



BRB No. 18-0340 BLA

JESSIE HURST)	
(Widow of CLARENCE HURST))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 03/28/2019
)	
GATLIFF COAL COMPANY)	
)	
Employer-Respondent)	
)	
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 John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

Jessie Hurst, Siler, Kentucky.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for
employer.

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

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel,² the Decision and Order Denying Benefits (2013-BLA-05660) of Administrative Law Judge John P. Sellers, III, 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 June 25, 2012.

The administrative law judge accepted employer's concession that the miner had eighteen years of coal mine employment, but found that claimant did not invoke the Section 411(c)(4) presumption of death due to pneumoconiosis because she failed to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2). 30 U.S.C. §921(c)(4).³ Turning to whether claimant established entitlement to benefits without the presumption, the administrative law judge found that she did not establish clinical or legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.107, or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, he denied survivor's benefits.⁴

¹ Claimant is the widow of the miner, who died on June 13, 2010. 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 the miner's death was due to pneumoconiosis if claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because claimant failed to establish total disability, the administrative law judge found it unnecessary to consider whether the miner's coal mine employment was underground or aboveground. Decision and Order at 8.

⁴ Section 422(l) of the Act, 30 U.S.C. §932 (l) (2012), provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. Claimant cannot benefit from Section 422(l), however, as the miner's lifetime claims for benefits were denied. Director's Exhibit 1.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial. 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's decision if it is rational, supported by substantial evidence, and in accordance with applicable law.⁵ 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).

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by: qualifying⁶ pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). If the administrative law judge finds that total disability has been established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge correctly found there are no pulmonary function studies or arterial blood gas studies in evidence. Decision and Order at 8. Consequently, we affirm his finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Claimant also did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii) because there is no evidence of cor pulmonale with right-sided

⁵ Because the miner's coal mine employment was in Kentucky, 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 (1989) (en banc); Director's Exhibit 3.

⁶ A "qualifying" pulmonary function study or arterial 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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

congestive heart failure. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; Decision and Order at 9.

The administrative law judge also considered the medical opinions of Drs. Broudy and Vuskovich, together with the miner's treatment records.⁷ Decision and Order at 9. Drs. Broudy and Vuskovich opined that the miner did not have a disabling ventilatory or respiratory impairment. Employer's Exhibits 1-3. The miner's treatment records do not reference any respiratory or pulmonary impairment. Director's Exhibits 10, 11; Claimant's Exhibit 1. Because no physician concluded that the miner had a totally disabling pulmonary or respiratory impairment, we affirm the administrative law judge's finding the medical opinions and treatment records do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (en banc); Decision and Order at 9.

Because there are no objective tests in the record and none of the medical opinions or treatment records diagnose total disability, we also affirm the administrative law judge's finding that the weight of the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2).⁸ *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Fields*, 10 BLR at 1-21;

⁷ The administrative law judge considered the miner's treatment records from Dr. Moses dating from August 16, 2001 to March 6, 2009, Central Baptist Hospital dating from June 18, 1992 to September 22, 2009, and Corbin Pathology Services dating from April 1, 2009 to September 21, 2009. Director's Exhibits 10, 11; Claimant's Exhibit 1. They list various medical diagnoses, including chronic obstructive pulmonary disease (COPD), pneumoconiosis, bronchitis, and coronary disease. *Id.*

⁸ For purposes of invoking the Section 411(c)(4) presumption, 20 C.F.R. §718.305(b)(4) states, "In the case of a deceased miner . . . [a finding of total disability] must not be based solely upon the . . . testimony of any person who would be eligible for benefits . . . if the claim were approved." If this survivor's claim had been approved, claimant would be eligible for benefits; thus, the administrative law judge accurately stated that her testimony cannot form the sole basis of a total disability finding. Decision and Order at 9; 20 C.F.R. §718.305(b)(4). Error, if any, in also stating that this regulation applies equally to the miner's 2007 testimony from his miner's claim is harmless, as the administrative law judge considered the totality of the record, including the miner's testimony, and permissibly found total disability not established because there are no objective studies showing total disability and the only two medical opinions concluded either that the miner was not totally disabled or there is no evidence to support such a diagnosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and

Shedlock, 9 BLR at 1-198; Decision and Order at 9. As claimant has failed to prove total disability, we affirm the administrative law judge's finding that she did not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4).⁹ See 20 C.F.R. §718.305(b), (c)(2); Decision and Order at 9.

Entitlement Under 20 C.F.R. Part 718

In a survivor's claim where the Section 411(c)(3) and 411(c)(4) presumptions are not invoked, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused or was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause if it hastens the miner's death. 20 C.F.R. §718.205(b)(6). Failure to establish any one of the requisite elements of entitlement precludes an award of benefits. See *Trumbo*, 17 BLR at 1-87-88.

Cause of Death

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has explained that pneumoconiosis may be found to have hastened the miner's death only if it does so "through a specifically defined process that reduces the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). A physician who opines that pneumoconiosis hastened death through a "specifically defined process" must explain how and why it did so. *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04, 24 BLR 2-257, 2-266-267 (6th Cir. 2010).

Order at 2-7. The administrative law judge also noted that the miner's testimony regarding his physical limitations occurred in a claim in which the miner similarly did not establish total disability because none of the objective tests were qualifying and the only two credited medical opinions concluded he was not disabled at that time. Decision and Order at n.4.

⁹ Because there is no evidence that the miner had complicated pneumoconiosis, claimant cannot invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); see 20 C.F.R. §718.304.

The administrative law judge considered the miner's death certificate, signed by Coroner J. Andrew Croley, and the medical reports of Drs. Broudy and Vuskovich.¹⁰ Decision and Order at 11; Director's Exhibit 9; Employer's Exhibits 1, 2, 3. The death certificate lists the sole cause of the miner's death as adenocarcinoma of the duodenum. Director's Exhibit 9. Dr. Broudy opined that the miner did not have clinical or legal pneumoconiosis, and died from adenocarcinoma of the duodenum. Employer's Exhibits 1, 3. Dr. Vuskovich opined that neither coal workers' pneumoconiosis nor coal mine dust exposure caused, significantly contributed to, or substantially aggravated the miner's fatal duodenal cancer or his death. Employer's Exhibit 2. As substantial evidence supports the administrative law judge's conclusion that "the record is devoid of any medical opinion suggesting a link between the Miner's death and pneumoconiosis," it is affirmed. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Williams*, 338 F.3d at 518, 22 BLR at 2-655. We therefore affirm the administrative law judge's finding claimant did not meet her burden to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b).

In light of our affirmance of the administrative law judge's finding that the evidence does not establish the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim, we affirm the denial of survivor's benefits under 20 C.F.R. Part 718.¹¹ *Trumbo*, 17 BLR at 1-87-88.

¹⁰ The miner's treatment records reflect that he was diagnosed with COPD, bronchitis, pneumoconiosis, coronary disease, gastric outlet obstruction, and advanced duodenal carcinoma. Director's Exhibits 10, 11; Claimant's Exhibit 1. There are no statements in the treatment records describing a causal relationship between pneumoconiosis and the miner's death. *Id.*

¹¹ We, therefore, need not address the administrative law judge's consideration of whether the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Larioni*, 6 BLR at 1-1278; Decision and Order at 10-11.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge