



BRB No. 20-0136 BLA

LOIS M. McGLOTHLIN)
(Widow of JERRY B. McGLOTHLIN))

Claimant-Petitioner)

v.)

DATE ISSUED: 03/30/2021

ISLAND CREEK COAL COMPANY)
c/o HEALTHSMART CASUALTY)

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 Denying Benefits in Survivor's Claim of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

Lois M. McGlothlin, Lebanon, Virginia.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ Associate Chief Administrative Law Judge Paul R. Almanza's Decision and Order Denying Benefits in Survivor's Claim (2014-BLA-05305) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Claimant filed her survivor's claim on March 13, 2013.²

The administrative law judge accepted Employer's stipulation to at least fifteen years of qualifying coal mine employment but found the Miner was not totally disabled. Thus, he found Claimant did not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Considering Claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge noted that Employer conceded the Miner suffered from simple clinical pneumoconiosis but found the evidence insufficient to establish legal pneumoconiosis. The administrative law judge further found that Claimant did not establish the Miner's death was due to pneumoconiosis and denied benefits. 20 C.F.R. §718.205(b).

On appeal, Claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, declined to file a substantive response to Claimant's appeal.

In an appeal filed without the assistance of counsel, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with

¹ On Claimant's behalf, Bradley Johnson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested that the Benefits Review Board review the administrative law judge's decision, but he does not represent Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

² Claimant is the widow of the Miner, who died on January 28, 2013. Director's Exhibits 2, 8. The Miner filed a claim several years before his death that the district director denied on February 5, 1999. Director's Exhibit 1. Because the Miner's claim was denied, Claimant is not eligible for derivative survivor's benefits at Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).

applicable law.³ 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).

Section 411(c)(4) Presumption –Total Disability

Section 411(c)(4) of the Act provides a rebuttable presumption that a miner’s death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Because Employer conceded that the Miner had fifteen years of qualifying coal mine employment, Claimant can invoke the presumption if she establishes that the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(iii).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987) (en banc).

The record contains two non-qualifying pulmonary function studies, conducted on August 18, 2008, and April 10, 2012,⁴ and two non-qualifying blood gas studies.⁵ 20

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner’s coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director’s Exhibit 3.

⁴ A “qualifying” pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A “non-qualifying” study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

⁵ The administrative law judge noted the August 28, 2008 blood gas study, but the treatment records also contain a blood gas study conducted on January 28, 2013, that is also non-qualifying. Director’s Exhibit 10.

C.F.R. §718.204(b)(2)(i),(ii); Decision and Order at 4-6; Director's Exhibit 11; Employer's Exhibits 3, 4. There is also no evidence the Miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 6. Thus, the administrative law judge accurately found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 5-6.

The medical opinion evidence consists of letters from the Miner's treating physicians, Drs. Parrish and Merva, and reports by Drs. Basheda, Rosenberg, and Rasmussen.⁶ 20 C.F.R. §718.204(b)(2)(iv). As the administrative law judge noted, in an April 10, 2013 letter, Dr. Parrish listed various medications that the Miner was taking prior to his death, which included two liters of supplemental oxygen given at bedtime. Director's Exhibit 12. Although Dr. Parrish addressed the cause of the Miner's death, he did not provide an opinion on total disability. *Id.*

In a September 19, 2013 letter, Dr. Merva indicated that he treated the Miner for insomnia since July of 2011. Director's Exhibit 12. He noted that the Miner used a bilevel positive airway pressure machine and supplemental oxygen at night because testing showed his oxygen levels desaturated prior to sleep. He opined these desaturations were caused by "primary lung disease" and "felt the [Miner] needed oxygen around the clock."⁷ *Id.*

Dr. Basheda reviewed the medical records at Employer's request and opined the Miner had a Class II impairment, which he defined as "a ten to twenty-five percent impairment" of the whole person. Employer's Exhibit 5 at 16-18. He opined the Miner had no significant pulmonary impairment based on the pulmonary function and blood gas studies that he reviewed. *Id.* Dr. Rosenberg also reviewed the medical records and opined the Miner was not totally disabled from a pulmonary perspective but may have had "a little restriction" related to a 2010 hiatal hernia surgical repair. Employer's Exhibit 6 at 5. Dr. Rosenberg stated the Miner's 2008 pulmonary function study was normal and the 2012 pulmonary function study, while showing a minimal reduction of FVC and FEV1, could not be validated. *Id.* Although he acknowledged the Miner suffered from nighttime hypoxemia related to his excess weight, Dr. Rosenberg opined that at the time of his death the Miner retained the pulmonary capacity to perform his "regular coal mine employment"

⁶ The administrative law judge found the Miner operated a continuous miner and his usual coal mine employment required heavy exertion. Decision and Order at 7.

⁷ There is no indication in the record that the Miner was using supplemental oxygen during the day. Director's Exhibits 9-11.

operating a continuous miner, based on the pulmonary function and blood gas study results. Employer's Exhibit 8 at 4, 7.

The administrative law judge rationally found that Dr. Parrish's opinion was not probative because he did not address the severity of the Miner's respiratory impairment or discuss whether the Miner was totally disabled. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986); Decision and Order at 7; Director's Exhibit 12. He also permissibly gave little weight to Dr. Merva's opinion because Dr. Merva did not provide any information on whether the Miner's oxygen desaturations at night would have prevented the Miner from returning to his usual coal mine employment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 7; Director's Exhibit 12. The administrative law judge also permissibly found Dr. Basheda's and Dr. Rosenberg's opinions more persuasive in view of their qualifications⁸ and because they reviewed the entirety of the medical record, including the non-qualifying objective studies. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 7; Employer's Exhibits 5, 6.

The administrative law judge also considered the Miner's treatment records and accurately found that while the Miner was diagnosed with heart disease and chronic obstructive pulmonary disease, the records do not include a physician's opinion indicating that he was totally disabled or any objective test results to support that conclusion.⁹ Decision and Order at 8; Director's Exhibits 9-11; Employer's Exhibits 9-13.

Because the administrative law judge acted within his discretion in weighing the medical opinions and treatment records, we affirm his determination Claimant did not meet

⁸ The administrative law judge noted that Dr. Basheda is Board-certified in Sleep Medicine and Internal Medicine with subspecialties in Pulmonary Disease and Critical Care. Employer's Exhibit 5 at 21. Dr. Rosenberg is Board-certified in Internal Medicine, Pulmonary Disease, and Occupational Medicine. Employer's Exhibit 6 at 7. Dr. Parrish is a doctor of Osteopathic Medicine, did his residency in internal medicine, and did not list any Board-certifications on his resume. Claimant's Exhibit 3. Dr. Merva is Board-certified in Neurology and Psychiatry and Sleep Medicine. Claimant's Exhibit 4 at 1.

⁹ Employer submitted Dr. Rasmussen's 2008 report from the Miner's claim. Although Dr. Rasmussen's report predates the Miner's death by approximately five years, the administrative law judge accurately noted that Dr. Rasmussen opined in 2008 that the Miner retained the respiratory capacity to perform his usual coal mine employment. Decision and Order at 8; Employer's Exhibit 8.

her burden to establish total disability. 20 C.F.R. §718.204(b)(2)(iv); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 6-8; Director’s Exhibits 9-12; Employer’s Exhibits 5, 6, 8-13. We therefore affirm, as supported by substantial evidence, the administrative law judge’s determination she is unable to invoke the Section 411(c)(4) presumption that the Miner’s death was due to pneumoconiosis. See 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(iii); Decision and Order at 8.¹⁰

Entitlement under 20 C.F.R. Part 718

In a survivor’s claim where no statutory presumptions are invoked, the claimant must establish the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(b)(1), (2); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner’s death is due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of his death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a “substantially contributing cause” if it hastens the miner’s death. 20 C.F.R. §718.205(b)(6); see *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 184-85 (4th Cir. 2014). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer conceded the Miner had clinical pneumoconiosis arising out of coal mine employment.¹¹ Decision and Order at 8. We see no error, however, in the administrative law judge’s finding that Claimant did not establish the Miner had legal pneumoconiosis.¹²

¹⁰ The administrative law judge did not address whether the Miner had complicated pneumoconiosis because the record contains no evidence of the disease. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, Claimant is unable to invoke the irrebuttable presumption that the Miner’s death was due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C. F.R. §718.304.

¹¹ Clinical pneumoconiosis consists of “those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissues to that deposition caused by dust exposure in coal mine employment.” 20 C.F.R. 718.201(a)(1).

¹² Legal pneumoconiosis includes “any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. 718.201(a)(2). The definition includes “any chronic pulmonary disease or respiratory or pulmonary impairment

Id. at n.7. While treatment records indicate the Miner was diagnosed with chronic obstructive pulmonary disease (COPD), none of the treating physicians or other physicians who offered medical opinions in this case identified coal mine dust as a cause of the COPD or diagnosed any other respiratory impairment related to coal mine dust exposure. Director's Exhibits 9-12; Employer's Exhibits 5-12, 15.

In determining whether Claimant could establish that the Miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(b), the administrative law judge considered the Miner's death certificate, the treatment notes of Drs. Parrish and Merva, the autopsy review reports of Drs. Oesterling and Caffrey, and the medical opinions of Drs. Basheda and Rosenberg.¹³ Decision and Order at 8-10.

The administrative law judge accurately found that Dr. Parrish is the only physician to link the Miner's pneumoconiosis to his death. Decision and Order at 9. The treatment records include Dr. Parrish's March 5, 2013 handwritten note, which states "underlying lung and heart disease likely contributed to [the Miner's] death but the autopsy is definitive as to whether 'black lung' was a factor."¹⁴ Director's Exhibit 10. After he reviewed the

significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

¹³ Dr. Mullins signed the Miner's death certificate and listed the cause of his death as "gangrenous cholecystitis due to (or as a consequence of) cardiopulmonary arrest." Director's Exhibit 8. Dr. Pardasani conducted the Miner's autopsy and identified simple coal workers' pneumoconiosis and findings consistent with heart disease, but he did not address the cause of the Miner's death. Director's Exhibit 13. Dr. Oesterling reviewed the Miner's autopsy slides and opined there was a minimal degree of coal workers' pneumoconiosis present that should not have hastened his death. Employer's Exhibit 15. Dr. Caffrey opined the Miner died as a result of complications from gallbladder surgery and that his coal mine employment did not hasten his death. Employer's Exhibit 7. Dr. Basheda stated the Miner died from gallbladder disease complicated by sepsis and cardiopulmonary arrest after surgery but that pneumoconiosis did not hasten his death. Employer's Exhibit 5 at 18. Dr. Rosenberg also opined the Miner's death was due to sepsis caused by a gangrenous gallbladder and that the minimal degree of simple clinical pneumoconiosis seen pathologically did not hasten the Miner's death. Employer's Exhibit 6 at 5. Dr. Merva offered no opinion on the cause of death. Director's Exhibit 12.

¹⁴ On the same handwritten note, Claimant asked that Dr. Parrish write a letter stating that her husband's death was due to black lung disease; Dr. Parrish's statements appear to be in response to that request. Director's Exhibit 10.

autopsy report, Dr. Parrish prepared an April 10, 2013 letter, addressed to “Whom it May Concern,” stating that the Miner died from “cardiopulmonary arrest secondary to septic gallbladder” and that coal workers’ pneumoconiosis “was at least a contributing factor” to the Miner’s death. Director’s Exhibit 12. The administrative law judge permissibly found Dr. Parrish’s opinion “neither well-reasoned nor well documented,” as he provided no rationale for his conclusions. See *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 9; Director’s Exhibits 10, 12. The autopsy report did not address the cause of the Miner’s death or whether pneumoconiosis contributed to the Miner’s death, and Dr. Parrish did not explain how the autopsy report supported his opinion. Director’s Exhibits 10, 12. Thus, we affirm the administrative law judge’s finding that Claimant did not establish the Miner’s death was due to pneumoconiosis as it is supported by substantial evidence. 20 C.F.R. §718.205; *Trumbo*, 17 BLR at 1-87-88; *Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge’s Decision and Order Denying Benefits in Survivor’s Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge