**U.S. Department of Labor**

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

BRB No. 16-0213 BLA

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| PATTY SUE SELLARDS<br>(Widow of JAMES R. SELLARDS)<br><br>Claimant-Petitioner<br><br>v.<br><br>KESSLER COALS, INCORPORATED<br><br>and<br><br>WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 01/26/2017<br><br>DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Patty S. Sellards, Beckley, West Virginia.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2013-BLA-05691) of Administrative Law Judge Scott R. Morris, rendered on a request for modification of the denial of a survivor's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] The administrative law judge accepted employer's stipulation to 15.76 years of coal mine employment, but determined that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis under Section 411(c)(4), 30 U.S.C §921(c)(4) (2012), because claimant did not meet the requirement that the miner's aboveground work at surface mines be in conditions substantially similar to those in an underground mine. The administrative law judge further determined that the miner had a smoking history of at least one hundred pack-years and that the miner had clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§ 718.202(a)(1), (4); 718.203(b). However, the administrative law judge found that claimant did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

[1] Claimant is the widow of the miner, James R. Sellards, who died on April 16, 2010. Director's Exhibit 8. Claimant filed her survivor's claim on February 21, 2012. Director's Exhibit 2. The district director issued a Proposed Decision and Order Denying Benefits on September 7, 2012, on the basis that claimant did not establish that pneumoconiosis contributed to the miner's death. Director's Exhibit 17. Claimant filed a request for modification on October 9, 2012. Director's Exhibit 18. The district director issued a Proposed Decision and Order Denying Request for Modification on February 1, 2013, because claimant again did not establish death causation. Director's Exhibit 21. Claimant then requested a hearing and the case was transferred to the Office of Administrative Law Judges and assigned to the administrative law judge. Director's Exhibit 22.

[2] There is no evidence in the record that the miner was awarded federal black lung benefits or that the miner had a claim for federal benefits pending at the time of his death. Therefore, claimant is not derivatively entitled to benefits pursuant to 30 U.S.C. §932(*l*) (2012). *See* 20 C.F.R. §725.212(a)(3).

In an appeal by a claimant who is appearing without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (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 applicable law.[3] 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).

## I. Substantial Similarity of Conditions in Surface Coal Mine Employment

Claimant is entitled to the Section 411(c)(4) presumption of death due to pneumoconiosis if, in addition to proving that the miner had a totally disabling respiratory or pulmonary impairment, claimant establishes that the miner had at least fifteen years of employment "in one or more underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines." 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698 (4th Cir. 2015). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663, 25 BLR 2-725, 2-730 (6th Cir. 2015).

Although claimant bears the burden of establishing comparability between dust conditions in underground and surface mine employment, she is not required to first establish the dust conditions in an underground mine, but "must only establish that [the miner] was exposed to sufficient coal dust in his surface mine employment." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988); *see Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-202 (7th Cir. 1995). It is then the function of the administrative law judge, based on his expertise and knowledge of the industry, "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Leachman*, 855 F.2d at 512-13.

[3] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

In this case, the administrative law judge initially determined that "[i]t is unrebutted that all of [the miner's] coal mine employment involved performing reclamation work as a bulldozer operator at a surface mine." Decision and Order at 21. The administrative law judge observed that the miner informed Dr. Rasmussen in 1987 that his work required him to clean the tracks of the bulldozer, which could take up to two hours to complete. *Id.*; Director's Exhibit 11. The administrative law judge also found that "[b]y testifying that she had to wash the [m]iner's clothes in a bucket and then in a washer to get them clean, [claimant indicated] that [the miner] was exposed to coal dust." Decision and Order at 6; Hearing Transcript at 15. The administrative law judge concluded, however, that claimant failed to satisfy her burden to establish that the miner was regularly exposed to coal mine dust. Decision and Order at 6.

We affirm the administrative law judge's finding because it is rational and supported by substantial evidence. The administrative law judge accurately determined that the record contains "no description of [the miner's] duties other than he operated a bulldozer and cleaned the vehicle's tracks," and that "[t]here is no information about the bulldozer itself, *i.e.* whether he worked in an open or closed cab, or whether there were active coal mine operations during his work." Decision and Order at 6. In addition, the administrative law judge acted within his discretion in finding that "a simple statement that the [m]iner's clothes were dirty is not enough for this Tribunal to make a reasoned finding that the miner was regularly exposed to coal dust." *Id.*; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998). Based on these findings, the administrative law judge rationally determined that there was insufficient evidence to establish that the miner was regularly exposed to coal dust in his surface mine employment. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Consequently, we affirm the administrative law judge's finding that claimant was not entitled to invocation of the Section 411(c)(4) presumption because the miner did not have at least fifteen years of qualifying coal mine employment. 20 C.F.R. §718.305(b); *see Bender*, 782 F.3d at 137, 25 BLR at 2-698.

## II. Death Causation - 20 C.F.R. §718.205(b)

In a survivor's claim where the Section 411(c)(3)[4] and 411(c)(4) presumptions do not apply, claimant must affirmatively establish, by a preponderance of the evidence, that

[4] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability or death due to pneumoconiosis if the miner suffers or 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

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(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (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(b)(6); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). Failure to establish any one of the required elements precludes entitlement to benefits. *See Trumbo,* 17 BLR at 1-87-88.

In determining that claimant did not meet her burden under 20 C.F.R. §718.205(b), the administrative law judge considered the medical opinions of Drs. Rasmussen, Weisman, and Bellotte, the death certificate, and the miner's treatment records. Decision and Order at 21; Director's Exhibit 11; Employer's Exhibit 1. The administrative law judge observed correctly that Drs. Rasmussen and Weisman did not address whether pneumoconiosis contributed to the miner's death, while Dr. Bellotte found that the miner's death was not due to pneumoconiosis, but rather was due to the miner's "staggeringly heavy tobacco abuse." Decision and Order at 21, *quoting* Employer's Exhibit 1. The administrative law judge also accurately noted that on the miner's death certificate, Dr. Simm listed lung cancer as the sole cause of the miner's death. Decision and Order at 21; Director's Exhibit 11. Finally, the administrative law judge reasonably determined that the other medical evidence made "almost no mention" of pneumoconiosis, but rather focused on the miner's cancer.[5] Decision and Order at 21;

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diagnosed by biopsy, 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; *see E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). The irrebuttable presumption is not available in this case because the record contains no evidence of complicated pneumoconiosis.

[5] The miner's treatment records reflect that his lung cancer had metastasized to his head, neck, liver, lungs, and lymph nodes. Director's Exhibit 20. They also reflect that the miner had a history of congestive heart failure, diabetes, chronic obstructive pulmonary disease secondary to cigarettes, and obstructive sleep apnea. Director's Exhibits 11, 20. Although the miner was found by the West Virginia Occupational Pneumoconiosis Board to have a forty-percent impairment attributable to pneumoconiosis, and there are references in the treatment records to "black lung" and

Director's Exhibits 11, 20; *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000).

We affirm, therefore, the administrative law judge's conclusion that claimant did not prove that the miner's death is due to pneumoconiosis, as that finding is rational and supported by substantial evidence. 20 C.F.R. §718.205(b); s*ee Shuff*, 967 F.3d at 979-80, 16 BLR at 2-92. Based on the administrative law judge's finding that claimant did not establish this essential element of entitlement, we also affirm the denial of benefits.[6] *See Trumbo*, 17 BLR at 1-87-88.

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"interstitial fibrosis," there are no statements describing a causal relationship between pneumoconiosis and the miner's death. *See* Director's Exhibits 11, 20.

[6] Although the administrative law judge did not explicitly rule on claimant's request for modification of the denial of her survivor's claim, his finding that claimant did not establish death due to pneumoconiosis precluded modification under 20 C.F.R. §725.310 in this case. *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge