BRB Nos. 11-0701 BLA
and 11-0702 BLA

PHYLLIS A. DARDI (Widow of, and o/b/o, CHARLES DARDI) Claimant-Respondent v. MARROWBONE DEVELOPMENT COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/19/2012 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5568, 2010-BLA-5572) of Administrative Law Judge Richard A. Morgan, rendered on claims filed pursuant to the provisions 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 miner's claim and a survivor's claim.[1] The claims were consolidated and forwarded to the administrative law judge for a hearing.

The administrative law judge noted that Congress amended the Act in 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to the miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act. Under Section 411(c)(4), if a miner establishes at least fifteen years of underground or substantially similar coal mine employment, and establishes that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden shifts to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by establishing that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id*.

After crediting the miner with at least thirty years of underground coal mine employment,[2] the administrative law judge found that claimant established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the

[1] The miner filed his claim for benefits on November 28, 2007. Director's Exhibit 2 (miner's claim). The district director denied benefits on August 29, 2008, because the miner did not establish that he was totally disabled. Director's Exhibit 21 (miner's claim). The miner requested modification on November 12, 2008. *See* 20 C.F.R. §725.310; Director's Exhibits 9, 28 (miner's claim). The miner died on December 27, 2008, and claimant, the miner's widow, filed her survivor's claim on May 29, 2009. Director's Exhibit 2 (survivor's claim). The district director granted modification in the miner's claim and awarded benefits, Director's Exhibit 32 (miner's claim), and awarded benefits in the survivor's claim. Director's Exhibit 22 (survivor's claim). Employer requested a hearing in both claims.

[2] The miner's coal mine employment was in West Virginia. Director's Exhibit 3 (miner's claim). 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 (1989) (en banc).

Section 411(c)(4) presumption. Further, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim. Alternatively, the administrative law judge found that claimant established entitlement to benefits in the miner's claim without the benefit of the presumption. Specifically, the administrative law judge found that claimant established that the miner had clinical pneumoconiosis, in the form of silicosis, and legal pneumoconiosis, in the form of chronic obstructive pulmonary disease due, in part, to coal mine dust exposure,[3] pursuant to 20 C.F.R. §718.202(a)(1),(2), (4), that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2),(c).

In regard to the survivor's claim, the administrative law judge noted that Section 1556 of Public Law No. 111-148 revived Section 932(*l*) of the Act, under which 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 survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). The administrative law judge applied Section 932(*l*) and awarded claimant survivor's benefits, because her claim was filed after January 1, 2005, and was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death. Alternatively, the administrative law judge found that claimant established entitlement to survivor's benefits by proving that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On appeal, with respect to the miner's claim, employer argues that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis, that the miner was totally disabled, and that the miner's total disability was due to pneumoconiosis. Regarding the survivor's claim, employer contends that the administrative law judge erred in applying amended Section 932(*l*). Alternatively, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence in finding that the miner's death was due to pneumoconiosis pursuant to

[3] "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 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).

20 C.F.R. §718.205(c).[4] Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has filed a limited response, arguing that the administrative law judge properly applied amended Section 932(*l*) to the survivor's claim.

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

The Miner's Claim

To establish entitlement to benefits under 20 C.F.R. Part 718, a miner must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

In determining whether claimant invoked the Section 411(c)(4) presumption, the administrative law judge considered whether the evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge found that the pulmonary function studies and blood gas studies, submitted pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), were non-qualifying,[5] and that there was no evidence that the miner suffered from cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii). The administrative law judge, however, found that under 20 C.F.R. §718.204(b)(2)(iv), the medical opinion evidence established that the miner suffered from a moderate pulmonary impairment that prevented him from performing his usual coal mine employment as an electrician, a job that required him to perform a "medium" degree of manual labor. Decision and Order at 24. Therefore, the administrative law judge determined that claimant "met her burden of proof in establishing the existence of total respiratory disability," pursuant to 20 C.F.R. §718.204(b)(2). *Id*.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least thirty years of underground coal mine employment, and that the evidence established that he had clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1),(2),(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

Employer argues that the administrative law judge erred in finding that the miner suffered from a totally disabling respiratory or pulmonary impairment. Specifically, employer maintains that the administrative law judge based his finding of total disability solely on Dr. Mettu's opinion that the miner had a "moderate pulmonary impairment." Employer's Brief at 4. Employer also argues that because Dr. Mettu displayed no knowledge of the exertional requirements of the miner's usual coal mine work, his opinion is not well-reasoned and, thus, cannot support a finding of total disability. *Id*. at 4-5. Employer's contentions lack merit.

As an initial matter, a review of the Decision and Order demonstrates that the administrative law judge's finding that the miner was totally disabled was not based on Dr. Mettu's opinion alone. In addition to Dr. Mettu's opinion diagnosing "moderate restrictive airway disease" with a "moderate pulmonary impairment," the administrative law judge considered Dr. Francis's opinion that the miner was "markedly limited" in his daily activities because of his pulmonary condition. Decision and Order at 23; Director's Exhibits 8, 28 (miner's claim). Although he gave it less weight, the administrative law judge also noted Dr. Lorenzana's observation that the miner was "extremely limited" by severe lung disease. *Id*.; Director's Exhibit 19 (miner's claim). In addition, the administrative law judge noted that Drs. Mettu, Francis, and Lorenzana all observed the miner's "24/7" use of oxygen.[6] Decision and Order at 23; Director's Exhibits 8, 19, 28 (miner's claim).

Moreover, contrary to employer's contention, any lack of knowledge on Dr. Mettu's part about the exertional requirements of the miner's work as an "electrical and belt man," Director's Exhibit 3 (miner's claim), does not invalidate the administrative law judge's finding of total disability. Dr. Mettu did not state that the miner was totally disabled. Instead, the administrative law judge relied on Dr. Mettu's determination that the miner had a moderate pulmonary impairment,[7] along with the observations of Drs. Francis and Lorenzana, and the administrative law judge's finding that the miner's job required "medium" manual labor, to find that the miner could not perform his usual coal

[6] Review of the record discloses no medical opinion evidence submitted by employer on the issue of whether the miner was totally disabled. In considering the medical opinion evidence, the administrative law judge noted that "employer presented no evidence that the miner was not totally disabled, although I recognize it need not have done so." Decision and Order at 23.

[7] Dr. Mettu arrived at his conclusion after examining the miner and performing a chest x-ray, a pulmonary function study, and an arterial blood gas study. Director's Exhibit 8 (miner's claim). Dr. Mettu diagnosed the miner with moderate restrictive airway disease. *Id.*

mine work and, thus, was totally disabled.[8] 20 C.F.R. §718.204(b)(1); Decision and Order at 23-24. This finding was within the administrative law judge's discretion, and it is supported by substantial evidence. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245, 1-246-47 (1985) (holding that an administrative law judge may infer that a miner is totally disabled from a medical report that describes the severity or physical effects of the miner's impairment). Employer raises no other arguments regarding the finding of total disability. Therefore, we affirm the administrative law judge's finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

Having found that the miner had at least thirty years of underground coal mine employment and a totally disabling pulmonary or respiratory impairment, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). As substantial evidence supports the administrative law judge's invocation finding, it is affirmed.

Further, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption, and thus concluded that the miner was totally disabled due to pneumoconiosis. Employer does not challenge these findings on appeal. Therefore, we affirm the administrative law judge's award of benefits in the miner's claim.[9] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Survivor's Claim

Turning to the survivor's claim, employer argues that the administrative law judge erred in applying amended Section 932(*l*) because the miner was not found entitled to benefits until after his death. Employer's Brief at 6-7. We disagree, and hold that amended Section 932(*l*) applies to claimant's survivor's claim, even though the miner was not awarded benefits during his lifetime. Contrary to employer's argument, a survivor is entitled to benefits as long as the miner is ultimately determined to be eligible to receive benefits. 30 U.S.C. §§901(a), 932(*l*); *see* 20 C.F.R. §725.212(a)(3)(ii);

[8] Employer does not challenge the administrative law judge's finding that the miner's work as an electrician required a medium degree of manual labor. Decision and Order at 24 and n.41. That finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

[9] Because we affirm, as unchallenged, the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), we need not address employer's challenges to the administrative law judge's alternative findings, that claimant proved that the miner suffered from legal pneumoconiosis, and that his total disability was due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c).

Pothering v. Parkson Coal Co., 861 F.2d 1321, 1328, 12 BLR 2-60, 2-70 (3d Cir. 1988); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989). We therefore affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits under amended Section 932(*l*).[10]

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[10] Because we affirm the administrative law judge's determination that claimant is automatically entitled to survivor's benefits pursuant to amended Section 932(*l*), 30 U.S.C. §932(*l*), we need not address employer's challenge to the administrative law judge's alternative finding that claimant proved that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c).