BRB No. 13-0444 BLA

VIOLET ADKINS (Widow of BILLY R. ADKINS) Claimant-Petitioner v. NEW ERA COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/16/2014 DECISION and ORDER

Appeal of the Decision and Order of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (10-BLA-5132) of Administrative Law Judge Peter B. Silvain, Jr., denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on February 9, 2009.

Considering amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited the miner with 12.51 years of coal mine employment.[3] The administrative law judge, therefore, determined that claimant failed to establish the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.[4] The administrative law judge further found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Turning to whether claimant could affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but did not establish that the miner's death was due to

[1] Claimant is the widow of the miner, who died on September 2, 2008. Director's Exhibit 10.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

[3] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board 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).

[4] The amendments also revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Claimant cannot benefit from this provision, as the miner's claim for benefits was subsequently withdrawn and, therefore, is considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibit 34.

pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[5] Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in crediting the miner with less than the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Claimant also argues that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. 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).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis set forth at 20 C.F.R. §718.304, is applicable, or the Section 411(c)(4) presumption is invoked and not rebutted. 20 C.F.R. §718.205(b)(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(b)(6).

The Section 411(c)(4) Presumption

Claimant argues that the administrative law judge erred in crediting the miner with fewer than the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Based upon the miner's employment histories and Social Security records, the administrative law judge credited the miner with 3.75 years of coal mine employment from 1971 to 1977, and an additional 8.76 years of coal mine

[5] After the administrative law judge issued his decision, the Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The provisions that were applied by the administrative law judge at 20 C.F.R. §718.205(c) are now set forth at 20 C.F.R. §718.205(b). 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.205(b)).

employment from 1978 to 1991, for a total of 12.51 years of coal mine employment.[6] Decision and Order at 5-7.

Claimant notes that, in his consideration of the claim, the district director credited the miner with twelve years of coal mine employment from 1978 to 1991. Because employer stipulated to twelve years of coal mine employment at the hearing, Hearing Transcript at 11, claimant asserts that employer's stipulation referenced claimant's coal mine employment between 1978 and 1991. As the administrative law judge credited the miner with 3.75 years of coal mine employment between 1971 and 1977, claimant contends that the miner should have been credited with a total of 15.75 years of coal mine employment. Claimant's Brief at 4-5.

The administrative law judge rejected claimant's argument, finding that although employer stipulated to twelve years of coal mine employment, there was no evidence that employer's stipulation was limited to any specific time period. Decision and Order at 7. The administrative law judge accurately noted that at the hearing, employer did not specify any range of dates for its stipulation. *Id.* The administrative law judge further noted that employer, in its post-hearing brief, calculated the miner's coal mine employment from 1971 through 1991 as totaling "about twelve years." Employer's Post-Hearing Brief at 17-18. The administrative law judge found that this further demonstrated that "[e]mployer's stipulation of twelve years was not limited to the years 1978 through 1991." Decision and Order at 7. Because it is rational, we affirm the administrative law judge's determination that employer's stipulation of twelve years of coal mine employment was not limited to any specific period of time.

Because claimant does not assert any additional error in regard to the administrative law judge's calculation regarding the length of the miner's coal miner employment, we affirm his determination that the miner worked for 12.51 years in coal employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In light of this affirmance, we also affirm the administrative law judge's finding that claimant is not entitled to the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4), as claimant did not establish the requisite fifteen years of qualifying coal mine employment necessary to invoke the presumption.[7]

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[6] The administrative law judge made calculations for two separate time periods because the miner's Social Security records include quarterly earnings before 1978, but only annual earnings thereafter. Decision and Order at 6; Director's Exhibit 6.

[7] Claimant argues that the administrative law judge erred in not addressing testimony provided by the miner's daughter regarding her observations of the miner's health condition. We disagree. Because claimant failed to establish that the miner had the necessary fifteen years of qualifying coal mine employment to invoke the Section

Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner was suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

Claimant argues that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).[8] In considering whether the autopsy evidence established the existence of complicated pneumoconiosis, the administrative law judge considered the opinions of Drs. Dennis, Caffrey, and Oesterling. While Dr. Dennis, the autopsy prosector, diagnosed complicated pneumoconiosis, Director's Exhibit 11, two reviewing pathologists, Drs. Caffrey and Oesterling, opined that the miner did not suffer from the disease. Director's Exhibit 12; Employer's Exhibits 5, 6.

In his consideration of the conflicting evidence, the administrative law judge accorded less weight to Dr. Oesterling's opinion because he found that the doctor's opinion was based upon a "misconstrued analysis of complicated pneumoconiosis." Decision and Order at 28. The administrative law judge, however, found that the opinions of Drs. Dennis and Caffrey were both well-reasoned and, therefore, entitled to probative weight.[9] *Id.* at 26-27. Having found that Drs. Dennis and Caffrey "each presented a reasoned and documented report," the administrative law judge found that the autopsy evidence was "inconclusive" as to the existence of complicated pneumoconiosis. *Id.* at 28.

411(c)(4) presumption, the administrative law judge did not, and was not required to, address whether the evidence established that the miner suffered from a totally disabling respiratory impairment.

[8] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[9] Because Drs. Dennis and Caffrey are each Board-certified in Anatomical and Clinical Pathology, the administrative law judge found that the doctors were equally qualified. Decision and Order at 26.

Claimant contends that the administrative law judge erred in not according greater weight to Dr. Dennis's opinion, based upon his status as the autopsy prosector. We disagree. An administrative law judge need not accord greater weight to the opinion of the autopsy prosector. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992) (holding that the administrative law judge did not explain how the autopsy prosector's ability to conduct a gross examination gave him an advantage over reviewing pathologists). In this case, the administrative law judge found that Dr. Dennis's status as the autopsy prosector did not provide him with an advantage over the reviewing pathologists in determining whether the miner suffered from complicated pneumoconiosis.[10] Decision and Order at 26. Because claimant does not otherwise challenge the administrative law judge's consideration of the autopsy evidence, we affirm his finding that the autopsy evidence was inconclusive and, therefore, insufficient to support a finding of complicated pneumoconiosis. We, therefore, affirm the administrative law judge's determination that claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).

Where the Section 411(c)(3) and 411(c)(4) presumptions do not apply, *see* 30 U.S.C. §921(c)(3), (4), claimant must affirmatively establish that pneumoconiosis was the cause or was a substantially contributing cause of the miner's death. *See* 20 C.F.R. §§718.1, 718.205(b)(1),(2). The administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis. Decision and Order at 43. Because claimant does not challenge this finding, it is affirmed. *Skrack*, 6 BLR at 1-711.

[10] Claimant does not explain how Dr. Dennis's status as the autopsy prosector provided him with an advantage over the reviewing pathologists in determining whether the miner suffered from complicated pneumoconiosis.

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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REGINA C. McGRANERY
Administrative Appeals Judge