**U.S. Department of Labor**

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

BRB No. 18-0279 BLA

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| FELICIA A. MUNCY<br>(Daughter of ANDREW J. SHULOCK)<br><br>Claimant-Petitioner<br><br>v.<br><br>U.S. STEEL MINING COMPANY<br><br>Employer-Respondent<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 04/05/2019<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Remand Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Felicia A. Muncy, Philippi, West Virginia.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel,[2] the Decision and Order on Remand Denying Benefits (2013-BLA-05874) of Administrative Law Judge Drew A. Swank, rendered on a survivor's claim filed on March 4, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C §§901-944 (2012) (the Act). This case is before the Board for the second time.

The administrative law judge initially denied benefits in a Decision and Order issued on November 10, 2015. In consideration of claimant's appeal, the Board affirmed the administrative law judge's determination that the miner had thirty-two years of qualifying coal mine employment, and his findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), (iv). *Muncy v. U.S. Steel Coal Co.*, BRB No. 16-0161 BLA, slip. op. at 3 n.5, 4 (May 30, 2017) (unpub.). The Board vacated, however, the administrative law judge's determination that the miner was not totally disabled because the administrative law judge did not consider all of the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii). *Id*. at 5. Thus, the Board vacated the administrative law judge's finding that claimant did not invoke the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] *Id*. Additionally, the Board vacated the administrative law judge's finding that claimant is an eligible disabled survivor of the miner because it was not adequately explained. *Id*. at 7-8. Accordingly, the Board vacated the denial of benefits and remanded the case for further consideration.[4] *Id*. at 8.

[1] Claimant is the adult daughter of the miner, Andrew J. Shulock, who died on January 24, 2013. Director's Exhibit 11.

[2] Andrea L. Kelley, claimant's sister and lay representative, requested that the Board review the administrative law judge's decision, but Ms. Kelley is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[3] Under Section 411(c)(4), the miner's death is presumed to be due to pneumoconiosis if claimant establishes that he had at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[4] Claimant requested reconsideration, which the Board denied on May 30, 2017. *Muncy v. U.S. Steel Coal Co.*, BRB No. 16-0161 BLA (May 30, 2017) (unpub. Order on Recon.). Claimant next appealed the Board's decision to the United States Court of

On remand, the administrative law judge found that claimant established that the miner was totally disabled and thereby invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. He also found that employer failed to rebut the presumption. The administrative law judge further determined, however, that claimant is not an eligible disabled survivor pursuant to 20 C.F.R. §§725.218(a) and 725.221. Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits, asserting that her case has not been properly considered and that she has been told by doctors that her father passed away due to black lung.[5] Employer responds, urging affirmance of the administrative law judge's determination that claimant is not an eligible survivor of the miner. Alternatively, employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption and that employer did not rebut it. The Director, Office of Workers' Compensation Programs, did not file a response brief.

In an appeal filed by a claimant 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 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

The regulations provide that a child of a deceased miner is entitled to benefits if the requisite standards of relationship and dependency are met. 20 C.F.R. §725.218(a). An unmarried adult child satisfies the dependency requirement if such child is eighteen years of age or older and is under a disability as defined in Section 223(d) of the Social Security

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Appeals for the Fourth Circuit, but claimant's petition for review was dismissed for lack of jurisdiction. *Muncy v. Director, OWCP*, No. 17-1012 (4th Cir. Mar. 14, 2017) (Order).

[5] Claimant attached medical evidence to her appeal letter. We are unable to consider this evidence as the Board's scope of review is limited to the record developed at the hearing before the administrative law judge. 20 C.F.R. §802.301. Claimant may submit, however, additional evidence along with a request for modification to the district director within one year of this decision. 20 C.F.R §725.310.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

Act, 42 U.S.C. §423(d), provided that the disability began before the child attained age twenty-two.[7] 20 C.F.R. §§725.209(a)(2)(ii), 725.221. The Social Security Act defines "disability" as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d)(1)(A); *Tackett v. Director, OWCP*, 10 BLR 1-117, 1-118 (1987). Benefits commence with the first month in which all the conditions of entitlement are met, and continue until the month before the month in which such child dies or marries, or the disability ceases. 20 C.F.R. §725.219.

The administrative law judge rationally found that although claimant has been receiving disability benefits from the Social Security Administration (SSA) for a "mental/affective/mood" disorder since April 14, 1986, when she was twenty-six years old, there is no evidence in the record to establish that she was disabled from that condition or that she suffered from any other disability, prior to reaching age twenty-two. Decision and Order on Remand at 25, *quoting* Director's Exhibit 14. To establish her dependency, claimant submitted an April 26, 2013 letter from Dr. Biola, her primary care physician, which states only, "this is to confirm that [claimant] is mentally and physically disabled and has been since birth." Director's Exhibit 20. We see no error in the administrative law judge's finding that Dr. Biola's statement is not adequately explained and that Dr. Biola's treatment records do not support her opinion.[8] *See Milburn Colliery Co. v. Hicks*, 138 F.3d

[7] Employer does not dispute that claimant is the miner's child, pursuant to 20 C.F.R. §725.208, or that she is currently unmarried, pursuant to 20 C.F.R. §725.209(a)(1).

[8] As noted by the administrative law judge, Dr. Biola's treatment records indicate that he began seeing claimant as a patient on March 6, 2012. Decision and Order on Remand at 26; Employer's Exhibit 3. Under "History of Present Illness," Dr. Biola noted that claimant "moved in with sister 6 mos. ago was in nursing home . . . unable to care for self anymore due to L hip pain and mental status changes sister attributes to TBI treatment record." Employer's Exhibit 3. Under "Physical Examination," Dr. Biola observed that claimant had a "[n]ormal range of motion, muscle strength, and stability in all extremities with no pain on inspection." *Id.* Dr. Biola also noted under "psychiatric" findings that claimant was "oriented to time, place, person, and situation." *Id.* Dr. Biola's assessment included "[o]steoarthritis, localized, primary, involving unspecified site." *Id.* On August 7, 2012, Dr. Biola's assessment included "mixed hyperlipidemia . . . [c]hronic," "[a]nxiety state, unspecified," and "[e]ssential and other specified forms of tremor." *Id.* at 14. Although Dr. Biola noted that claimant was unable to care of herself, he did not indicate when this first occurred. *Id.*

524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Claimant also relies on a May 16, 2014 letter from Dr. Mac Ewen, indicating that she was treated during "the 1960's and 1970's" at the Alfred I. DuPont Institute for Children. Claimant's Exhibit 1. Dr. Mac Ewen stated that claimant "has a diagnosis of congenital dislocation of the left hip and subluxation of the right hip" and "was born disabled." *Id*. He further stated: "[Claimant's] parents . . . first brought her to the Institute in March, 1963 for orthopedic evaluation. In April, 1963, the first operation on [claimant's] left hip was carried out; an open reduction of dislocation of the left hip with Salter osteotomy of the left ilium. The second operation on [claimant's] left hip was carried out in May, 1965; arthroplasty, left hip joint, with anterior acetabuloplasty . . . ." *Id*.

The administrative law judge rationally found Dr. Mac Ewen's letter insufficient to satisfy claimant's burden of proof because he did not discuss the course of claimant's hip condition after her childhood surgery "or elaborate on any continuing disability." Decision and Order on Remand at 26; s*ee Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Moreover, the administrative law judge noted that the record includes Dr. Rahman's neurology report indicating that while claimant has some difficulty with her left hip, she is "able to walk on a regular gait." Decision and Order on Remand at 25, *quoting* Director's Exhibit 12.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985); Decision and Order on Remand at 25. Because the evidence fails to establish that claimant was under a disability prior to age twenty-two, we affirm the administrative law judge law judge's finding that claimant is not an eligible survivor of the deceased miner, and we further affirm the denial of survivor's benefits.[9] 42 U.S.C. §423(d)(1)(A); 20 C.F.R. §§725.209(a)(2)(ii), 725.221.

[9] Because we affirmed the administrative law judge's finding that claimant is not an eligible survivor of the deceased miner, we need not address employer's arguments regarding the administrative law judge's findings on the merits of claimant's entitlement to benefits. *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382-83 n.4 (1983).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge