

U.S. Department of Labor

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



BRB No. 17-0321 BLA

FREDA BROCK ADAMS)	
(Widow of GILLUS ADAMS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JERICOL MINING, INCORPORATED)	
)	
and)	DATE ISSUED: 03/26/2018
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	
)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Freda Brock Adams, Loyall, Kentucky.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel,² the Decision and Order Denying Benefits (2015-BLA-05070) of Administrative Law Judge Adele Higgins Odegard 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 January 16, 2014.

The administrative law judge credited the miner with twenty years of underground coal mine employment, pursuant to the parties' stipulation. Decision and Order at 6. The administrative law judge further found that the evidence failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that the miner was totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(4) of the Act.³ 30 U.S.C. §921(c)(4) (2012). The administrative law judge 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.

Turning to whether claimant could affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge found that the medical opinion evidence did not establish the existence of legal pneumoconiosis⁴ pursuant

¹ Claimant is the widow of the miner, who died on August 27, 2013. Director's Exhibit 9.

² 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).

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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

⁴ "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).

to 20 C.F.R. §718.202(a)(4). The administrative law judge found, however, that the autopsy evidence established that the miner suffered from clinical pneumoconiosis⁵ pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge further found that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

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

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law.⁶ 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.⁷ See 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). A miner's death will be considered to be due to pneumoconiosis if

⁵ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *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).

⁶ The miner's coal mine employment was in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁷ Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), 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). Claimant cannot benefit from this provision, as the miner's two claims for benefits were denied. Director's Exhibit 1.

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, or the presumption set forth at 20 C.F.R. §718.305 is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4). 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).

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 21. We, therefore, affirm the administrative law judge's finding that claimant failed to establish invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

The Section 411(c)(4) Presumption—Total Disability

In considering whether the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge accurately found that the two pulmonary function studies of record were non-qualifying.⁸ Decision and Order at 10; Director's Exhibit 15 at 27, 31.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), she also found that of the three blood gas studies of record, two were non-qualifying, while the third study, although qualifying, could not establish total disability. Director's Exhibit 15 at 36; Claimant's Exhibits 1, 2. Specifically, the administrative law judge accurately noted that the qualifying blood gas study of July 17, 2013, was conducted during the miner's final hospitalization, which ended in his death.⁹ Decision and Order at 11; Claimant's Exhibit 2. The administrative law

⁸ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

⁹ The administrative law judge noted that the miner was admitted to the James H. Quillen VA Medical Center on July 14, 2013, for "progressive weakness, increasing frequency of falling, and decreased appetite" Decision and Order at 11, *quoting* Director's Exhibit 10 at 1. During that hospitalization, the qualifying blood gas study of July 17, 2013 was obtained. As was further summarized by the administrative law judge,

judge correctly applied 20 C.F.R. §718.105(d), which provides that “any such study shall be accompanied by a physician’s report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death.” The administrative law judge accurately found that no physician’s report accompanied the July 17, 2013 qualifying blood gas study. Decision and Order at 11 n.12. Therefore, she properly declined to rely on the July 17, 2013 blood gas study as evidence of total disability.¹⁰

Further, the administrative law judge accurately found that there is no evidence of cor pulmonale with right-sided congestive heart failure in the record pursuant to 20 C.F.R. §718.204(b)(2)(iii). Therefore, we affirm the administrative law judge’s findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Fino and Rosenberg. The administrative law judge noted that, based on a review of the miner’s medical records, Dr. Fino initially opined that the miner was totally disabled, based upon the qualifying blood gas study obtained on July 17, 2013, a month before his death. Decision and Order at 12; Employer’s Exhibit 9. However, when later deposed, Dr. Fino discounted this blood gas study because the miner was “sick . . . with other medical conditions” at that time. Employer’s Exhibit 10 at 11. Dr. Fino concluded that the miner had no ventilatory impairment and had mild hypoxemia based on a 2006 blood gas study, which had resolved by the time of a 2010 blood gas study. *Id.* The administrative law judge concluded that Dr. Fino’s opinion did not support a finding that the miner was totally disabled. Decision and Order at 14-15. The administrative law judge further considered Dr. Rosenberg’s opinion that the miner was not totally disabled at the time of death. Decision and Order at 15; Employer’s Exhibits 11, 12. Thus, we affirm, as supported by substantial evidence, the administrative law judge’s determination that the medical opinion evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

“the [m]iner was transferred to Hospice Care at the same Medical Center on July 20, 2013 and died on August 27, 2013, after a ‘progressive decline.’” *Id.*

¹⁰ Moreover, the administrative law judge noted Dr. Fino’s opinion that the results of the July 17, 2013 blood gas study were unreliable because the “[m]iner was ‘sick . . . with other medical conditions,’ notably, anaplastic metastatic carcinoma, at the time the test was administered.” Decision and Order at 14, *quoting* Employer’s Exhibit 10 at 10-11.

Because claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant was unable to invoke the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4).

Part 718 Entitlement

Where no statutory presumptions apply, claimant must establish 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); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Although claimant established that the miner had clinical pneumoconiosis arising out of coal mine employment, the administrative law judge found that she did not establish that the miner had legal pneumoconiosis. Decision and Order at 23.

Legal Pneumoconiosis

“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). A disease arising out of coal mine employment includes “any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b). The miner was diagnosed with emphysema, chronic obstructive pulmonary disease (COPD), and cancer that metastasized to his lungs. Director's Exhibits 10 at 1; 11 at 31; 14 at 25. A review of the record discloses no evidence that any of those diseases were related to the miner's coal mine dust exposure.¹¹ We therefore affirm the administrative law judge's finding that the medical evidence did not establish that the miner had legal pneumoconiosis.

Death Due to Pneumoconiosis

Where the Section 411(c)(3) and 411(c)(4) statutory presumptions do not apply, claimant must affirmatively establish that pneumoconiosis 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); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

¹¹ Drs. Fino and Caffrey specifically opined that the miner's cancer was unrelated to coal mine dust exposure. Employer's Exhibits 10 at 13; 13 at 4.

The administrative law judge found that there was no evidence that the miner's clinical pneumoconiosis played any role in his death due to metastatic cancer. Decision and Order at 29. Substantial evidence supports the administrative law judge's finding.

As summarized by the administrative law judge, the autopsy report prepared by Drs. Ratliff and Ganote listed several diagnoses, but did not specify which diseases caused or contributed to the miner's death.¹² Decision and Order at 28 n.24; Director's Exhibit 10 at 1, 5. Dr. Holladay completed the miner's death certificate, and listed "pulmonary neoplasms consistent with metabolic disease—unknown primary," as the immediate cause of death. Director's Exhibit 9. Dr. Holladay also listed "chronic renal disease, cardiovascular disease, [and] history [of] prostate cancer," as other significant conditions that contributed to the miner's death. *Id.* Drs. Fino, Rosenberg, and Caffrey each addressed the cause of the miner's death. None opined that the miner's death was related to his clinical pneumoconiosis or coal mine dust exposure.¹³ Employer's Exhibits 9-13. Thus, we affirm, as supported by substantial evidence, the administrative law

¹² The final anatomic diagnoses included anaplastic carcinoma that was metastatic to the lungs, liver, and mediastinum; mixed dust granulomas of the lungs; emphysema and fibrosis; and coronary arteriosclerosis. Director's Exhibit 10 at 1. The administrative law judge additionally noted, accurately, that Drs. Ratliff and Ganote did not specifically address whether the miner had either clinical or legal pneumoconiosis. *Id.* Her earlier finding that the autopsy evidence established that the miner had clinical pneumoconiosis was based on the autopsy review report of employer's physician, Dr. Caffrey. Decision and Order at 20-21; Employer's Exhibit 13.

¹³ Dr. Fino opined that the miner died from "metastatic cancer to the lungs" and that coal mine dust exposure played "no role in his death." Employer's Exhibit 9 at 12. Dr. Rosenberg opined that the miner's death was not "caused, hastened[,], or contributed to by his past coal mine employment." Employer's Exhibit 11 at 7. Dr. Caffrey reviewed the miner's autopsy report and slides, and opined that "the cause of death is the poorly differentiated anaplastic carcinoma . . . consistent with origin from the prostate. There is no cause and effect relationship between this and [the miner's] employment in the coal[]mining industry." Employer's Exhibit 13 at 4. Dr. Caffrey further opined that the miner's clinical pneumoconiosis "did not cause, contribute to[,], or hasten [the miner's] death." *Id.*

judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

As claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions, 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. *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