BRB Nos. 13-0182 BLA
and 13-0182 BLA-A

JOYCE ANN DAUGHERTY (Widow of LONNIE DAUGHERTY)	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
RAPOCA ENERGY CORPORATION	)	DATE ISSUED: 01/23/2014
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier- Respondents Cross-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (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.

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

PER CURIAM:

Claimant appeals, and employer/carrier (employer) cross-appeals, the Decision and Order Denying Benefits (2009-BLA-5598) of Administrative Law Judge Peter B. Silvain, Jr., with respect to a survivor's claim filed on July 24, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge noted that employer continues to contest its designation as responsible operator, although Administrative Law Judge Larry S. Merck previously determined, in his February 22, 2011 Order Affirming Responsible Operator Designation, that employer was the properly designated responsible operator.[2] The administrative law judge then determined that claimant established 9.87 years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[3] The administrative law judge found that claimant did not establish that

[1] Claimant is the widow of the miner, Lonnie Daugherty, who died on November 6, 2007. Director's Exhibit 14. The miner filed a claim for benefits on May 7, 1980, which was finally denied by Administrative Law Judge Richard E. Huddleston on July 31, 1985, because the miner did not establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] This case was initially assigned to Administrative Law Judge Larry S. Merck and then reassigned to Administrative Law Judge Robert B. Rae after claimant requested a continuance. Claimant requested another continuance, which Judge Rae granted, and the case was then reassigned to Judge Merck. While pending before Judge Merck, employer filed a Motion to Dismiss on the grounds that employer was incorrectly identified as the responsible operator. Employer and claimant also filed motions for summary judgment, asserting that the Director, Office of Workers' Compensation Programs, named the wrong responsible operator. Following Judge Merck's Order, denying the parties' motions, claimant requested another continuance and employer filed a Motion for Reconsideration of Judge Merck's Order. Judge Merck granted the request for continuance and denied employer's request for reconsideration. The case was then reassigned to Administrative Law Judge Peter B. Silvain, Jr. (the administrative law judge).

[3] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 78

the miner had pneumoconiosis or that the miner's death was due to pneumoconiosis. Consequently, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that she established only 9.87 years of coal mine employment. In addition, claimant contends that the administrative law judge erred in weighing the evidence concerning the existence of complicated pneumoconiosis, legal pneumoconiosis, and death causation. Employer initially filed a cross-appeal, asserting that the administrative law judge erroneously adopted Judge Merck's determination that employer is the properly identified responsible operator. Employer then filed a brief in response to claimant's appeal, which urges affirmance of the denial of benefits and argues that, to the extent the administrative law judge erred, it was in admitting Dr. Dennis's opinion over employer's objection, based on the suspension of Dr. Dennis's medical license. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief to employer's cross appeal requesting that the Board reject employer's arguments concerning its designation as the responsible operator.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305). Under amended Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had fifteen or more years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine. The administrative law judge determined that the presumption at amended Section 411(c)(4) is inapplicable, as claimant did not establish that the miner had at least fifteen years of qualifying coal mine employment. Decision and Order at 20.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish the existence of simple clinical pneumoconiosis at 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

In order to establish entitlement to survivor's benefits, without benefit of the amended Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305), 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. 20 C.F.R. §§718.202(a), 718.203, 718.205(b); [6] *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(b)(1)-(3). 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); *see Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Pneumoconiosis hastens death if it does so "through a specifically defined process that reduced the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

I. Length of Coal Mine Employment

The administrative law judge determined that the miner's Social Security records "are the most reliable source of calculating the length of the [m]iner's coal mine employment." Decision and Order at 5. To calculate the miner's coal mine employment prior to 1978, the administrative law judge credited as a full quarter, any quarter in which the miner earned fifty dollars or more, resulting in a total of 8.25 years. *Id.*; *see* Director's Exhibit 12. Because post-1977, the Social Security records do not report the miner's earnings by quarter for these years, the administrative law judge compared the miner's yearly earnings to the average yearly coal mine earnings set forth in Exhibit 610 of the *Black Lung Benefits Act Procedure Manual*, and credited the miner with an additional 1.62 years. Decision and Order at 5. Based on these calculations, the

[6] The Department of Labor recently revised 20 C.F.R. §718.205 and moved the provisions describing the methods by which a claimant can establish death due to pneumoconiosis from 20 C.F.R. §718.205(c) to 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)). Based on the effective date of October 25, 2013, the revised regulation is applicable to this claim and is cited accordingly.

administrative law judge found that claimant established that the miner had 9.87 years of coal mine employment. *Id*.

Claimant contends that the administrative law judge should have found that the miner had eleven years of coal mine employment, based on the determination by the district director and claimant's testimony. However, claimant does not identify any error in the method that the administrative law judge used to calculate the miner's coal mine employment, nor does she explain how consideration of eleven years of coal mine employment, versus 9.87 years, would have altered the administrative law judge's findings. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."). Consequently, we affirm the administrative law judge's determination that the miner had 9.87 years of coal mine employment.[7]

II. 20 C.F.R. §718.304 – Existence of Complicated Pneumoconiosis

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability or death due to pneumoconiosis, if the miner suffered from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) 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, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must consider all relevant evidence on this issue, i.e., evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc).

Claimant contends that the administrative law judge erred in finding that she did not establish the existence of complicated pneumoconiosis, when Dr. Dennis, as the

[7] Even if the administrative law judge had determined that the miner had eleven years of coal mine employment, this would not have entitled claimant to the presumption at amended Section 411(c)(4), as it would still fall below the minimum requirement of fifteen years.

autopsy prosector, was able to view more evidence, thereby entitling his opinion diagnosing progressive massive fibrosis to greater weight than the opinions of the physicians who reviewed the autopsy slides.[8] Although claimant cites *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991), in support of her assertion, the Board subsequently held that an administrative law judge is not required to give greater weight to a physician's opinion, based on his role as the prosector, over the opinions of physicians who reviewed the autopsy slides. *See Urgolites*, 17 BLR at 1-22-23. Further, in *Gruller*, the prosector, unlike Dr. Dennis in this case, identified lesions that were one centimeter in diameter. *See Gruller*, 16 BLR at 1-5. Moreover, the administrative law judge correctly found that none of the three other pathologists diagnosed complicated pneumoconiosis. *See* Decision and Order at 23; Claimant's Exhibit 1; Employer's Exhibits 8, 10, 11. Thus, the allegation of error raised by claimant is without merit. Because claimant has not raised any other specific objection to the administrative law judge's weighing of Dr. Dennis's opinion, we affirm his determination that Dr. Dennis's opinion was entitled to little weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Urgolites v. BethEnergy Mines*, 17 BLR 1-20 (1992). We further affirm the administrative law judge's finding that claimant did not establish that the miner had complicated pneumoconiosis and, therefore, was not entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304.

III. 20 C.F.R. §718.205(b) – Death Causation

On the issue of death causation, the administrative law judge initially indicated that, as claimant did not establish that the miner had pneumoconiosis, she necessarily could not establish that the miner's death was due to pneumoconiosis. Decision and Order at 27. However, the administrative law judge also found that, even if the existence of pneumoconiosis had been established, the evidence was insufficient to establish death causation, as Drs. Dennis, DeLara, and Baker, all of whom diagnosed some form of pneumoconiosis, did not specifically explain how it contributed to the miner's death. *Id*. We affirm the administrative law judge's determination, as it is rational and supported by substantial evidence.[9] *See Williams*, 338 F.3d at 518, 22 BLR at 2-655. Dr. Dennis

[8] Dr. Dennis stated that "[f]eatures of massive fibrosis are present in several sections E, F, G and H." Director's Exhibit 16. The term "progressive massive fibrosis" is generally considered to be equivalent to the term "complicated pneumoconiosis." *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1359, 20 BLR 2-227, 2-228 (4th Cir. 1996) (noting that complicated pneumoconiosis is known "by its more dauntingly descriptive name, 'progressive massive fibrosis.'").

[9] Based on our affirmance of the administrative law judge's decision to discredit Dr. Dennis's opinion on the issues of complicated pneumoconiosis and death due to pneumoconiosis, we need not address employer's contention that the administrative law

stated, without elaboration, that the miner "died a pulmonary death." Director's Exhibit 16. Similarly, Dr. DeLara opined that the miner "died of [sic] respiratory death due to severe coal workers' pneumoconiosis with emphysema, fibrosis pulmonary edema and congestion" and checked "yes" on a form asking whether he believed that pneumoconiosis contributed to the miner's death. Claimant's Exhibit 1. Dr. Baker indicated that "the presence of obstructive airway disease due at least in part to his coal dust exposure hastened his death[,]" but did not explain why he believed that was the case. *Id*. Based on this evidence, the administrative law judge rationally concluded that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).[10] *See Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303, 24 BLR 2-257, 2-266 (6th Cir. 2010). Consequently, we affirm the denial of benefits.[11]

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judge erred in admitting Dr. Dennis's report, over employer's motion to strike, based on the suspension of Dr. Dennis's medical license. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[10] Because we have affirmed the administrative law judge's findings that claimant did not establish the existence of complicated pneumoconiosis, or death due to pneumoconiosis, we need not address claimant's arguments concerning the existence of legal pneumoconiosis.

[11] In light of our decision to affirm the denial of benefits, we decline to address employer's contention, on cross-appeal, that it was improperly designated as the responsible operator. *See Larioni*, 6 BLR at 1-1277.

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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JUDITH S. BOGGS
Administrative Appeals Judge