BRB Nos. 11-0304 BLA, 11-0304 BLA-A,
11-0478 BLA and 11-0478 BLA-A

CHRISTINE HENSLEY (Widow of and o/b/o the Estate of LAWRENCE E. HENSLEY) Claimant-Petitioner v. PATHFORK HARLAN COAL COMPANY[1] Employer Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent Cross-Petitioner	)	DATE ISSUED: 12/22/2011 DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Christine Hensley, Pathfork, Kentucky, *pro se*.

Eric R. Collis, Prospect, Kentucky, for employer.

Rita Roppolo (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.

[1] In an Order dated September 11, 2009, the administrative law judge determined that Pathfork Harlan Coal Company was improperly named the responsible operator, and thus found that the Black Lung Disability Trust Fund is liable for any benefits that may be awarded. Administrative Law Judge's September 11, 2009 Order at 8.

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

PER CURIAM:

Claimant[2] appeals, without the assistance of counsel, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order (06-BLA-5608, 07-BLA-5071) of Administrative Law Judge Kenneth A. Krantz denying benefits on claims filed 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*)). This case involves a miner's subsequent claim filed on October 23, 2003,[3] and a survivor's claim filed on June 30, 2005.

The administrative law judge adjudicated both the miner's 2003 subsequent claim and the survivor's claim pursuant to 20 C.F.R. Part 718,[4] and properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005.[5] Decision and Order at 7. With regard

[2] Claimant is the surviving spouse of the deceased miner, who died on May 3, 2005. Director's Exhibit 15.

[3] The current claim is the miner's fifth claim. His prior claim, filed on August 5, 1994, was denied by the district director on March 30, 1995, because the miner did not establish any element of entitlement. Director's Exhibit 1. There is no indication that the miner took any further action in regard to his 1994 claim.

[4] Because the miner's 2003 subsequent claim and the survivor's claim were both filed after January 19, 2001, they are each subject to the evidentiary limitations of 20 C.F.R. §725.414. *See* 20 C.F.R. §725.2(c). When a miner files a subsequent claim, all the evidence from the prior claim(s) is specifically made part of the record in the miner's claim. *See* 20 C.F.R. §725.309(d). Such an inclusion is not automatically available, however, in a survivor's claim filed pursuant to the revised regulations. The parties must designate the claim that each piece of evidence supports, and the administrative law judge should consider this evidence on the specific issues of entitlement in each claim, and in accordance with the evidentiary rules applicable to each claim. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241-42 (2007)(*en banc*). Consequently, in this case, the administrative law judge reviewed different sets of evidence designated for his consideration in each claim.

[5] In an April 26, 2010 Order, the administrative law judge provided the parties with notice of Section 1556, and of its potential applicability to this case, and set a

to the miner's claim, the administrative law judge credited the miner with 37.4 years of coal mine employment, of which 28.9 years were underground,[6] but determined that the amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), are inapplicable to the miner's claim, because it was filed before January 1, 2005. The administrative law judge further found that the new evidence established that the miner suffered from clinical pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and thus found that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. 20 C.F.R. §725.309. Considering the miner's 2003 claim on the merits, the administrative law judge found that the evidence in the miner's claim did not establish a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits in the miner's claim.

In adjudicating the survivor's claim, the administrative law judge considered whether claimant could establish her entitlement to survivor's benefits with the aid of the rebuttable presumption of death due to pneumoconiosis that was reinstated by the recent amendment to the Act. *See* 30 U.S.C. §921(c)(4). The administrative law judge found that, although the presumption was potentially applicable to the survivor's claim based on the claim's filing date, claimant failed to establish the existence of a totally disabling respiratory impairment, a finding that was necessary for her to establish invocation of the rebuttable presumption of death due to pneumoconiosis under 30 U.S.C. §921(c)(4). Considering the survivor's claim pursuant to 20 C.F.R. Part 718, the administrative law judge again found that the evidence established the existence of clinical pneumoconiosis. However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits on both claims. The Director, Office of Workers' Compensation

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schedule for the parties to submit additional evidence and argument. The Director, Office of Workers' Compensation Programs (the Director), submitted a brief urging the administrative law judge to deny benefits. Neither claimant nor employer submitted additional evidence or argument.

[6] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 1 at 58. 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 (1989)(*en banc*).

Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order. The Director has also filed a cross-appeal, contending that the administrative law judge erred in transferring liability to the Black Lung Disability Trust Fund (the Trust Fund).[7] Employer responds to the Director's cross-appeal, arguing in support of the administrative law judge's transfer of liability to the Trust Fund.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

The Miner's Claim

In order to establish entitlement to benefits under Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Having found the existence of pneumoconiosis established in the miner's claim, the administrative law judge next considered whether claimant established that the miner suffered from a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b). The administrative law judge found that no objective testing was performed in connection with the miner's 2003 claim,[8] but that the record contained a pulmonary function study performed on November 4, 1992, by Dr. Woolum, claimant's treating physician, that was non-qualifying.[9] Decision and Order at 12, 24; Director's

[7] The Director asserts that if the Board affirms the denial of benefits in both the miner's and survivor's claims, the Board need not reach the liability issue. Director's Petition for Review at 6 n.3.

[8] By letter dated November 10, 2003, Dr. Woolum, the miner's treating physician, notified the Office of Workers' Compensation Programs that, due to the miner's advanced Alzheimer's disease, it was impossible for the miner to undergo pulmonary function testing. Director's Exhibit 15 at 1.

[9] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the

Exhibit 16 at 15. Thus, the administrative law judge concluded that claimant failed to establish total disability, pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge further found that no blood gas studies were submitted for consideration, and that there is no evidence of record indicating that the claimant suffered from cor pulmonale with right-sided congestive heart failure. Decision and Order at 24. Thus, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 24. In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accurately noted that, while the record is replete with evidence that the miner was unable to perform his usual coal mine work, or comparable work, due to advanced Alzheimer's disease, chronic obstructive pulmonary disease, and cardiovascular disease, none of the physicians of record opined that the miner had a totally disabling respiratory impairment.[10] Decision and Order at 25; Director's Exhibits 1 at 128-29, 403, 16 at 31; Claimant's Exhibit 1. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge also considered claimant's hearing testimony and Affidavit of Deceased Miner's Condition. Decision and Order at 26. The administrative law judge properly found that as the record contains medical evidence addressing the miner's pulmonary and respiratory condition, claimant is precluded from establishing total disability through lay evidence. 20 C.F.R. §718.204(d)(3); Decision and Order at 26.

Finally, based upon his findings under Section 718.204(b)(2)(i)-(iv), the administrative law judge rationally determined that the evidence of record, as a whole, did not demonstrate that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R.§ 718.204(b). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 26. Therefore, we affirm the administrative law judge's

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requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] In 1987, Dr. Williams diagnosed "no functional pulmonary impairment." Director's Exhibit 1 at 129, 403. In 1979, 1988 and 1994, Dr. Dahhan opined that the miner had no pulmonary disability. Director's Exhibit 1 at 129, 130, 403. In 1991, Dr. Baker opined that the miner's respiratory impairment was "minimal or mild." Director's Exhibit 1 at 130. In 2003 and 2007, Dr. Woolum opined that pneumoconiosis contributed to the miner's death, and that the miner could not undergo pulmonary function testing because of advanced Alzheimer's disease, but Dr. Woolum did not otherwise comment on the miner's respiratory capacity. Claimant's Exhibit 1.

conclusion that the preponderance of the evidence did not establish total disability in the miner's claim, pursuant to 20 C.F.R. §718.204(b)(2).[11] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

In light of our affirmance of the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits in the miner's claim, under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

The Survivor's Claim

The administrative law judge considered whether claimant could establish entitlement to survivor's benefits with the aid of the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), that was reinstated by the recent amendment to the Act.[12] *See* 30 U.S.C. §921(c)(4). As set forth above, the administrative law judge properly found that, because claimant filed her survivor's claim after January 1, 2005, and it was still pending on March 23, 2010, amended Section 411(c)(4) applies to the survivor's claim. Relevant to this survivor's claim, amended Section 411(c)(4) provides a rebuttable presumption that the miner died 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.

[11] The record contains results from six additional pulmonary function studies, dating from 1979 to 1994, and eight blood gas studies, performed between 1979 and 1998, that were not specifically discussed by the administrative law judge. Director's Exhibits 1 at 128-29, 16 at 31. However, as none of the pulmonary function studies produced qualifying results, and only the 1998 blood gas study, performed while the miner was hospitalized, produced qualifying results, we affirm, as supported by substantial evidence, the administrative law judge's conclusion that claimant did not establish total disability by a preponderance of the evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 26.

[12] The amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). However, as we have affirmed the administrative law judge's denial of benefits in the miner's claim, claimant cannot establish entitlement to benefits pursuant to 30 U.S.C. §932(*l*).

The administrative law judge found that, while claimant established more than fifteen years of qualifying coal mine employment, the medical record in the survivor's claim consists solely of hospitalization and treatment records, the miner's death certificate, dated May 3, 2005 and signed by Dr. Woolum, the miner's treating physician, and a June 18, 2007 letter, also from Dr. Woolum. Decision and Order at 2, 27-29; Survivor's Director's Exhibit 26 at 8; Claimant's Exhibit 1. The administrative law judge concluded that, as in the miner's claim, while the hospitalization records and Dr. Woolum's letter document the miner's treatment for various respiratory conditions, they do not contain an opinion that the miner's respiratory conditions were totally disabling. The administrative law judge again considered claimant's hearing testimony and Affidavit of Deceased Miner's Condition, and properly found that, as in the miner's claim, as the record contains medical evidence addressing the miner's pulmonary and respiratory condition, claimant is precluded from establishing total disability through lay evidence in the survivor's claim. 20 C.F.R. §718.204(d)(3); Decision and Order at 29. Thus, the administrative law judge concluded that claimant failed to establish invocation of the rebuttable presumption of death due to pneumoconiosis by a preponderance of the evidence under 30 U.S.C. §921(c)(4). Decision and Order at 29. As this finding is supported by substantial evidence, it is affirmed.[13] *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that 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(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, where the amended Section 411(c)(4) presumption is not applicable, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R.

[13] The miner's treatment records contain results from one pulmonary function study, performed in 1992, and two blood gas studies, performed in 1989 and 1998, that were not specifically discussed by the administrative law judge. Survivor's Director's Exhibits 20 at 15, 25, 50. However, as only the 1998 blood gas study, performed while the miner was hospitalized, produced qualifying results, we affirm, as supported by substantial evidence, the administrative law judge's conclusion that claimant did not establish total disability by a preponderance of the evidence in the survivor's claim. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; Decision and Order at 30.

§718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

The administrative law judge noted that the evidence relevant to the cause of the miner's death, pursuant to 20 C.F.R. §718.205(c), consists of the miner's death certificate, and the June 18, 2007 letter from Dr. Woolum.[14] Decision and Order at 27. The administrative law judge properly found that, on the death certificate, Dr. Woolum listed the immediate cause of the miner's death as a myocardial infarction, and listed the underlying causes of death as arteriosclerotic cardiovascular disease and Alzheimer's disease, and did not mention pneumoconiosis. Decision and Order at 27; Survivor's Director's Exhibit 15. The administrative law judge further found that, by contrast, in his June 18, 2007 letter, Dr. Woolum opined that pneumoconiosis contributed to the miner's death:

> The last several years of his life [the miner] was confined to a skilled nursing facility. His primary diagnosis for skilled nursing was severe dementia. However, he was complicated by coronary artery disease and certainly lung disease with documented [coal] workers' pneumoconiosis. He finally succumb[ed] to what appeared to be a cardiac death but during his stay in our institution, he had frequent bouts of shortness of breath, wheez[ing] and respiratory infections. It is my opinion, his pneumoconiosis was a contributing factor to his death.

Claimant's Exhibit 1.

The administrative law judge initially found that, as Dr. Woolum stated that the miner's death "appeared to be a cardiac death," and as Dr. Woolum did not list pneumoconiosis as a cause of the miner's death on the death certificate, the evidence did not establish that pneumoconiosis was a direct cause of the miner's death. Decision and Order at 28. Considering whether pneumoconiosis contributed to, or hastened, the miner's death, the administrative law judge noted, correctly, that the United States Court of Appeals for the Sixth Circuit held in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), that pneumoconiosis must hasten the miner's death through a specifically defined process and reduce the miner's life by an estimable time period, and that a medical opinion, that pneumoconiosis makes someone weaker, and therefore less resistant to some other trauma, is legally insufficient to satisfy the

[14] The administrative law judge correctly noted that, as claimant's claim was filed after January 1, 1982, and as there is no evidence of complicated pneumoconiosis in the record, the presumptions at 20 C.F.R. §718.303 and 718.304 are not available to claimant. Decision and Order at 28.

"hastening" standard. *Williams*, 338 F.3d at 518, 22 BLR at 655; Decision and Order at 28. The administrative law judge permissibly found that Dr. Woolum's opinion was not sufficient to meet this standard because the physician failed to explain how pneumoconiosis hastened death through a specifically defined process that reduced the miner's life by an estimable time. *See Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303, 24 BLR 2-257, 2-266 (6th Cir. 2010); *Williams*, 338 F.3d at 518, 22 BLR at 2-655; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 28. As it is supported by substantial evidence, we affirm the administrative law judge's conclusion that there is no evidence of record legally sufficient to support claimant's burden pursuant to *Williams*, and that, therefore, claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; Decision and Order at 28.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis, either with the aid of the rebuttable presumption contained at amended Section 411(c)(4), or pursuant to 20 C.F.R. §718.205(c), we affirm the administrative law judge's denial of benefits in this survivor's claim under 20 C.F.R. Part 718.[15] *Trumbo*, 17 BLR at 1-87-88.

[15] As we have affirmed the administrative law judge's denial of benefits in both the miner's and survivor's claims, we need not address the arguments raised by the Director on cross-appeal.

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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BETTY JEAN HALL
Administrative Appeals Judge