

BRB No. 09-0758 BLA

DELIA RUSSELL)
(Widow of EUGENE RUSSELL))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 07/29/2010
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Delia Russell, Bellefonte, Pennsylvania, *pro se*.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order-Denial of Benefits (2007-BLA-5690) of Administrative Law Judge Ralph A. Romano

¹ Claimant is the widow of a miner who died on December 12, 2005. Director's Exhibit 10. Claimant stated, in her application for benefits, that the miner never filed a claim for benefits, and the record does not indicate that the miner ever filed a claim.

² E. Junior Russell, claimant's son, requested, on behalf of claimant, that the Board review the administrative law judge's decision. By Order dated Sep. 17, 2009, the Board stated that it would review claimant's appeal as an appeal filed without the assistance of counsel. 20 C.F.R. §§802.211(e), 802.220; *see Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

(the administrative law judge) on a survivor's claim filed on April 13, 2006, 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 one and one-half years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a) and that the pneumoconiosis arose out of the miner's coal mine employment at 20 C.F.R. §718.203(c). However, the administrative law judge found that death due to pneumoconiosis was not established at 20 C.F.R. §718.205(c). The administrative law judge also found that claimant failed to establish the existence of complicated pneumoconiosis and was not, therefore, entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the administrative law judge's decision denying benefits be affirmed.

In an appeal filed by a claimant proceeding without the assistance of counsel, the Board considers the issue raised on appeal 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 supported by substantial evidence, are rational, and are consistent with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish 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. §§718.1, 718.202, 718.203,

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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 Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, *inter alia*, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that, at the time of death, he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.⁴

By Order issued on May 10, 2010, the Board permitted supplemental briefing in this case to address the impact, if any, of the 2010 amendments in this claim. In response, claimant contends that she is entitled to the Section 411(c)(4) presumption because there is evidence in the record that the miner had a totally disabling respiratory impairment. The Director responds, contending that claimant cannot benefit from the Section 411(c) presumption because she has not established fifteen years of qualifying coal mine employment, even if she were able to show that the miner had a totally disabling respiratory impairment.

Coal Mine Employment

The administrative law judge credited the miner with one and one-half years of coal mine employment. Decision and Order at 12. In reaching this finding, the administrative law judge found that the district director did not credit the miner with any years of coal mine employment, and that claimant, herself, stated in her application for benefits that she was unsure of the length of the miner’s coal mine employment. Director’s Exhibit 2. The administrative law judge noted, however, that the record included a W-2 statement for 1972 from Reppert Fuels, showing that the miner earned \$2,092.25, as well as a payroll statement from Reppert Fuels for a two-week period, showing that the miner earned \$2.00 an hour. Director’s Exhibit 5. The administrative

⁴ In addition, under Section 422(l) of the Act, 30 U.S.C. §932(l), as amended, a qualified survivor of a miner, who filed a successful claim for benefits, is automatically entitled to survivor’s benefits without the burden of establishing entitlement. Because there is no indication that the miner filed a claim, claimant cannot benefit from this amendment.

law judge also noted that the record included a letter from Reppert Fuels to the miner, dated June 11, 1973, stating that the miner was formerly employed by Reppert Fuels at a coal tipple near Buckhannon, West Virginia. Director's Exhibit 6. Finally, the administrative law judge found that the miner's Social Security earnings record indicated that the miner worked for Reppert Fuels during six quarters in 1971 and 1972, and a wage calculation of "86.56" days worked in those years. Director's Exhibit 7. As substantial evidence supports the administrative law judge's finding of one and one-half years of coal mine employment; we affirm it.⁵ See *Kingery v. Director, OWCP*, 8 BLR 1-185 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Brumley v Clay Coal Corp.*, 6 BLR 1-956 (1984).

Death Due To Pneumoconiosis

Considering the medical opinion evidence at Section 718.205(c) on the issue of death causation, the administrative law judge correctly found that the autopsy report indicated the presence of pneumoconiosis, but did not "ascribe the miner's demise to that condition,"⁶ and could not, therefore, establish that the miner's death was due to

⁵ Because claimant requested a decision on the record, no testimony was elicited regarding the miner's coal mine employment. On appeal, claimant states that Dr. Husari found that the miner had a coal mine employment history of twelve years. As support for the doctor's finding of twelve years, claimant avers:

It is a fact that during the 1960's[,] [the miner,] on his farm in West Virginia[,] did operate a coal mine for private consumption. [The miner] did indeed drill with a hand auger at the face, load and blast the coal and haul it to his residence for his personal use. In citing the [twelve] years[,] I am certain this is where some of those [twelve] years came from in Dr. Husari's letter.

Claimant's Letter at 2.

Based on the evidence before him, the administrative law judge properly found that the miner had one and one-half years of coal mine employment. Decision and Order at 4-5. However, if claimant has additional evidence concerning the length of the miner's coal mine employment, she may file a request for modification within one year of the Board's Decision and Order in this case. See 20 C.F.R. §725.310.

⁶ The autopsy, limited to the lungs, was conducted by Dr. Franco, who noted chronic obstructive pulmonary disease, spontaneous pneumothorax, post-thoracotomy, and focal areas of fibrosis, microscopically, and stated that the miner "probably died with acute and organizing bronchopneumonia and respiratory failure." Director's Exhibit 11.

pneumoconiosis. Decision and Order at 13; 20 C.F.R. §718.205(c). The administrative law judge also properly found that the three physicians “who had the most contact with the miner [did] not offer a persuasive conclusion to support a finding that the miner’s death was due to pneumoconiosis.” Decision and Order at 14. The administrative law judge found that Dr. Zuriqat⁷ “attributed the [m]iner’s lung disease in part to his ‘occupational exposure[,]’ but found that it was not clear from the doctor’s opinion that “his notation of ‘significant occupational exposure’ refers just to the two years of coal mine employment or whether that exposure included [seventeen] years of work in a sawmill.” Decision and Order at 14. The administrative law judge found that, even accounting for the fact that Dr. Zuriqat was a treating physician and, even assuming that “Dr. Zuriqat’s opinion support[ed] [an] inference that he ascribed the [m]iner’s death in part to pneumoconiosis,” the opinion “is unreasoned in light of the documentation of record.” Decision and Order at 14. The administrative law judge, therefore, properly found that it did not establish death causation at Section 718.205(c). See 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Next, the administrative law judge found that the probative value of Dr. Husari’s opinion, as to “the role pneumoconiosis played in the [m]iner’s total respiratory disability,” was undermined, because it was premised on the doctor’s belief that the miner had twelve years of coal mine employment, while the record only established one and one-half years.⁸ See *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985). Additionally, the administrative law judge found that Dr. Kung did not offer an opinion as to the contribution that pneumoconiosis made to the miner’s death and that his statement, that the miner’s work history of underground coal mining strongly suggests a diagnosis of complicated pneumoconiosis, was not supported by x-ray, autopsy or CT scan evidence.⁹

⁷ Dr. Zuriqat stated that he was treating the miner for “advanced lung disease secondary to severe emphysema,” that the miner had “occupational exposure,” and that, on autopsy, “silicoanthracotic dust deposits and nodules...consistent with occupational lung disease, which contributed to the severity of the patient’s condition and disabled him,” were found. Director’s Exhibit 15.

⁸ Dr. Husari treated the miner in 2000, and diagnosed coal workers’ pneumoconiosis and chronic obstructive pulmonary disease. Director’s Exhibit 24.

⁹ Dr. Kung, a Board-certified pulmonologist, who saw the miner during his hospitalization in 2005, noted “fibrotic changes in both upper lung fields. These changes... suggested the possibility of pneumoconiosis as an additional diagnosis.” Director’s Exhibit 17. Dr. Kung noted that this possibility was borne out by the autopsy findings. *Id.* A progress note dated November 19, 2005, regarding the chest x-ray reviewed by Dr. Kung states: “The cephalad pull of the pulmonary hila and the patient’s

The administrative law judge, therefore, properly found that his opinion did not establish death due to pneumoconiosis at Section 718.205(c), and failed to establish complicated pneumoconiosis at Section 718.304. Accordingly, we affirm the administrative law judge's finding that the evidence did not establish death due to pneumoconiosis at Section 718.205(c).

As claimant has failed to establish at least fifteen years of qualifying coal mine employment on this record, she cannot benefit from consideration of her claim under Section 411(c)(4). 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

occupational history of underground coal, including rock drilling at the coal face, strongly suggest a diagnosis of complicated coal miner's pneumoconiosis." *Id.*