**U.S. Department of Labor**

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

BRB No. 16-0301 BLA

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| EDITH G. HEATHERINGTON (Widow of MELVIN R. HEATHERINGTON) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | DATE ISSUED: 03/16/2017 |
| McELROY COAL COMPANY | ) | |
| and | ) | |
| CONSOL ENERGY, 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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Christopher J. Prezioso (Dinsmore & Shohl, LLP), Wheeling, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (2014-BLA-5741) of Administrative Law Judge Thomas M. Burke denying benefits 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 October 17, 2013.

After crediting the miner with more than fifteen years of underground coal mine employment,[2] the administrative law judge found that the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because the evidence did not establish that the miner was totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis provided at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4)(2012). Turning to whether claimant could establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge found that the x-ray and medical opinion evidence under 20 C.F.R. §718.202(a)(1), (4), did not establish that the miner had clinical pneumoconiosis.[4] The administrative law judge, however, found that the medical opinion evidence established that the miner suffered from legal

[1] Claimant is the surviving spouse of the miner, who died on December 12, 2002. Director's Exhibit 10.

[2] 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).

[3] Section 411(c)(4) of the Act provides 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 or pulmonary impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305. 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 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 two claims for benefits were denied. Miner's Claim Files 1 and 2 (unmarked exhibits).

[4] "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

pneumoconiosis[5] pursuant to 20 C.F.R. §718.202(a)(4), in the form of chronic obstructive pulmonary disease (COPD) due to both coal mine dust exposure and cigarette smoking. However, the administrative law judge found that the evidence did not establish that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the pulmonary function study evidence and medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Claimant further contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205.[6] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if 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,[7] or the Section 411(c)(4) presumption is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4).

[5] "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).

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that the blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), that the x-ray and medical opinion evidence did not establish clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and that the medical opinion evidence did not establish that the miner's lung cancer constituted legal pneumoconiosis. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 11, 16.

[7] A review of the record does not reveal any evidence of complicated pneumoconiosis. Consequently, claimant is not entitled to the Section 411(c)(3)

**The Section 411(c)(4) Presumption**

Claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant did not invoke the Section 411(c)(4) presumption. Claimant specifically argues that the administrative law judge erred in finding that the pulmonary function study evidence and the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[8]

The record contains three pulmonary function studies conducted on March 11, 1988, April 11, 1991, and July 7, 1994. The March 11, 1988 and July 7, 1994 studies produced non-qualifying values,[9] Employer's Exhibits 4, 17, while the April 11, 1991 study produced qualifying values. Employer's Exhibit 13. However, the administrative law judge determined that the April 11, 1991 pulmonary function study was accompanied by only one tracing of the MVV, rather than the two tracings required by 20 C.F.R. §718.103(b).[10] Decision and Order at 10. Because the April 11, 1991 pulmonary function study was not in substantial compliance with the requirements of 20 C.F.R. §718.103(b), the administrative law judge determined that it could not constitute evidence of the presence of a pulmonary impairment. *Id*. at 10-11. The administrative law judge, therefore, found that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*. at 11.

Claimant argues that, contrary to the administrative law judge's finding, the April 11, 1991 pulmonary function study contained the required number of tracings.

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irrebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304.

[8] As there is no evidence that the miner had cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[10] Section 718.103(b) requires the submission of three tracings of the "flow versus volume" and "volume versus time" measurements of a pulmonary function study. It further provides that "[i]f the MVV is reported, two tracings of the MVV whose values are within 10% of each other shall be sufficient." 20 C.F.R. §718.103(b); *see also* 20 C.F.R. Part 718, App. B (2)(iii)(D).

Claimant's Brief at 8. We disagree. Although claimant correctly notes that the April 11, 1991 study included three tracings of the flow versus volume and volume versus time measurements, the administrative law judge correctly found that the study did not contain the required number of MVV measurement tracings. *See* Director's Exhibit 11 at 38. As the administrative law judge further correctly noted that the April 11, 1991 study was qualifying "[b]ased on the MVV" value,[11] the administrative law judge properly found that this study was insufficient to establish total disability. *See* 20 C.F.R. §718.103(b),(c). Consequently, we affirm the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. DelVecchio, Ranavaya, Fino, and Sood. Dr. DelVecchio opined that the miner suffered from a respiratory impairment with a "50%" degree of severity. Director's Exhibit 11 at 49. Dr. Ranavaya opined that the miner had a mild obstructive impairment that was not totally disabling. Employer's Exhibit 7. Conversely, Drs. Fino and Sood opined that the miner was totally disabled from a respiratory standpoint. Employer's Exhibit 8; Claimant's Exhibit 1.

In considering the medical opinion evidence, the administrative law judge found that the opinions of Drs. DelVecchio, Ranavaya, and Fino were not well-reasoned, as the physicians failed to consider the exertional requirements of the miner's last coal mine employment. Decision and Order at 12. Additionally, the administrative law judge found Dr. Sood's opinion to be poorly reasoned, as the physician relied upon estimates and generalizations of the work levels required by coal mining in general and not upon

[11] In order to be qualifying, a pulmonary function study must have both a qualifying value for its FEV1, and a qualifying value for at least one of its three other tests, the FVC, MVV, and FEV1/FVC. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). The record reflects that, for a person of the miner's age, sex, and height, the FEV1 value of the April 11, 1991 pulmonary function study, 1.86, was qualifying, the FVC value, 2.87, was non-qualifying, the MVV value, 70.40, was qualifying, and the FEV1/FVC value, 64.8%, was non-qualifying. Director's Exhibit 11 at 35. Thus, the April 11, 1991 pulmonary function study was qualifying based solely on its FEV1 and MVV values. 20 C.F.R. §718.204(b)(2)(i),(B). Therefore, contrary to claimant's contention, the presence of the required tracings for the tests other than the MVV does not undercut the administrative law judge's finding that the MVV portion of the study was not in substantial compliance with the applicable quality standards. Claimant's Brief at 8; *see* 20 C.F.R. §718.103(b).

the specific exertional requirements of the miner's usual coal mine employment. *Id*. Accordingly, the administrative law judge found that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends that the administrative law judge erred in finding that the opinions of Drs. Sood and Fino did not establish total disability.[12] Specifically, claimant contends that the administrative law judge erred in not taking official notice of the exertional requirements of the miner's last coal mine job as set forth in the Dictionary of Occupational Titles. Claimant's Brief at 9-10. Claimant contends that the administrative law judge should have then compared the exertional requirements of the miner's job with the opinions of Drs. Sood and Fino. *Id*. at 10.

The administrative law judge found that the miner's last coal mining job was as a "supply and motor man and general laborer."[13] Decision and Order at 3. However, the administrative law judge found, and claimant does not contest, that the record contains no evidence regarding the exertional requirements of the miner's usual coal mine employment. *Id*. at 13. It is claimant's burden to establish the exertional requirements of the miner's usual coal mine employment. *Cregger v. U. S. Steel Corp.*, 6 BLR 1-1219, 1-1221 (1984). Moreover, claimant did not request that the administrative law judge take official notice of the Dictionary of Occupational Titles. Because claimant failed to make this request before the administrative law judge, the administrative law judge did not err in not taking official notice of the Dictionary of Occupational Titles.[14] *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal*

[12] Because claimant does not challenge the administrative law judge's decision to discount Dr. DelVecchio's opinion, the administrative law judge's credibility determination is affirmed. *See Skrack*, 7 BLR at 1-711.

[13] Substantial evidence supports the administrative law judge's determination that the miner's usual coal mine employment was as a "supply and motor man and general laborer." Decision and Order at 3. Claimant testified that the miner last worked as a general laborer and supply motor man, as stated in her application for benefits. Director's Exhibit 3; Hearing Transcript at 10. Moreover, a letter from Consolidation Coal Company reported that the miner worked in the position of "Motor/Supply" from 1979 to 1984 and from 1987 to 1992, and as "Gen. Labor" from 1970 to 1971, from 1972 to 1979, and in 1987. Director's Exhibit 4.

[14] Moreover, while the administrative law judge has the discretion to take official notice of the Dictionary of Occupational Titles, there is no requirement that he do so. *See* 29 C.F.R. §18.84; *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-138-139 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-2 (1989).

*Co.*, 9 BLR 1-73, 1-75 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984).

Claimant further argues that the administrative law judge erred in discounting the opinions of Drs. Sood and Fino. Claimant's Brief at 10. Specifically, claimant contends that Dr. Sood's opinion is well-reasoned, and that Dr. Sood properly "correlated the objective testing with the exertional requirements of [the miner's] past relevant coal mine employment." *Id.* at 12. Claimant further contends that Dr. Fino compared the miner's pulmonary impairment to the exertional requirements of his last coal mine employment. *Id*. at 13.

Contrary to claimant's arguments, the administrative law judge correctly noted that Dr. Sood stated that he was unaware of the exertional requirements of the miner's specific job. Decision and Order at 12; Claimant's Exhibit 1 at 10. The administrative law judge, therefore, permissibly found that Dr. Sood's opinion that the miner is totally disabled based upon the "median exertion level" required in coal mining jobs was based on generalities and not on the specific exertional requirements of the miner's usual coal mine employment. *See Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 12-13. Moreover, the administrative law judge permissibly discounted Dr. Fino's opinion that the miner was totally disabled from his last position of "motor/supply," because Dr. Fino failed to indicate his understanding of the exertional requirements of that position. *See Eagle v. Armco Inc.*, 943 F.2d 509, 512, 15 BLR 2-201, 2-205 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 183, 15 BLR 2-16, 2-21 (4th Cir. 1991); Decision and Order at 12. As claimant makes no other challenge to the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), that finding is affirmed. *See* 20 C.F.R. §802.211(b).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4).

**Death Due to Pneumoconiosis**

Where the Section 411(c)(3) and 411(c)(4) presumptions do not apply, *see* 30 U.S.C. §921(c)(3), (4), claimant must affirmatively establish that pneumoconiosis was the cause or was a substantially contributing cause of the miner's death. *See* 20 C.F.R. §§718.1, 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); *Bill Branch Coal*

*Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000), *citing Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992).

In considering whether the miner's death was due to pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Ranavaya and Sood.[15] Dr. Ranavaya opined that the miner's death was due to lung cancer that was "most probably caused" by cigarette smoking, and that the miner's death was unrelated to his coal mine dust exposure.[16] Employer's Exhibit 7. Conversely, Dr. Sood opined that the miner's legal pneumoconiosis (COPD) substantially contributed to his death because "COPD is a risk factor for lung cancer and for lung cancer mortality, and . . . the [miner's] death certificate lists lung cancer as the cause of death." Claimant's Exhibit 1.

The administrative law judge found Dr. Sood's opinion poorly reasoned, because Dr. Sood failed to adequately link the miner's COPD to his death. The administrative law judge determined that Dr. Sood instead relied upon "vague suggested correlation[s]," while failing to elaborate on how the studies he cited applied to the miner's specific situation. Decision and Order at 18. The administrative law judge, therefore, found that the medical opinion evidence did not establish that the miner's death was due to pneumoconiosis.

Claimant contends that the administrative law judge erred in finding that Dr. Sood's opinion did not establish that the miner's death was due to pneumoconiosis. We disagree. In his consideration of Dr. Sood's opinion, the administrative law judge noted that Dr. Sood, in opining that COPD was a substantially contributing cause of the miner's death, relied upon studies that he opined demonstrated that "COPD increased mortality in general." Decision and Order at 18. The administrative law judge, however, found that the doctor did not adequately connect "the medical literature's general conclusions about COPD mortality" to his conclusion in this case that COPD was a substantially contributing cause of the miner's death. *Id.* Substantial evidence supports this finding. The administrative law judge, therefore, permissibly determined that Dr. Sood's opinion regarding the cause of the miner's death was not sufficiently reasoned. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-263; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155

[15] The administrative law judge also considered the miner's death certificate, which was completed by Dr. Przybysz. Dr. Przybysz noted that the miner died from "metastatic non small cell lung cancer," and listed no contributory or underlying causes of the miner's death. Director's Exhibit 10.

[16] The administrative law judge discounted Dr. Ranavaya's opinion because the doctor did not address the effect, if any, of the miner's chronic obstructive pulmonary disease on his death. Decision and Order at 18.

(1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Consequently, we affirm the administrative law judge's determination that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b)(2).

As claimant did not invoke the Section 411(c)(4) presumption, and did not establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge