

U.S. Department of Labor

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



BRB No. 20-0214 BLA

MINNIE PEARL ESTEP)
(Widow of LAWRENCE OWEN ESTEP))

Claimant-Petitioner)

v.)

OLGA COAL COMPANY)

and)

DATE ISSUED: 05/25/2021

WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)

Employer/Carrier-)
Respondents)

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 of Theodore W. Annos,
Administrative Law Judge, United States Department of Labor.

Minnie Pearl Estep, Panther, West Virginia.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for
Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE, and JONES,
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ Administrative Law Judge Theodore W. Annos's Decision and Order Denying Benefits (2017-BLA-06154) rendered on a survivor's claim filed on November 19, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited the Miner with 10.96 years of underground coal mine employment, and therefore found Claimant² could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.³ 30 U.S.C. §921(c)(4) (2018). He further found Claimant did not establish the existence of complicated pneumoconiosis, and therefore 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); 20 C.F.R. §718.304. Considering Claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found Claimant established the Miner had clinical pneumoconiosis⁴ arising out of coal mine employment. However, he found there is no

¹ On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the administrative law judge's decision, but Ms. Combs is not representing 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 April 21, 2015. Director's Exhibit 13. The Miner filed a claim for benefits on June 12, 1980, which was denied as abandoned on May 12, 1981. 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).

³ Section 411(c)(4) provides a rebuttable presumption that a miner's death was due to pneumoconiosis if the miner had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

⁴ "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

evidence 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. Employer and its Carrier respond in support. The Director, Office of Workers' Compensation Programs, has not filed a response.

In an appeal filed without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are 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).

Section 411(c)(4) Presumption - Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing 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, 1-710-11 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method of calculation and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge considered the Miner's CM-911a Employment History Form, his Social Security Administration (SSA) earnings records, pay stubs, and Claimant's testimony. Decision and Order at 6-7. He further noted Claimant alleged approximately sixteen years of coal mine employment. Decision and Order at 6; Hearing Transcript at 13-14.

The administrative law judge found the Miner's SSA earnings records and paystubs the most probative evidence of record because they were detailed and reliable. Decision and Order at 6. As they did not identify the beginning and ending dates of the Miner's coal

⁵ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Decision and Order at 2.

mine employment, he permissibly applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to calculate its length. Thus, the administrative law judge divided the Miner's annual earnings by the average daily wage in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual* to determine the number of days he worked per year.⁶ Decision and Order at 7.

For those years in which the Miner was continuously employed by a single employer for a full calendar year and worked in or around the coal mines for at least 125 days, the administrative law judge credited him with a full year of employment. Decision and Order at 7. For years in which he worked for less than 125 days, the administrative law judge credited him with partial years based upon the number of days he worked in coal mine employment divided by a 125-day work year. *Id.* Based upon these calculations, the administrative law judge credited the Miner with 10.96 years of coal mine employment from 1965 to 1980.⁷ *Id.*

The administrative law judge's determination potentially overstates the miner's years of coal mine employment as a consequence of using 125 as his divisor. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). However any error in this regard is harmless, as he correctly determined that Claimant did not invoke the rebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Invocation of the Section 411(c)(3) Presumption -- Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which: (a)

⁶ The regulation provides that if the beginning and ending dates of a miner's employment cannot be ascertained, or the miner's employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing his yearly income by the average daily earnings of employees in the coal mining industry, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*.

⁷ Using the earnings reported on the Miner's paystubs, the administrative law judge credited him with 0.44 years of coal mine employment from 1965 to 1968. Decision and Order at 7; Director's Exhibit 6. He credited the Miner with an additional 10.52 years of coal mine employment from 1969 to 1980, based upon the earnings reported on his Social Security Earnings Record. Decision and Order at 7; Director's Exhibit 7.

when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. See *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The administrative law judge considered the autopsy reports of Drs. Cinco and Oesterling and the medical opinion of Dr. Spagnolo. Decision and Order at 15-17; see 20 C.F.R. §718.304(b), (c). The administrative law judge accurately found that Dr. Cinco's opinion the Miner had multiple conglomerate anthracosis nodules measuring up to 1.5 centimeters in diameter is the only evidence that supports a diagnosis of complicated pneumoconiosis.⁸ Decision and Order at 16; Director's Exhibit 15. Dr. Oesterling, who reviewed the autopsy slides and treatment records, opined the Miner had simple but not complicated pneumoconiosis with lesions measuring at most 0.80 of a centimeter. Director's Exhibit 16; Employer's Exhibit 14. Similarly, Dr. Spagnolo opined the Miner had simple but not complicated pneumoconiosis based upon his belief that Dr. Oesterling's autopsy report was more consistent with the Miner's treatment records and clinical findings. Employer's Exhibit 11, 15.

In weighing the conflicting evidence, the administrative law judge noted Dr. Cinco's credentials are not in the record, unlike those of Drs. Oesterling and Spagnolo.⁹ Decision

⁸ Review of the record reflects that the Miner's treatment records contain x-rays, computed tomography scans, and other records detailing medical problems including gastrointestinal disease, heart disease, and chronic obstructive pulmonary disease, but those records are silent as to the existence of large masses or the presence or absence of complicated pneumoconiosis. Director's Exhibit 15; Employer's Exhibits 3-10. We therefore affirm the administrative law judge's determination that the treatment records do not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 16.

⁹ Dr. Oesterling is Board certified in Anatomic and Clinical Pathology and Nuclear Medicine, and Dr. Spagnolo is Board certified in Internal and Pulmonary Medicine. Director's Exhibit 16; Employer's Exhibits 11, 14, 15.

and Order at 16. He therefore permissibly accorded greater weight to the opinions of Drs. Oesterling and Spagnolo based upon their documented qualifications. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 16. He further permissibly found Dr. Oesterling's opinion, which illustrated with photographs his belief that Dr. Cinco's measurements were "exaggerated,"¹⁰ called into question Dr. Cinco's opinion. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *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 16. Because the administrative law judge permissibly discredited Dr. Cinco's autopsy report, the only evidence of complicated pneumoconiosis, we affirm his finding that the autopsy evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(b); Decision and Order at 17.

Consequently, we also affirm his determination that the evidence as a whole does not establish complicated pneumoconiosis, 20 C.F.R. §718.304, and that Claimant failed to invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3).

Part 718 Entitlement - Death Due to Pneumoconiosis

Because the Section 411(c)(3) and Section 411(c)(4) statutory presumptions do not apply, Claimant must establish the Miner had pneumoconiosis arising out of coal mine employment, and that his 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 pneumoconiosis or complications of pneumoconiosis cause a miner's 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" of a miner's death 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 (4th Cir

¹⁰ Dr. Cinco noted a 1.2 centimeter "coalescent nodular fibrous lesion" on slide 7, a 1.5 centimeter "large coalescent sclerotic nodule" on slide 10, a 1.4 centimeter "aggregate lesion" on slide 12, and "[c]oalescent sclerotic and hyalinized nodules" on slide 13, the greatest of which measured 1.4 centimeters. Director's Exhibit 15. Dr. Oesterling, who provided photographs of his findings, opined slide 10 shows a lymph node and not a macronodule, and the lesions marked by Dr. Cinco on slides 7, 12, and 13 extend beyond the end of the nodules, causing the measurements to be "exaggerate[d]." Director's Exhibit 16; Employer's Exhibit 14.

2014). Failure to establish any one of the required elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

The administrative law judge accurately found that no physician attributed the Miner's respiratory impairment to his coal mine employment or to pneumoconiosis. Decision and Order at 14. Consequently, as no physician diagnosed the Miner with a chronic respiratory or pulmonary disease or impairment arising out of his coal mine employment, other than clinical pneumoconiosis, Claimant did not otherwise establish the Miner suffered from legal pneumoconiosis.¹¹ 20 C.F.R. §718.201(a)(2), (b). The administrative law judge further recognized, however, the uncontradicted autopsy evidence established the Miner suffered from simple clinical pneumoconiosis, and that it arose out of his coal mine employment. Decision and Order at 14-15; 20 C.F.R. §§718.201(a)(1), 718.202(a)(2), 718.203(b).

Even so, the administrative law judge accurately found the record contains no medical evidence that pneumoconiosis caused or hastened the Miner's death. 20 C.F.R. §718.205(b); *Collins*, 751 F.3d at 185; *Trumbo*, 17 BLR at 1-87; Decision and Order at 17-18. He therefore accurately found Claimant's statements and testimony cannot establish that the Miner's death was due to pneumoconiosis, as the regulation at 20 C.F.R. §718.205(b) requires that a claimant establish death due to pneumoconiosis by "competent medical evidence," and lay testimony alone may not satisfy a claimant's burden of proof on this issue. 20 C.F.R. §718.205(b); *see Salyers v. Director, OWCP*, 12 BLR 1-193, 1-196 (1989); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order at 18.

We therefore affirm the administrative law judge's finding that Claimant did not establish the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b). Because Claimant failed to establish an essential element of entitlement in a survivor's claim, we affirm the denial of survivor's benefits under 20 C.F.R. Part 718. *Trumbo*, 17 BLR at 1-87-88.

¹¹ "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge