment. Decision and Order at 4.

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

⁴ The Director, Office of Workers' Compensation Programs, has determined that there is no responsible operator that can be held liable in this case and that the Black Lung Disability Trust Fund is responsible for the payment of any benefits awarded. Director's Exhibit 24.

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.⁵ 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).

In a survivor's claim where the Section 411(c)(3) and 411(c)(4) presumptions are not invoked,⁶ claimant must establish by a preponderance of the evidence 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); see *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-304 (6th Cir. 2010); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514 (6th Cir. 2003). Failure to establish any one of these elements of entitlement precludes an award of benefits in the survivor's claim. See *Trumbo*, 17 BLR at 1-87-88.

In addressing whether claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b),⁷ the administrative law judge noted that the death certificate states that the miner died as a result of blunt force trauma to the head, neck, chest and upper extremities – resulting from an automobile accident in which the vehicle overturned and the miner was ejected from it. Director's Exhibit 19. No other causes or conditions were listed. *Id.* Considering Dr. Dennis's autopsy report, the administrative law judge observed that the reference to coal workers' pneumoconiosis as a cause of death was "added in hand-writing after the printed text with black marker."

⁵ Because the record reflects that the miner's last coal mine employment was in Kentucky, we 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); Director's Exhibit 3.

⁶ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not invoke the Section 411(c)(3) and 411(c)(4) presumptions. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

⁷ The administrative law judge noted that he would consider the issue of death causation, assuming the miner had pneumoconiosis. Decision and Order at 7.

Decision and Order at 5 n.8; *see* Director’s Exhibit 20. The administrative law judge found that Dr. Dennis’s opinion was not well reasoned because:

Dr. Dennis’s hand written conclusion that [the miner’s] death was due to pneumoconiosis [] appears to be an unexplained afterthought. Nowhere in his report does Dr. Dennis explain why [the miner’s] death was due to pneumoconiosis or address why [the miner’s] car accident was not the sole cause of his death.

Decision and Order at 8.

Claimant states that since Dr. Dennis opined that “the miner’s death was hastened by his respiratory condition and edema and pulmonary embolus, as well as by coal workers’ pneumoconiosis,” it can be reasonably concluded that coal workers’ pneumoconiosis “did contribute” to the miner’s death. Claimant’s Brief at 4. Claimant, however, does not raise any specific error with regard to the administrative law judge’s finding that Dr. Dennis’s opinion, which is the only opinion supportive of her burden of proof, is not well-reasoned on the issue of death causation. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Furthermore, in asserting that Dr. Dennis’s opinion is credible, claimant is asking for a reweighing of the evidence, which the Board is not empowered to do.⁸ *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). It is the province of the administrative law judge to evaluate the medical evidence, draw inferences, and to assess the probative value of the evidence. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Crisp*, 866 F.2d at 185. We therefore 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. §718.205(b). *See Conley*, 595 F.3d at 303-304; *Williams*, 338 F.3d at 518; Decision and Order at 8.

⁸ 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 v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

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