**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0137 BLA
and 16-0415 BLA

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| TEMPLE DUNCAN<br>(o/b/o and Widow of RONALD DUNCAN)<br><br>Claimant-Petitioner<br><br>v.<br><br>TENNESSEE COAL 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: 02/28/2017<br><br>DECISION and ORDER |

Appeals of the Decision and Order Denying Benefits on Remand and the Decision and Order Denying Benefits in a Survivor's Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Temple Duncan, Strunk, Kentucky.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits on Remand (2005-BLA-05516) and the Decision and Order Denying Benefits in a Survivor's Claim (2013-BLA-05355) of Administrative Law Judge Joseph E. Kane, rendered on claims 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 miner's subsequent claim, filed on October 2, 2001, which is before the Board for the second time,[2] and a survivor's claim,[3] filed on January 23, 2012. The Board has consolidated these appeals for purposes of decision only.

In a Decision and Order issued on June 10, 2009, Administrative Law Judge Donald Mosser adjudicated the miner's claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725, credited the miner with at least thirteen years of coal mine employment, and found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Consequently, pursuant to 20 C.F.R. §725.309(d), Judge Mosser found that the miner established that an applicable condition of entitlement had changed since the denial of the miner's prior claim became final. Considering the claim on the merits, Judge Mosser found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). Accordingly, the administrative law judge awarded benefits.

Upon consideration of employer's appeal, the Board vacated Judge Mosser's finding that the medical opinions were sufficient to establish total respiratory disability

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decisions, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] The miner filed his first claim for black lung benefits on November 18, 1987, which was denied by the district director on May 10, 1988, because the miner did not establish any element of entitlement. Director's Exhibit 1. The miner filed a second claim on April 24, 1997. Director's Exhibit 2. On August 20, 1997, the district director denied benefits, because claimant failed to prove that he was totally disabled. *Id.* Claimant took no action until he filed this subsequent claim. Director's Exhibit 4.

[3] Claimant is the widow of the miner, who died on February 24, 2012. Survivor's Claim Director's Exhibit 7.

pursuant to 20 C.F.R. §718.204(b)(2)(iv), and vacated his finding that a change in an applicable condition of entitlement was demonstrated pursuant to 20 C.F.R. §725.309(d). The Board thus vacated the award of benefits and remanded the case for a reevaluation of the medical opinions of Drs. Patton, Baker, Repsher and Fino in compliance with the requirements of the Administrative Procedure Act (APA).[4]

On remand, because Judge Mosser was unavailable, the case was reassigned to Judge Kane (the administrative law judge). In a Decision and Order on Remand issued on November 12, 2015, in the miner's claim, the administrative law judge credited the miner with thirteen years of qualifying coal mine employment, based on a stipulation by the parties, and found that the evidence failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge thus found that the evidence failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits in the miner's claim.

In a separate Decision and Order issued on April 28, 2016, in the survivor's claim, the administrative law judge found that, although the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, in both the miner's subsequent claim and the survivor's claim, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has not filed a response brief in these appeals.

In an appeal filed by a claimant proceeding without the assistance of counsel, the Board considers 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,

[4] The Administrative Procedure Act, 5 U.S.C. §§500-596, as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A).

and are 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).

**Miner's Claim**

To be entitled to benefits under the Act in the miner's subsequent claim, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner had a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

When a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing this condition of entitlement to proceed with the miner's claim. 20 C.F.R. §725.309(c).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the four newly submitted pulmonary function studies of record, conducted on December 15, 2001, November 19, 2002, April 16, 2003 and September 9, 2004.[6] Decision and Order on Remand at 4; Director's Exhibits 16, 36; Employer's Exhibit 1. The administrative law judge noted that the pulmonary function studies conducted on December 15, 2001 and April 16, 2003, produced non-qualifying results, while the

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last year of coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); 2009 Decision and Order at 4; Director's Exhibit 5.

[6] The record also includes a pulmonary function study conducted on July 18, 2006, contained in Dr. Patton's treatment records, which produced non-qualifying results and, therefore, is insufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Claimant's Exhibit 3.

pulmonary function studies conducted on November 19, 2002 and September 9, 2004 produced qualifying results.[7] *Id*. In weighing the qualifying pulmonary function studies, the administrative law judge stated:

> Although the November 19, 2002 and September 9, 2004, [pulmonary function studies] are qualifying, they do not state the cooperation and effort levels of the Miner. The physicians of record have also questioned the validity of the 2002 and 2004 tests. Therefore, I give no weight to the 2002 and 2004 [pulmonary function studies].

Decision and Order on Remand at 4; Director's Exhibit 36.

The administrative law judge's finding regarding the pulmonary function studies is rational and supported by substantial evidence. In a supplemental report dated October 25, 2004, Dr. Baker stated, "I have revised my letter of September 14, 2004 for [the miner] following the results of continued invalid pulmonary function studies."[8] Director's Exhibit 36. Dr. Repsher stated that the studies performed on November 19, 2002 and September 9, 2004, "are medically invalid for interpretation" due to the miner's poor effort and lack of cooperation. Employer's Exhibits 3, 5-6. Based on this evidence, the administrative law judge permissibly found that the November 19, 2002 and September 9, 2004 pulmonary function studies were insufficient to establish total disability. *See* 20 C.F.R. §718.101(b) (providing that "any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered"). In the absence of conforming, valid pulmonary function studies, the administrative law judge rationally determined that claimant was unable to establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2)(i). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Consequently, we affirm the administrative law judge's finding that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), the administrative law judge properly found that total respiratory disability was not established, as the blood gas

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[7] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[8] Dr. Burki reviewed the tracings associated with pulmonary function studies conducted on December 15, 2001 and October 7, 2004, along with the comments provided by the technicians, and determined that the results of the studies were invalid due to suboptimal effort on the miner's part. Director's Exhibits 16, 36.

studies yielded non-qualifying values[9] and there was no evidence establishing that the miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order on Remand at 4-5.

In determining whether the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Baker, Patton, Repsher and Fino.[10] Decision and Order on Remand at 5. In his supplemental report dated October 25, 2004, Dr. Baker opined, "if [the pulmonary function] tests are near valid, [the miner] would be totally disabled from doing his usual and customary duties of a coal miner," but then stated that disability was only a "possibility." Director's Exhibit 36. In weighing Dr. Baker's opinion, the administrative law judge stated:

> Dr. Baker completed the [Department of Labor]-sponsored examination and provided supplemental reports. In his most recent supplemental opinion filed prior to the Board's remand order, Dr. Baker wrote that it is a "possibility" that the Miner was totally disabled but he could not make a determination because of the invalid pulmonary function testing. Although he made prior disability findings, his most recent opinion is contradictory. His prior opinions of disability are also not supported by the objective testing. I find his opinion unreasoned and undocumented. Therefore, I find that Dr. Baker's opinion does not support a finding of total disability.

Decision and Order on Remand at 5; Director's Exhibits 16, 36. The administrative law judge permissibly discredited Dr. Baker's most recent opinion because it was equivocal and it conflicted with his prior opinions, which were unsupported by the objective evidence of record. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Clark*, 12 BLR at 1-155.

In weighing Dr. Patton's opinion, the administrative law judge stated:

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[9] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[10] The administrative law judge incorporated by reference Judge Mosser's summaries of the medical opinions. Decision and Order on Remand at 3. Drs. Repsher and Fino concluded that the miner did not have a clinically significant impairment. Employer's Exhibits 1-3, 5-7.

> Dr. Patton was the Miner's treating physician and he opined that the Miner was totally disabled. Dr. Patton based this opinion on the Miner's lack of response to bronchodilator treatment. However, this opinion is in conflict with the [pulmonary function] testing. The April 2003 testing illustrates improvement after the administration of bronchodilators and the 2002 and 2004 testing is invalid for lack of effort. Therefore, I give his opinion little weight on the issue of total disability.

Decision and Order on Remand at 5; *see* Director's Exhibit 36; Claimant's Exhibits 4, 5. Having found that the November 19, 2002 and September 9, 2004 pulmonary function studies were invalid, the administrative law judge permissibly accorded less weight to Dr. Patton's opinion. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark*, 12 BLR at 1-155; *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984). Because there is no other new medical opinion evidence supportive of a finding that the miner suffered from a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant failed to establish that the applicable condition of entitlement has changed since the date of the denial of the miner's prior claim. 20 C.F.R. §725.309(c). We, therefore, affirm the administrative law judge's denial of benefits in the miner's subsequent claim.[11] *See White*, 23 BLR at 1-3.

[11] As the record contains no evidence of complicated pneumoconiosis, claimant cannot establish entitlement by invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012), as implemented by 20 C.F.R. §718.304. Claimant is also precluded from invoking the rebuttable presumption of total disability or death due to pneumoconiosis at Section 411(c)(4) of the Act because the administrative law judge rationally found that the evidence was insufficient to establish total respiratory or pulmonary disability, which is one of the prerequisites for invocation of the presumption. 30 U.S.C. §921(c)(3) (2012), as implemented by 20 C.F.R. §718.305(b)(1)(iii). Therefore, we need not address the administrative law judge's finding of thirteen years of coal mine employment when claimant was required to establish fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, to invoke the Section 411(c)(4) presumption. 30 U.S.C.

**Survivor's Claim**

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39, 1-40-41 (1988). A miner's death will be considered 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 presumption set forth at 20 C.F.R. §718.305 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).

Pursuant to 20 C.F.R. §718.205, the administrative law judge primarily considered autopsy reports by Drs. Nichols and Crouch, and the medical report and treatment records by Dr. Patton.[12] Decision and Order at 15-16. As the administrative law judge noted, Dr. Nichols performed the miner's autopsy and prepared a report dated November 2, 2011. *Id*. at 15; Director's Exhibit 48. Dr. Nichols concluded that the miner's death was due to heart failure and, although he stated that pneumoconiosis was present, he did not indicate whether pneumoconiosis caused, contributed to, or hastened the miner's death. Director's Exhibit 48. The administrative law judge thus rationally found that his opinion did not support a finding that pneumoconiosis hastened the miner's death. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); Decision and Order at 15. The administrative law judge further observed correctly that Dr. Crouch submitted a consultative autopsy report in which she opined that the autopsy slides were insufficient to support a cause of death finding, but the dust-

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§921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b)(1)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1284, 1-1278 (1984).

[12] The administrative law judge also considered the death certificate but gave it "little probative weight" because the doctor's name was illegible, his qualifications were not in the record, and the basis of his opinion that pneumoconiosis was a secondary cause of death was not disclosed. Decision and Order at 15. The administrative law judge reviewed the medical opinions of Drs. Repsher and Fino, and gave them "no weight" at 20 C.F.R. §718.205(b) because their reports were prepared before the miner died and, therefore, did not provide opinions on the cause of the miner's death. *Id*. at 16; *see* Director's Exhibit 48.

related changes observed were too mild to have caused, contributed to, or hastened the miner's death. Decision and Order at 16; Employer's Exhibit 12. The administrative law judge acted within his discretion in concluding that her opinion did not support a finding that pneumoconiosis hastened the miner's death. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 16.

In contrast, we cannot affirm the administrative law judge's weighing of the miner's treatment records and Dr. Patton's reports. Upon considering this evidence,[13] the administrative law judge stated:

> Dr. Patton opined that the Miner's pneumoconiosis caused hypoxia which was the immediate cause of the miner's acute heart failure which led to his death. Dr. Patton based his opinion on his finding that the autopsy "showed coronary stenosis, up to grade II in severity, but there was no occlusion or acute thrombosis to have triggered a fatal arrhythmia without the presence of significant hypoxia." As a result, Dr. Patton opined that the Miner's death resulted from acute cardiac failure triggered by hypoxia secondary to coal workers' pneumoconiosis. In his supplemental report, he continued to state that the autopsy "showed no acute pulmonary embolus or coronary thrombosis to explain the Miner's death other than by hypoxia induced arrhythmia."

Decision and Order at 16, *quoting* Director's Exhibits 54, 55. The administrative law judge further noted that the autopsy reports were "very limited in their examination of the body," and concluded that Dr. Patton's opinion was unsupported because "the treatment records and CT scans reveal a history of small right pulmonary thromboembolism." *Id.*

The rationales that the administrative law judge provided for giving "less weight" to Dr. Patton's opinion are inconsistent with the record and do not acknowledge relevant case law on the value of autopsy evidence. Decision and Order at 16. With respect to the record evidence, the administrative law judge did not address the significance of the fact that the evidence that the miner suffered from a pulmonary thromboembolism dates from November 2006 – nearly five years before the miner's death on October 26, 2011. Director's Exhibits 47, 54. Thus, the administrative law judge did not explain how the

[13] The administrative law judge observed that Dr. Patton treated the miner for thirty-four years and that the treatment records were from Dr. Patton and Lake Cumberland Regional Hospital. Decision and Order at 9, 14; Director's Exhibits 53, 54. The treatment records contain a November 6, 2006 CT scan interpreted by Dr. Gonzalez as showing a "[s]mall right pulmonary thromboembolism." Director's Exhibit 54.

evidence from 2006 undercut Dr. Patton's statement that the autopsy evidence did not reveal an acute pulmonary embolus or coronary thrombosis. *See* Director's Exhibit 55. In addition, the administrative law judge did not consider that autopsy evidence is generally recognized as providing the most reliable evidence of disease, nor did he explain how the autopsy's limited scope detracted from the credibility of Dr. Patton's finding that the autopsy revealed no pulmonary embolus. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999) (The administrative law judge rationally gave greatest weight to the autopsy findings of complicated pneumoconiosis because the autopsy involved a complete examination of the lungs.); *Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985) (The administrative law judge reasonably determined that the miner's autopsy, which involved a direct examination of lung tissue, is more reliable than an x-ray in providing the basis for a diagnosis of pneumoconiosis.). Because the administrative law judge's decision to discredit Dr. Patton's opinion identifying pneumoconiosis as a contributing cause of the miner's death was based upon inadequate rationales, we must vacate his finding and remand this case to him for reconsideration of Dr. Patton's opinion at 20 C.F.R. §718.205(b).

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand in the miner's claim is affirmed, but the Decision and Order Denying Benefits in a Survivor's Claim is vacated and that case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge