

BRB Nos. 13-0494 BLA
and 13-0494 BLA-A

WANDA GAIL BANGERT)	
(Widow of JON DANE BANGERT))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
BEECH GROVE COAL SALES,)	DATE ISSUED: 07/22/2014
INCORPORATED)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Wanda Gail Bangert, Statesville, North Carolina, *pro se*.

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

Maia S. Fisher (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals, and employer/carrier (employer) cross-appeals, the Decision and Order - Denying Benefits (2012-BLA-5233) of Administrative Law Judge Alan L. Bergstrom rendered on a survivor's claim filed on September 2, 2010,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited the miner with 13 and 1/12 years of underground coal mine employment. Because claimant failed to establish that the miner had at least 15 years of coal mine employment, the administrative law judge found that claimant was not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2012). The administrative law judge, therefore, adjudicated the claim under the regulations set forth at 20 C.F.R. Part 718.³ Addressing the merits, the administrative law judge found that claimant established that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.

¹ Claimant is the widow of the miner, who died on April 11, 2010. Director's Exhibit 11.

² 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 this case, Congress reinstated Section 411(c)(4) of the Act, which provides, *inter alia*, a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

Qualifying coal mine employment is defined as work in an underground mine or work in a mine with substantially similar conditions to those of an underground mine. *See* 30 U.S.C. §921(c)(4)(2012).

³ The amendments also revived Section 422(l) of the Act, which 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 is not entitled to an award of benefits based on derivative entitlement pursuant to amended Section 932(l), as the miner was not receiving benefits at the time of his death.

§§718.202(a)(2), (a)(4) and 718.203(b). The administrative law judge further found, based on the fact that claimant established that the miner had at least 10 years of coal mine employment and that the miner's death was due to respirable causes, that claimant was entitled to the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at 20 C.F.R. §718.303. However, the administrative law judge found that employer rebutted the presumption by establishing that the miner's death was not due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not be submitting a substantive response to claimant's appeal.

In a cross-appeal, employer contends that the administrative law judge erred in excluding the deposition testimony of Dr. Roggli, arguing that it should have been admitted as the cross-examination of a physician who had provided an affirmative medical report pursuant to 20 C.F.R. §725.414. In response, however, the Director contends that the administrative law judge properly excluded the deposition testimony of Dr. Roggli. Specifically, the Director contends that Dr. Roggli's deposition testimony was properly excluded, pursuant to the evidentiary limitations of 20 C.F.R. §725.414, because "it is 'not [] an affirmative autopsy report or a rebuttal autopsy report,' but merely a 'cross-examination of an opposing party's witness.'" Director's Letter Response Brief at 2. Claimant has not responded to employer's cross-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); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.⁴ 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).

Initially, we address the administrative law judge's determination regarding the length of the miner's coal mine employment, as it is relevant to whether claimant is entitled to invocation of the rebuttable presumption that the miner's death was due to

⁴ Because the miner's coal mine employment was in West Virginia, 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); Director's Exhibits 3, 4.

pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). Claimant bears the burden of proof in establishing the length of his coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). The administrative law judge's finding as to the length of coal mine employment will be upheld, if it is based on a reasonable method of computation and is supported by substantial evidence in the record considered as a whole. *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985); *Caldrone v. Director, OWCP*, 6 BLR 1-575, 1-578 (1983).

Claimant alleged that the miner had 15 years of underground coal mine employment. Director's Exhibits 3, 4. In considering the relevant evidence, namely Form CM-911a - "Employment History", claimant's testimony regarding the miner's employment history, the miner's Social Security Earnings statements, and the employment history entries made in the miner's medical records, Decision and Order at 25-30, the administrative law judge found that it established that the miner had at most a total of 13 and 1/12 years of coal mine employment between 1964 and April, 1985, based on both full and partial years of coal mine employment.⁵ Decision and Order at 25-31. The administrative law judge, therefore, reasonably determined that the evidence supported a finding of 13 and 1/12 years of coal mine employment. *Hunt*, 7 BLR at 1-710-11; *Caldrone*, 6 BLR at 1-578. Hence, we affirm his finding that claimant established that the miner had 13 and 1/12 years of qualifying coal mine employment. Because claimant failed to establish 15 years of qualifying coal mine employment, we affirm the administrative law judge's determination that claimant was not entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4).

Death Due to Pneumoconiosis

In order to establish entitlement to survivor's benefits, unassisted by the amended Section 411(c)(4) presumption, 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. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b);⁶ *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A

⁵ The evidence also shows that the miner was involved in non-coal mine employment from 1959 through 1963, and periods between 1965 and 1973. Decision and Order at 25.

⁶ After the administrative law judge issued his decision, the Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The provisions that were previously set forth at 20 C.F.R. §718.205(c) are now set forth at 20 C.F.R.

miner's death will be considered to be due to pneumoconiosis if the evidence establishes any of the following facts: pneumoconiosis was the cause of the miner's death; pneumoconiosis was a substantially contributing cause or factor leading to the miner's death; death was caused by complications of pneumoconiosis; the presumption relating to complicated pneumoconiosis, set forth at 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

The administrative law judge considered all of the relevant evidence regarding the cause of the miner's death, namely the miner's death certificate,⁷ the autopsy reports by Drs. Sporn, Swedarsky and Tomaszewski,⁸ the medical report of Dr. Elnaggar,⁹ claimant's

§718.205(b). 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (codified at 20 C.F.R. §718.205(b)).

⁷ The death certificate, signed by Dr. Scholar, the miner's oncologist, attributed the miner's death to metastases to the bone caused by lung cancer, with morbid obesity as a contributing cause of death. Director's Exhibit 11.

⁸ The miner's lungs were removed on May 13, 2010 at an autopsy by Piedmont Pathology, for pathological consultation. Director's Exhibit 12. Dr. Sporn, from the Department of Pathology at Duke University, performed the autopsy on the miner's lungs only. *Id.* Dr. Sporn, who is Board-certified in Internal Medicine and Anatomic Pathology, diagnosed poorly differentiated non-small cell carcinoma in the right lung and emphysema; diffuse and non-specific interstitial fibrosis; bronchopneumonia and scattered coal dust macules consistent with simple coal workers' pneumoconiosis in both lungs. *Id.* Dr. Sporn did not, however, provide a specific opinion regarding the cause of the miner's death. *Id.*

Dr. Swedarsky, who is Board-certified in Anatomic and Clinical Pathology, reviewed the autopsy report and autopsy slides prepared by Dr. Sporn. Employer's Exhibit 1. Dr. Swedarsky diagnosed non-small cell carcinoma of the lung, which most likely caused the miner's death. Dr. Swedarsky also diagnosed acute and organizing bronchopneumonia; pulmonary edema; pulmonary emboli; atelectasis; emphysema; non-specific interstitial fibrosis (possibly from radiation treatments) and black pigment with pigment macules. *Id.* Additionally, Dr. Swedarsky opined that a diagnosis of simple pneumoconiosis cannot be made in this case absent the formation of coal nodules, which he did not see. *Id.*

treating physician, the medical reports of Drs. Ghio and Tomashefski,¹⁰ and the miner's hospitalization and treatment records.¹¹ Decision and Order at 9-24; Director's Exhibits 11-15; Employer's Exhibits 1, 3, 6.

Dr. Tomashefski, who is Board-certified in Anatomic and Clinical Pathology, conducted an autopsy review. Dr. Tomashefski stated that the cause of the miner's death was lung cancer of the right lobe, with an immediate cause of severe pneumonia. Dr. Tomashefski further noted poorly differentiated malignant neoplasm in the right lung and bronchial tissue. Director's Exhibit 15. In both lungs, Dr. Tomashefski diagnosed alveolar edema; subacute fibrinous pneumonia; recent thromboemboli; severe panlobular and centrilobular emphysema; and mild black pigment deposition with inconspicuous birefringent crystals. *Id.* However, Dr. Tomashefski stated that the macules and micronodules occupy less than 1% of the parenchyma shown on the slides and, therefore, he diagnosed very simple coal workers' pneumoconiosis. *Id.*

⁹ In a November 30, 2010 report, Dr. Elnaggar, who is Board-certified in Internal Medicine and the subspecialties of Critical Care Medicine and Pulmonary Disease, was the miner's primary treating physician for twelve years. He opined that the miner had pneumoconiosis that contributed to his pulmonary impairment. He also diagnosed severe chronic obstructive pulmonary disease (COPD), cor pulmonale, morbid obesity, sleep apnea and severe arthritis with chronic pain. He opined that lung cancer caused the miner's death, but that his lung cancer was "at least in part attributed to his coal dust exposure." Director's Exhibit 13.

In a July 21, 2011 deposition, Dr. Elnaggar stated that the immediate cause of death was pneumonia and the primary cause was lung cancer. Director's Exhibit 16 at 17. He further stated that, while he could not cite to any "specific supporting medical research[,]," Director's Exhibit 16 at 15-16, he did not agree that the miner's lung cancer was caused solely by cigarette smoking and stated that "[s]ome patients can develop lung cancer from coal dust exposure." *Id.* at 15. He further stated that in this case, he could not say whether the miner would have survived longer had he not suffered from pneumoconiosis because this was a complicated case where the patient had multiple significant lung problems that had progressed over time. *Id.* at 17-30. When pointedly asked whether pneumoconiosis contributed to the miner's death, he testified, "No, I did not say that it contributed to his death. It contributed to his impairment.... His death, I really could not tell you that, no. I have no way to answer that question for you. Like I said, I told you earlier that his cancer and his COPD are the major disabling components in his lung disease." Director's Exhibit 16 at 20.

¹⁰ Drs. Ghio and Tomashefski attributed the miner's death to causes other than pneumoconiosis, based on their reviews of the miner's medical records and the autopsy evidence. Dr. Ghio is Board-certified in Internal Medicine with a subspecialty in

Weighing all the relevant evidence, the administrative law judge correctly found that death due to pneumoconiosis was not established pursuant to 20 C.F.R. §§718.205(b)(3), 718.304, because there was no evidence of complicated pneumoconiosis or progressive massive fibrosis. Decision and Order at 35. The administrative law judge also found that the weight of the medical evidence failed to establish that the immediate cause of the miner's death was coal workers' pneumoconiosis. *Id.* at 37. Specifically, the administrative law judge correctly found that the evidence regarding cause of death established that the immediate cause of the miner's death was pneumonia and the primary cause of his death was metastatic lung cancer.¹² *Id.*; Director's Exhibits 11-16; Employer's Exhibit 6. The administrative law judge, therefore, properly found that none of the evidence established that pneumoconiosis or its complications caused the miner's death. *See* 20 C.F.R. §718.205(b)(1); *Sparks*, 213 F.3d at 190, 22 BLR at 2-259; *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93; Decision and Order at 37.

Pulmonary Disease. He stated that there were no medical studies on coal miners proving a relationship between lung cancer and coal dust exposure. Dr. Ghio attributed the miner's respiratory disease, including his lung cancer, entirely to cigarette smoking. Employer's Exhibit 3.

Dr. Tomaszewski opined that the miner's pneumoconiosis was of such a mild degree that it would not have contributed to his death or to any of his other respiratory problems. Director's Exhibit 15; Employer's Exhibit 6 at 21-22. Dr. Tomaszewski further stated that the medical literature does not support a link between coal dust exposure and lung cancer and it has not identified coal mine dust as a carcinogen. Employer's Exhibit 6 at 19-20. He attributed the miner's lung cancer and other respiratory impairments to his 45-year smoking history.

¹¹ The miner's hospitalization and treatment records show a history of severe respiratory disease, including cor pulmonale with right-sided congestive heart failure and COPD with chronic hypoxia, polycythemia, and interstitial scarring. Director's Exhibits 14, 15. They do not, however, address the etiology of either the miner's lung disease or his terminal lung cancer. Also, they do not include a diagnosis of pneumoconiosis while the miner was alive. Director's Exhibits 14, 15.

¹² The administrative law judge further found that, while the miner was diagnosed with cor pulmonale and COPD during his lifetime, no physician provided a well-reasoned medical opinion attributing the cor pulmonale or COPD to the miner's coal mine employment. Decision and Order at 37.

Additionally, pursuant to 20 C.F.R. §718.205(b)(2), (6), the administrative law judge properly determined that Dr. Elnaggar, the miner's treating physician, and the only physician who opined that pneumoconiosis contributed to the miner's death, was entitled to "low probative" weight because it was equivocal. Decision and Order at 38; Director's Exhibits 13, 16. Specifically, the administrative law judge noted that Dr. Elnaggar, in his November 30, 2010 report, opined that pneumoconiosis contributed to the miner's death because the severity of the miner's lung cancer was due, at least in part, to the miner's coal dust exposure. Decision and Order at 38; Director's Exhibit 13. Subsequently, however, the administrative law judge noted that in his July 21, 2011 deposition, Dr. Elnaggar opined that the miner's case was too complicated to fully determine whether the miner's pneumoconiosis contributed to, or hastened, the miner's death. Decision and Order at 38; Director's Exhibit 16 at 17, 20. Considering both of Dr. Elnaggar's statements, the administrative law judge rationally accorded little weight to Dr. Elnaggar's opinion that pneumoconiosis contributed to the miner's death, because the physician failed to provide sufficient support for his opinion linking coal dust exposure to lung cancer. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 38. Thus, because the administrative law judge provided a proper basis for according little weight to the opinion of Dr. Elnaggar, we need not address the administrative law judge's weighing of the contrary medical opinions in this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele*, 6 BLR at 1-382 n.4.

Further, in considering the merits of this claim, the administrative law judge stated that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at 20 C.F.R. §718.303. Contrary to the administrative law judge's finding, however, Section 718.303 is not applicable in the present case, as the claim was filed after January 1, 1982. 20 C.F.R. §718.303(c). We need not, however, remand the case to the administrative law judge for further proceedings as the administrative law judge properly concluded that the evidence: failed to establish that pneumoconiosis caused the miner's death; failed to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death; failed to establish that the miner's death resulted from complications caused by pneumoconiosis; and failed to establish that the miner had complicated pneumoconiosis. 20 C.F.R. §718.205(b); *see* discussion, *supra*. Consequently, the administrative law judge's misapplication of Section 718.303 is harmless error. *See generally Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (an error is harmless unless it could have made a difference in the outcome.) (The parenthetical explanation quoted is not applicable in *pro se* cases).

As the administrative law judge's findings are supported by substantial evidence, they are affirmed. We, therefore, affirm the administrative law judge's findings that

pneumoconiosis did not cause, contribute to, or hasten the miner's death.¹³ 20 C.F.R. §718.205(b).

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

¹³ In light of our decision to affirm the denial of benefits, we need not address employer's contention, on cross-appeal, regarding the administrative law judge's decision to exclude the deposition testimony of Dr. Roggli. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).