

BRB No. 12-0319 BLA

BARBARA J. CONN)
(Widow of and o/b/o LUNDY CONN))
)
Claimant-Petitioner)
)
v.)
)
STEVEN LEE ENTERPRISES,) DATE ISSUED: 01/23/2013
INCORPORATED)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Barbara J. Conn, Stanton, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order

¹ Claimant is the widow of the miner, who died on December 7, 2008. Director's

(2010-BLA-5371 and 2010-BLA-5372) of Administrative Law Judge Larry S. Merck denying benefits on a miner's claim and a survivor's claim filed pursuant to the provisions of Title IV 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)) (the Act). This case involves a request for modification of the miner's subsequent claim.

The pertinent procedural history of this case is as follows: The miner filed his first claim on April 3, 1990. Director's Exhibit 1. It was finally denied by the district director on June 8, 1992, because the evidence did not establish any of the elements of entitlement. *Id.* The miner filed his second claim (a subsequent claim) on September 19, 2008. Director's Exhibit 3. It was denied by the district director on April 13, 2009, because the evidence did not establish any of the elements of entitlement. Director's Exhibit 29. Claimant filed a request for modification of the miner's claim on September 14, 2009. Director's Exhibit 34. The district director denied claimant's request for modification of the miner's claim on January 21, 2010. Director's Exhibit 38. On February 23, 2010, the district director transferred both the miner's claim and the survivor's claim to the Office of Administrative Law Judges for a formal hearing.² Director's Exhibits 74, 75. In his Decision and Order dated January 4, 2012, the administrative law judge credited the miner with 6.43 years of coal mine employment and adjudicated the miner's claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718, as he found that Section 1556 of the Patient Protection and Affordable Care Act (PPACA) was not applicable in this case.³ Although the administrative law judge found that the new evidence did not establish either the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3), and (4)⁴ or the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he found that the new biopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement

Exhibit 51. She filed her survivor's claim on December 23, 2008. Director's Exhibit 44.

² The district director denied benefits in the survivor's claim on July 15, 2009. Director's Exhibit 66.

³ The administrative law judge noted that he granted claimant's request for a decision on the record on October 21, 2010.

⁴ The administrative law judge also found that the newly submitted autopsy evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

pursuant to 20 C.F.R. §725.309 in the miner's claim. On the merits, the administrative law judge found that the biopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, the administrative law judge found that the evidence did not establish that the clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Further, although the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), he found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits in the miner's claim. With respect to the survivor's claim, 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 challenges the administrative law judge's denial of benefits in both claims. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.⁵ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal

⁵ The record indicates that the miner was employed in the coal mining industry in Kentucky. Director's Exhibits 4, 45. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the PPACA, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(l)). The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Initially, we will address the administrative law judge's finding that Section 1556 of the PPACA was not applicable to either claim in this case, based on his determination that claimant failed to establish that the miner worked 15 or more years in qualifying coal mine employment.

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

In addressing the length of coal mine employment issue, the administrative law judge noted that “[c]laimant contends that [the miner] worked in coal mine employment for 9.5 years.”⁶ Decision and Order at 5. The administrative law judge also found that the Social Security earnings record was the most reliable evidence of the miner's coal mine employment. The administrative law judge then noted that the miner's yearly earnings in coal mine employment were compared to the average yearly earnings in coal mine employment set forth in Exhibit 610 of the *Office of Workers' Compensation*

⁶ The miner alleged nine years of coal mine employment in the claim filed on April 3, 1990. Director's Exhibit 1. In the subsequent claim filed on September 19, 2008, the miner alleged nine and one-half years of coal mine employment. Director's Exhibit 3.

Programs Coal Mine (BLBA) Procedure Manual, and he was credited with a proportional amount of time. Hence, based on the Social Security earnings record and Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, the administrative law judge credited the miner with 6.43 years of coal mine employment.

Section 725.101(a)(32) provides that to be credited with a year of coal mine employment, claimant must prove that the miner worked in or around a coal mine over a period of one calendar year, or partial periods totaling one year, during which he worked for at least 125 working days. 20 C.F.R. §725.101(a)(32). Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the finder-of-fact may, in his discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).⁷ 20 C.F.R. §725.101(a)(32)(iii). Additionally, the pertinent regulation provides that "[a] copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history." *Id.*

In this case, the administrative law judge used the incorrect table at Exhibit 610 to credit the miner with 365 days of employment if his income exceeded the industry standard for just 125 days of work. *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-281 (2003). Moreover, the administrative law judge failed to take note of whether the miner's coal mine employment, as set forth in the Social Security earnings record, spanned the whole year, or just quarters within a year. Thus, the administrative law judge's method of calculating the miner's years of coal mine employment is not reasonable. Nevertheless, because the evidence of record is insufficient to establish 15 years of qualifying coal mine employment as a matter of law, we affirm the administrative law judge's finding that Section 1556 of the PPACA was not applicable in this case.

Next, we address the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).⁸ The

⁷ Exhibit 609 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual, Wage Based History*, contains the average annual wages for miners by year.

⁸ Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing

administrative law judge considered the reports of Drs. Forehand, Crouch, Rosenberg, Vuskovich, and Oesterling.⁹ None of the physicians opined that the miner's disabling respiratory impairment was due to pneumoconiosis. Dr. Forehand opined that the miner's emphysema related to cigarette smoking was the sole cause of his respiratory impairment. Director's Exhibit 15. Dr. Crouch opined that coal dust exposure could not have caused any clinically significant degree of respiratory impairment or disability. Employer's Exhibit 6. Dr. Crouch further opined that cigarette smoking was the most likely factor contributing to any clinically demonstrable impairment. *Id.* Dr. Rosenberg opined that the miner was disabled by a smoking related form of chronic obstructive pulmonary disease (COPD), and not by coal mine dust exposure or coal workers' pneumoconiosis. Employer's Exhibit 4. Dr. Vuskovich opined that neither pneumoconiosis nor coal dust exposure substantially contributed to the miner's disabling respiratory impairment. Employer's Exhibit 12. Dr. Vuskovich further opined that pneumoconiosis did not have an adverse effect on the miner's respiratory condition, and that it did not materially worsen a totally disabling respiratory impairment which was caused by a disease or exposure unrelated to coal mine employment. *Id.* Dr. Oesterling opined that "[t]here is evidence of a very mild macular pleural based coalworkers' (sic) pneumoconiosis" and that [t]his level of dust deposit does not impose sufficient damage to alter function." Employer's Exhibit 8. Dr. Oesterling further opined that "[w]ithout functional change this could in no way have been a factor in [the miner's] lifetime symptomatology." *Id.*

cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

⁹ The administrative law judge accurately noted that Dr. Dennis did not render an opinion with regard to the issue of disability causation in his autopsy report. Decision and Order at 37; Director's Exhibits 33, 53. Additionally, the administrative law judge accurately noted that the treatment records did not contain any well-reasoned and well-documented medical opinions regarding the issue of disability causation. Decision and Order at 37; Employer's Exhibit 6.

The administrative law judge gave little weight to the opinions of Drs. Forehand and Crouch because they did not opine that the miner suffered from clinical pneumoconiosis, contrary to his own finding.¹⁰ The administrative law judge also gave little weight to Dr. Rosenberg's opinion because he found that the doctor's opinion that the miner did not have legal pneumoconiosis was not well-reasoned and the doctor's opinion regarding clinical pneumoconiosis was vague and inconclusive.¹¹ In addition, the administrative law judge gave little weight to Dr. Vuskovich's opinion that clinical pneumoconiosis did not contribute to the miner's disabling respiratory impairment because he found that the doctor's diagnosis regarding clinical pneumoconiosis was equivocal. However, the administrative law judge gave full probative weight to Dr. Vuskovich's opinion that legal pneumoconiosis did not contribute to the miner's disabling respiratory impairment because he found that the doctor's diagnosis regarding legal pneumoconiosis was based on objective medical evidence. The administrative law judge also gave full probative weight to Dr. Oesterling's opinion that clinical pneumoconiosis did not cause any of the miner's respiratory impairment because he found that it is well-reasoned and well-documented. Because the administrative law judge properly found that "there are no well-reasoned or well-documented medical opinions finding that [the miner's] pneumoconiosis was a substantially contributing cause to [his] totally disabling respiratory impairment," Decision and Order at 37-38; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), we affirm the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

Turning to the survivor's claim, we address the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at

¹⁰ The administrative law judge reasonably gave less probative weight to the medical evidence in the record from the miner's first claim "due to its age." Decision and Order at 37; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc); Director's Exhibit 1.

¹¹ Dr. Rosenberg opined that the miner had, at worse, a minimal degree of clinical pneumoconiosis. Employer's Exhibit 4.

20 C.F.R. §718.205(c). Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).¹² See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(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(c)(5); see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

At Section 718.205(c), the administrative law judge considered the reports of Drs. Rosenberg, Dennis, Crouch, and Oesterling, as well as the death certificate signed by Dr. Maynard, the miner's treating physician. None of the physicians opined that pneumoconiosis contributed to the miner's death. Dr. Rosenberg opined that the miner's death was not caused, hastened or accelerated by his past coal mine dust exposure. Employer's Exhibit 4. Dr. Dennis opined that "[the miner] died a pulmonary death with pulmonary congestion and edema, bronchopneumonia and pulmonary clusters of clotted blood and emphysematous changes." Director's Exhibits 33, 53. Dr. Dennis then opined that "[the miner] also had simple coal worker's (sic) pneumoconiosis." *Id.* In her report, Dr. Crouch stated, "[g]iven [the] limitations of the autopsy, it is not possible to make an independent pathological assessment of the cause of death."¹³ Employer's Exhibit 6. In

¹² Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

¹³ Dr. Crouch noted that "the events described on the Medical Certificate of Death

her deposition, however, Dr. Crouch opined that the miner's death was not related to, caused or hastened by coal workers' pneumoconiosis or the inhalation of coal mine dust. Employer's Exhibit 7. Dr. Oesterling diagnosed a very mild macular pleural-based coal workers' pneumoconiosis and opined that "[t]his level of dust deposit does not impose sufficient damage to alter function." Employer's Exhibit 8. Dr. Oesterling further opined that "[w]ithout functional change this could in no way impact on [the miner's] demise by contributing to it, hastening it or causing it." *Id.* In the death certificate, Dr. Maynard listed respiratory failure as the immediate cause of the miner's death, and pneumonia and COPD as underlying causes of his death. Director's Exhibit 51.

The administrative law judge gave little weight to Dr. Rosenberg's opinion because he found that the doctor's opinion that the miner did not have legal pneumoconiosis was not well-reasoned and that the doctor's opinion regarding clinical pneumoconiosis was vague and inconclusive. The administrative law judge also gave little weight to Dr. Dennis's opinion because he found that it is vague and unclear. In addition, the administrative law judge gave little weight to Dr. Maynard's opinion in the death certificate and medical treatment records because the record does not contain the doctor's credentials or the medical information that he relied on to reach his conclusions with regard to the cause of the miner's death. However, the administrative law judge gave full probative weight to the opinions of Drs. Crouch and Oesterling because he found that they are well-reasoned and well-documented, as they are based on objective medical evidence. Because the administrative law judge properly found that "there are no well-reasoned or well-documented opinions finding that [the miner's] death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause to [his] death or that it hastened his death," Decision and Order at 40; *see Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *Fuller*, 6 BLR at 1-1294, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of survivor's benefits under 20 C.F.R. Part 718. *Trumbo*, 17 BLR at 1-88.

appear compatible with the autopsy findings, [*i.e.*,] respiratory failure secondary to pneumonia occurring in the setting of chronic obstructive pulmonary disease." Employer's Exhibit 6.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge