

BRB Nos. 12-0599 BLA
and 12-0600 BLA

KOLLEENA R. PARSONS)
(o/b/o and Widow of ROGER L. PARSONS,)
SR.))
)
Claimant-Petitioner)
)
v.)
)
SIMMONS FORK MINING) DATE ISSUED: 07/29/2013
)
and)
)
BRICKSTREET MUTUAL INSURANCE)
COMPANY, INCORPORATED)
)
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 Denying Benefits of Lystra A. Harris,
Administrative Law Judge, United States Department of Labor.

Kolleena R. Parsons, Lynco, West Virginia, *pro se*.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals
Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Benefits (2011-BLA-5207 and 2011-BLA-5208) of Administrative Law Judge Lystra A. Harris rendered on a miner's claim² and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).

Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to these claims, amended Section 411(c)(4) provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis at the time of his death, and that his death was due to pneumoconiosis, if the evidence establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine.³ 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment in the miner's claim, and death in the survivor's claim, did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge credited the miner with more than thirty-five years of coal mine employment. However, the administrative law judge found that the evidence of record did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge found that claimant was precluded from invoking the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Adjudicating the miner's and survivor's claims pursuant to 20 C.F.R. Part 718, the

¹ Claimant, Kolleena R. Parsons, is the widow of the miner, who died on November 2, 2009. Survivor-Director's Exhibit 12. Claimant filed a survivor's claim for benefits on January 4, 2010. Survivor-Director's Exhibit 2. The survivor's claim was consolidated with the miner's claim for adjudication before the administrative law judge.

² The miner filed his application for benefits on September 29, 2008. Miner-Director's Exhibit 2. Claimant continues to pursue the miner's claim on behalf of his estate.

³ The amendments also revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that the survivor of a miner who was entitled 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).

administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement. Accordingly, the administrative law judge denied benefits in both the miner's and survivor's claims.

On appeal, claimant generally challenges the administrative law judge's denial of benefits in both claims. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a miner's claim, claimant must demonstrate by a preponderance of the evidence 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). In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, 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, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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 Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the miner's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Miner-Director's Exhibit 3.

Turning to the issue of total respiratory disability, the administrative law judge determined that the record contains one pulmonary function study at Section 718.204(b)(2)(i), which yielded non-qualifying values.⁵ Miner-Director's Exhibit 1. Thus, the administrative law judge properly found that the pulmonary function study evidence failed to demonstrate total respiratory disability. 20 C.F.R. §718.204(b)(2)(i); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 11. Likewise, the administrative law judge properly determined that the single arterial blood gas study of record produced non-qualifying values. Miner-Director's Exhibit 11. Hence, we affirm the administrative law judge's determination that total respiratory disability was not demonstrated under Section 718.204(b)(2)(ii). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 11. Similarly, we affirm the administrative law judge's determination that the record contains no evidence of cor pulmonale with right-sided congestive heart failure, and thus, total disability cannot be demonstrated by that means. 20 C.F.R. §718.204(b)(2)(iii); *see Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); Decision and Order at 11.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge determined that the record contains the medical opinions of Drs. Forehand and Castle.⁶ In a report dated October 15, 2008, Dr. Forehand opined that the miner had the physiological capacity to perform his previous coal mine work from a respiratory standpoint. Miner-Director's Exhibit 11; Employer's Exhibit 16. By contrast, Dr. Castle opined that, prior to his death, the miner "was very likely totally and permanently disabled" due to his non-small cell lung cancer.⁷ Employer's Exhibit 16. In a report dated June 17, 2011, Dr. Castle stated that he was unable to accurately determine the severity of the miner's

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

⁶ In addition, the record contains the decision of the West Virginia Occupational Pneumoconiosis Board, which found sufficient evidence to justify a diagnosis of pneumoconiosis but no pulmonary functional impairment attributable to the disease. Miner's-Director's Exhibit 8. It is well established that the finding of a state workers' compensation board is not binding on the administrative law judge. *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744, 1-748 n.5 (1985).

⁷ In addition, Dr. Castle opined that the miner was "not permanently and totally disabled as a result of coal workers' pneumoconiosis or a coal mine induced lung disease." Employer's Exhibit 16.

respiratory impairment prior to his death, due to the absence of valid ventilatory function studies. Employer's Exhibit 16. However, Dr. Castle testified by deposition on September 11, 2011, that if he had diagnostic studies that measured the miner's ventilatory function or blood gas transfer ability, his opinion that the miner "absolutely" was disabled "would only be bolstered." Employer's Exhibit 21 at 13. When reviewing the medical opinion evidence, however, the administrative law judge stated that "no physician of record concluded that the Miner was totally disabled," and concluded that total respiratory disability was not demonstrated under Section 718.204(b)(2)(iv). Decision and Order at 11. Because the administrative law judge mischaracterized the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), we must vacate her finding that the medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv), and remand this case for further findings. On remand, after reconsidering the medical opinion evidence pursuant to Section 718.204(b)(2)(iv) to determine whether it demonstrates total respiratory disability, she must then consider whether all of the evidence, when weighed together, establishes total respiratory disability at Section 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc).

If the administrative law judge finds, on remand, that total respiratory disability is established, she must determine whether claimant is entitled to the presumption of total disability due to pneumoconiosis in the miner's claim, and the presumption that the miner's death was due to pneumoconiosis in the survivor's claim, pursuant to amended Section 411(c)(4).⁸ If the administrative law judge finds invocation of the amended Section 411(c)(4) presumption established, she must then determine whether employer has rebutted the presumption with affirmative proof that the miner did not have pneumoconiosis or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine in the miner's claim and, if reached, that his death was not due to pneumoconiosis in the survivor's claim. 30 U.S.C. §921(c)(4); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th

⁸ The administrative law judge credited the miner with "more than" thirty-five years of coal mine employment. Decision and Order at 5. If the administrative law judge finds total respiratory disability established on remand, she must determine whether the miner worked at least fifteen years in underground coal mine employment, or in surface employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4).

Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81 (2012).⁹

Accordingly, the Decision and Order Denying Benefits of the administrative law judge in both the miner's and survivor's claims is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁹ We affirm, as supported by substantial evidence, the administrative law judge's finding that the record contains no evidence of clinical or legal pneumoconiosis by x-ray, biopsy, autopsy, medical opinion or CT scan pursuant to 20 C.F.R. §§718.202(a), 718.107.