

BRB No. 11-0860 BLA

SHIRLEY A. BAILEY )  
(Widow of ADRIAN BAILEY) )  
 )  
 Claimant-Petitioner )  
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 v. )  
 )  
 KENTUCKY MAY COAL CORPORATION ) DATE ISSUED: 09/19/2012  
 INCORPORATED )  
 )  
 and )  
 )  
 PROGRESS FUELS CORPORATION )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

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

Shirley A. Bailey, Salyersville, Kentucky, *pro se*.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and  
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2008-BLA-05839) of Administrative Law Judge John P. Sellers, III, rendered on a survivor's claim filed on October 17, 2007 pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The administrative law judge credited the miner with at least thirty years of above ground work in both underground and surface coal mines and adjudicated the claim under the regulations at 20 C.F.R. Part 718. Considering amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),<sup>2</sup> the administrative law judge determined that, although the miner had at least fifteen years of qualifying coal mine employment, the evidence failed to establish that the miner had a totally disabling respiratory or pulmonary impairment, and thus claimant did not invoke the rebuttable presumption of death due to pneumoconiosis. The administrative law judge further found that while the evidence was sufficient to establish that the miner suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits, and argues that the opinion of Dr. Hardin, the miner's treating physician, is entitled to greater weight than the opinions of Drs. Vuskovich and Rosenberg. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

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<sup>1</sup> Claimant is the surviving spouse of the miner, Adrian Bailey, who died on November 28, 2003. Director's Exhibit 7.

<sup>2</sup> Amendments to the Act, contained in Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. In relevant part, amended Section 411(c)(4), 30 U.S.C. §921(c)(4), provides that if a miner worked at least fifteen years in underground coal mine employment or in conditions that are substantially similar to those found in an underground mine, and the miner also had a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). Additionally, pursuant to amended Section 432(l), U.S.C. §932(l), if a miner was awarded benefits during his lifetime, an eligible survivor does not have to establish death due to pneumoconiosis and is automatically entitled to benefits. Claimant is not eligible for benefits pursuant to amended Section 932(l), as there is no indication in the record that the miner was receiving benefits at the time of his death.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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 in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, 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(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

#### **I. AMENDED SECTION 411(c)(4)**

The administrative law judge found that claimant was not entitled to the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) because the evidence failed to establish, pursuant to 20 C.F.R. §718.204(b), that the miner had a totally disabling respiratory or pulmonary impairment. *See* 30 U.S.C. §921(c)(4); Decision and Order at 16-20. We affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), because "the only pulmonary function study of record that produced a

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

full set of values,” dated November 12, 2003,<sup>4</sup> was non-qualifying.<sup>5</sup> Decision and Order at 18-19; *see* Director’s Exhibit 10-20.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that of the three arterial blood gas studies of record, only one study, dated November 24, 2003, performed during the miner’s final hospitalization, was qualifying for total disability under the regulatory criteria. Decision and Order at 19; *see* Director’s Exhibits 10-193; 10-195; Employer’s Exhibit 3. The administrative law judge properly found that the November 24, 2003 study did not constitute evidence of total disability since the study was not “accompanied by a physician’s report establishing that the test results were produced by a chronic respiratory or pulmonary condition.”<sup>6</sup> 20 C.F.R. §718.105(d); *see* Decision and Order at 19; Director’s Exhibit 1-183. Thus, because the blood gas study evidence was insufficient to establish total disability under the regulatory criteria, we affirm the administrative law judge’s finding that claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.105(d), 718.204(b)(2)(ii); Decision and Order at 19. In addition, because there was no evidence in the record that the miner had cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii). *Id.*

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Hardin, Vuskovich, and Rosenberg. Decision and Order at 19-20. The record indicates that Dr. Hardin treated the miner from February 1999 to

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<sup>4</sup> The administrative law judge noted that a pulmonary function study obtained on November 13, 2003 was administered from the miner’s bedside and did not produce complete results. Decision and Order at 13 n.7.

<sup>5</sup> A “qualifying” pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A “non-qualifying” study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

<sup>6</sup> The regulation at 20 C.F.R. §718.105(d) provides:

If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner’s death, then any such study must be accompanied by a physician’s report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled.

September 22, 2003, for bronchitis, diabetes, atherosclerotic heart disease, and peripheral vascular disease. Claimant's Exhibit 3. The administrative law judge properly found that Dr. Hardin "never stated in either his reports or his deposition that the miner had a totally disabling respiratory or pulmonary impairment." Decision and Order at 19. The administrative law judge further noted that Dr. Hardin's medical records do not contain any objective tests for disability; therefore, "[a]bsent pulmonary function studies and arterial blood studies, it is not clear how Dr. Hardin would have been able to determine whether the miner's shortness of breath or other respiratory symptoms were due to his lungs as opposed to his heart." *Id.*

The administrative law judge further noted that Drs. Vuskovich and Rosenberg "both reviewed the miner's hospitalization and treatment records and concluded that there simply was no objective evidence that the miner had a significant respiratory or pulmonary impairment." Decision and Order at 19; Director's Exhibit 9; Employer's Exhibit 6. Dr. Rosenberg specifically opined that the miner was not totally disabled from performing his usual coal mine work, prior to his terminal hospitalization for heart disease. Employer's Exhibit 7. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Because we affirm the administrative law judge's overall finding that the evidence was insufficient to establish that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that claimant failed to invoke the amended Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4).

## **II. DEATH DUE TO PNEUMOCONIOSIS**

The administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), based upon Dr. Hardin's opinion that the miner had chronic bronchitis due to coal dust exposure. Decision and Order at 23-24. In considering whether the miner's death was due to pneumoconiosis, the administrative law judge set forth the relevant medical evidence, including the miner's death certificate, the hospital records related to the miner's final hospitalization from November 11, 2003 to November 28, 2003, Dr. Hardin's reports and deposition testimony, the reports and deposition of Dr. Vuskovich, and the reports of Dr. Rosenberg.

As noted by the administrative law judge, the death certificate listed the immediate cause of the miner's death as cardiac arrest/congestive heart failure, due to or as a consequence of coronary artery disease, due to or as a consequence of ventricular

tachycardia. Decision and Order at 24; Director's Exhibit 7. There is no mention of pneumoconiosis. Director's Exhibit 7. The miner's hospital records from his final hospitalization included a discharge summary that noted the miner's final diagnoses as: 1) superficial femoral artery obstruction of the left great toe; 2) history of coronary artery bypass graft in 1994; 3) hypertension; 4) acute renal failure with significant renal artery stenosis; 5) diabetes mellitus; 6) anemia, status post transfusion; and 7) status post-cerebrovascular accident (CVA) in 1994. Decision and Order at 24; Director's Exhibit 10-184.

The administrative law judge correctly found that Dr. Hardin was the only physician of record to draw a connection between the miner's death and his coal mine employment. Decision and Order at 24. Dr. Hardin prepared a report on January 1, 2008, and in response to the question of whether pneumoconiosis hastened the miner's death, Dr. Hardin wrote, "[r]espiratory problems caused stress on cardiovascular and cerebrovascular systems, hastening development of cardiovascular disease and CVA." Director's Exhibit 8. Dr. Hardin also prepared a report, which is undated, and opined that the miner's "Coal Workers' Pneumoconiosis resulted in marked stress on [the miner's] health thereby hastening and significantly contributing to his death." Claimant's Exhibit 2. During his deposition, Dr. Hardin testified that respiratory problems can cause mechanical changes in the chest wall that put stress upon the heart, and infection or bronchitis can impair oxygen delivery, which causes the heart to work harder. Claimant's Exhibit 3 at 12. Dr. Hardin further testified that ventricular tachycardia is rapid heart rate, and that the stress from the miner's respiratory problems could cause the heart to beat faster. *Id.* at 14. In addition, Dr. Hardin noted that the combination of lung disease and congestive heart failure adds to the risk of death because diseased lungs stress the heart, causing it to wear out further, and causing mechanical changes that predispose the heart to accumulating fluid. *Id.* at 15-16.

In weighing Dr. Hardin's opinion, against the contrary opinions of Drs. Vuskovich and Rosenberg,<sup>7</sup> that the miner's death was unrelated to his coal dust exposure, the administrative law judge gave less weight to Dr. Hardin's opinion and explained:

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<sup>7</sup> Drs. Vuskovich and Rosenberg opined that pneumoconiosis did not hasten the miner's death. Director's Exhibit 9; Employer's Exhibit 7. Dr. Vuskovich attributed the miner's death to long-standing diabetes, coronary heart disease, cerebrovascular disease and, in the end, manifestations of peripheral vascular disease. Director's Exhibit 9. The administrative law judge found that Dr. Vuskovich noted the absence of any significant pulmonary impairment in rejecting "the suggestion that coal workers' pneumoconiosis, including legal pneumoconiosis, had reduced the miner's lifespan." Decision and Order at 25; *see* Director's Exhibit 9. Dr. Rosenberg stated that there was no objective evidence that the miner had a lung impairment that would have strained the miner's heart and

Weighing these three opinions, I note again that Dr. Hardin was the miner's treating physician for several years. However, even so, I do not find persuasive his opinion that the miner's chronic bronchitis played a role in the miner's death. Although I have credited his diagnosis of chronic bronchitis, I have also found that the record fails to establish that the miner had a significant lung impairment which would have had the hastening or contributing effect on his death that Dr. Hardin theorizes. Without evidence of significant lung impairment, Dr. Hardin's opinion regarding the role of lung disease in the miner's death loses much of its force.

Decision and Order at 26. The administrative law judge was specifically persuaded by Dr. Rosenberg's opinion, that the miner's death was not hastened by coal dust exposure, as Dr. Rosenberg is Board-certified in Pulmonary Medicine, while he noted that Dr. Hardin specializes in Family and Ambulatory Medicine, and is not a pulmonologist.<sup>8</sup> Decision and Order at 10, 26.

We conclude that the administrative law judge acted within his discretion in according greatest weight to Dr. Rosenberg's opinion, based upon Dr. Rosenberg's qualifications and the administrative law judge's finding that Dr. Rosenberg's opinion was better supported by the medical evidence. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553, *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 26. Furthermore, although claimant contends that the administrative law judge erred in failing to accord greater weight to Dr. Hardin's opinion, based upon his status as the miner's treating physician, the United States Court of Appeals for the Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-649 (6th Cir. 2003). Rather, the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* In this case, the administrative law

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hastened or accelerated his death. Rather, Dr. Rosenberg opined that the miner died from severe coronary artery disease and associated heart failure with superimposed pneumonia. Employer's Exhibit 7.

<sup>8</sup> Dr. Rosenberg is also Board-certified in Internal Medicine and Occupational Medicine. Employer's Exhibit 8; Decision and Order at 14. Dr. Hardin is Board-certified in Ambulatory Medicine. Claimant's Exhibit 3 at 4; Decision and Order at 10. Dr. Vuskovich is Board-certified in Occupational Medicine. Director's Exhibit 9-16; Decision and Order at 12.

judge permissibly found that Dr. Hardin's opinion on the issue of death causation was not entitled to deference, as Dr. Hardin did not persuasively explain how coal dust exposure hastened the miner's death, and since he cited to no objective evidence to support his conclusions. *See Id.; Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 26. Therefore, because it is supported by substantial evidence, 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. §718.205(c). Decision and Order at 26.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge