**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0058 BLA

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| DONNA CAROL CALDWELL (Widow of EDGAR CALDWELL) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| V & E MINING COMPANY | ) | DATE ISSUED: 01/29/2019 |
| Uninsured Employer | ) | |
| EASTOVER MINING COMPANY | ) | |
| Employer-Respondent | ) | |
| 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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Donna Carol Caldwell, Helton, Kentucky.

William Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2015-BLA-05566) of Administrative Law Judge Richard M. Clark, rendered on a claim 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 survivor's claim filed on March 27, 2014.

The administrative law judge credited the miner with 14.41 years of coal mine employment. Because the miner did not have at least fifteen years of coal mine employment, the administrative law judge found that claimant could not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). He also found that because the record lacks evidence of complicated pneumoconiosis, the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act is inapplicable. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. Considering whether claimant could establish entitlement to benefits without the aid of the Section 411(c)(3) or Section 411(c)(4) presumptions, the administrative law judge found that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and he denied benefits.

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

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law.[2] 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).

[1] Claimant is the widow of the miner, who died on November 9, 2012. Director's Exhibits 2, 10. 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 decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order). The parties waived a hearing and requested a decision on the record in this case. Decision and Order at 2.

[2] The miner's coal mine employment was in Kentucky. Director's Exhibit 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals

**The Section 411(c)(3) Presumption—Complicated Pneumoconiosis**

The administrative law judge accurately noted that the record contains no evidence that the miner had complicated pneumoconiosis. Decision and Order at 14 n.6. We, therefore, affirm the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). *See* 20 C.F.R. §718.304.

**The Section 411(c)(4) presumption - Length of Coal Mine Employment**

Claimant bears the burden of proof to establish the length of the miner's coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance 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. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In calculating the length of the miner's coal mine employment, the administrative law judge considered the miner's and survivor's claim forms, the miner's Social Security Administration (SSA) earnings records, his testimony, and affidavits from his coworkers. Decision and Order at 7-11.[3] The administrative law judge noted that the claim forms alleged employment with several coal mine operators from 1970 through 1987. Decision and Order at 8. For the miner's pre-1978 coal mine employment, the administrative law judge relied on the miner's SSA earnings records, and permissibly credited the miner with coal mine employment for every quarter of a year in which he had earnings from coal mine operators that exceeded $50.00. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984);

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for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] The miner's testimony and the coworkers' affidavits considered by the administrative law judge are contained in the record of the miner's denied claim. This 749-page file is labeled "LM-1 Claim" and was forwarded with the record in the survivor's claim, pursuant to claimant's appeal. It is not clear from the administrative law judge's Decision and Order whether he actually admitted the miner's claim record into evidence in the survivor's claim. Any error by the administrative law judge in this regard was harmless, however, as his consideration of the miner's claim record worked to claimant's benefit. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The miner's claim record contains substantially more evidence of the miner's post-1977 coal mine employment than claimant was able to submit in her survivor's claim. Director's Exhibits 3, 6.

Decision and Order at 8. Using this method, the administrative law judge found that the miner's coal mine employment earnings exceeded $50.00 for one quarter of a year in 1970, three quarters in 1973, four quarters in 1974, four quarters in 1975, three quarters in 1976, and three quarters in 1977, for a total of four and one-half years. Decision and Order at 8; Director's Exhibit 6.

The administrative law judge next calculated the miner's coal mine employment from 1978 onwards. Decision and Order at 8-9. For this period, he noted that the miner's SSA earnings records "differed significantly" from his testimony and claim forms reflecting "regular and continuous" coal mine employment.[4] Decision and Order at 10. Based on the miner's testimony that "he was usually paid either in cash or by personal check" during this period, the administrative law judge reasonably "gave the most weight to the miner's testimony (as corroborated by the affidavits of his coworkers) for purposes of determining the length of his coal mine employment after 1978."[5] *Id.*; *see Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); LM-1 Claim at 398-401, 609.

The administrative law judge accurately noted the miner's testimony that he temporarily stopped working in coal mine employment after the third quarter of 1977,[6] and worked for one year in non-coal mine work in Washington, D.C., before returning to coal mine work in 1978. Decision and Order at 10-11; LM-1 Claim at 157, 396-98, 606-608. Based on this testimony, the administrative law judge found that the miner returned to coal mine employment "at the end of the third quarter or the beginning of the fourth quarter of 1978." Decision and Order at 10. Further, he noted that the miner testified that from 1978 to August of 1988, he worked for various coal mine companies owned by Vic Nantz, Jr.

[4] Using a formula set forth at 20 C.F.R. §725.101(a)(32)(iii), the administrative law judge found that the miner's earnings records established only .67 of a year of coal mine employment between 1978 and 1988. Decision and Order at 9.

[5] The administrative law judge found that the miner's testimony with respect to his coal mine employment from 1978 onward was corroborated by the affidavit of his coworker, Roy Roark. Decision and Order at 10; LM-1 Claim at 263-64. Mr. Roark indicated that the miner worked continuously in coal mining from 1978 to 1984 for a total of six or seven years. *Id*.

[6] The administrative law judge found this testimony consistent with the miner's SSA earnings records, which reflected earnings for only the first three quarters of 1977. Decision and Order at 10; Director's Exhibit 6.

*Id*.; LM-1 Claim at 130-31, 615-16. According to the miner, he stopped working in coal mining in August of 1988 because he suffered an aortic aneurysm. *Id*.

Based on the foregoing evidence, the administrative law judge found that the miner's testimony and the affidavits of his coworkers established that he "worked in coal mining on a regular and continuous basis from the fourth quarter of 1978 until sometime in August of 1988." Decision and Order at 10. Therefore, he credited the miner "with one-quarter year of coal mine employment in 1978, a full year of coal mine employment for each of the nine years between 1979 and 1987, and two-thirds of one year of coal mine employment for 1988," finding that the evidence established "that the miner worked for 9.91 years [in] coal mine employment" from 1978 to 1988. *Id*.

Because the administrative law judge's findings are reasonable and based on substantial evidence, we affirm his determination that claimant established a total of 14.41 (4.5 + 9.91 = 14.41) years of coal mine employment. *See Muncy*, 25 BLR at 1-27. As claimant established less than fifteen years of coal mine employment, we affirm the administrative law judge's finding that claimant is unable to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 10-11.

**Entitlement Under 20 C.F.R. Part 718**

In a survivor's claim, where the presumptions at Sections 411(c)(3) and 411(c)(4) do not apply, claimant must establish by a preponderance of the evidence that the miner's death was due to pneumoconiosis arising out of coal mine employment.[7] *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-87-88 (1993). Before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trumbo*, 17 BLR at 1-88.

The administrative law judge denied benefits because he found that claimant failed to establish that the miner had either clinical or legal pneumoconiosis.[8] The administrative

[7] Section 422(*l*) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*)(2012). Claimant cannot benefit from this provision, as the miner's lifetime claim for benefits was denied.

[8] Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung

law judge correctly found that claimant is unable to establish clinical pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1) because "the parties did not designate any x-ray interpretations classified using the ILO system" and because the miner's hospitalization and treatment records do not include any x-ray readings that are positive for pneumoconiosis. Decision and Order at 14-19; Director's Exhibits 11-13; Claimant's Exhibits 1-3. As there is no biopsy or autopsy evidence, the administrative law judge also correctly found that claimant is unable establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 15. Further, because claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumption, she cannot establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

In considering the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge correctly noted that claimant did not designate any medical opinions for consideration, and that employer's physicians, Drs. Vuskovich and Rosenberg, did not diagnose the miner with pneumoconiosis. Decision and Order at 21; Director's Exhibit 13; Employer's Exhibit 1. The administrative law judge further noted that the miner's hospitalization and treatment records contained references to "coal workers' pneumoconiosis" and "black lung." Director's Exhibits 11-13; Claimant's Exhibits 1-3. He permissibly found that those diagnoses were not well-reasoned or documented, however, because "the physicians who noted these conditions in the miner's medical history did not identify the bas[e]s for their conclusions."[9] Decision and Order at 21; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Further, although the miner's treatment records also include diagnoses of chronic obstructive pulmonary disease and emphysema, a review of the record indicates that no physician opined that those diseases were significantly related to, or substantially aggravated by, dust exposure in the miner's coal mine employment. *See* 20 C.F.R. §718.201(b); Director's Exhibits 11-13; Claimant's Exhibits 1-3. As it is supported by substantial evidence, we affirm the administrative law

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tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[9] The administrative law judge correctly noted that miner's death certificate did not include a diagnosis of pneumoconiosis. Decision and Order at 19; Director's Exhibit 10.

judge's finding that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in her survivor's claim, 20 C.F.R. §718.205(a)(1), a finding of entitlement is precluded. *See Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge