

BRB No. 13-0532 BLA

NANCY L. BEVERLY)
(Widow of ROY M. BEVERLY))
)
Claimant-Petitioner)
)
v.)
)
CLINCHFIELD COAL)
COMPANY/PITTSTON COMPANY) DATE ISSUED: 05/19/2014
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of Decision and Order of Richard T. Stansell-Gamm,
Administrative Law Judge, United States Department of Labor.

Nancy L. Beverly, Clintwood, Virginia, *pro se*.¹

Timothy W. Gresham and John S. Honeycutt (Penn, Stuart & Eskridge),
Abingdon, Virginia, for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

¹ Ron Carson, 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 Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Claimant² appeals, without assistance of counsel, the Decision and Order (2011-BLA-5664) of Administrative Law Judge Richard T. Stansell-Gamm 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 claimant's request for modification of a survivor's claim filed on October 27, 2006.

In the initial decision, the administrative law judge accepted the parties' stipulation that the miner suffered from clinical pneumoconiosis. The administrative law judge, however, found that the evidence did not establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis. *N.L.B. [Beverly] v. Clinchfield Coal Co.*, BRB No. 09-0102 BLA (Aug. 28, 2009) (unpub.). The Board, therefore, affirmed the administrative law judge's denial of benefits. *Id.*

Claimant timely requested modification. Director's Exhibit 44. In a Decision and Order dated August 9, 2013, the administrative law judge credited the miner with at least fifteen years of qualifying coal mine employment,³ and found that the medical evidence established that the miner was totally disabled by a pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.⁴ 30 U.S.C.

² Claimant is the surviving spouse of the deceased miner who died on April 26, 2005. Director's Exhibit 8.

³ The record indicates that the miner's coal mine employment was in 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 (1989) (en banc).

⁴ 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 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). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the

§921(c)(4). The administrative law judge, however, found that employer rebutted the presumption. Accordingly, the administrative law judge denied benefits.

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

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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. 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,⁵ or the Section 411(c)(4) presumption 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 sole basis available for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR

regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

⁵ The administrative law judge found that there is no evidence of complicated pneumoconiosis and, therefore, found that claimant is not entitled to the Section 411(c)(3) 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; Decision and Order at 8.

2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

If the administrative law judge finds that claimant is entitled to invocation of the presumption of death due to pneumoconiosis at 20 C.F.R. §718.305, the Department's regulations provide that the burden of proof shifts to employer to establish rebuttal by establishing both that the miner did not have legal pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2)⁶ and clinical pneumoconiosis as defined in 20 C.F.R. §718.201(a)(1),⁷ or by establishing that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(2); *see also Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

The administrative law judge found that employer could not disprove the existence of clinical or legal pneumoconiosis. Consequently, the administrative law judge found that employer could not establish the first prong of rebuttal. Decision and Order at 33. The administrative law judge, therefore, next considered whether employer could establish rebuttal by demonstrating that the miner's death was not caused or hastened by pneumoconiosis.

In addressing the second prong of rebuttal, the administrative law judge considered the opinions of Drs. Shamiyeh, Bluemink, Miller, Naeye, Caffrey, Hippensteel and Castle. Dr. Shamiyeh completed the miner's death certificate, listing the miner's cause of death as lung cancer, due to chronic obstructive pulmonary disease (COPD), coal workers' pneumoconiosis, and coronary artery disease. Director's Exhibit 8. In a letter dated March 26, 2007, Dr. Shamiyeh stated that:

[The miner] died . . . because of lung cancer with metastasis. He had a history for COPD, coal worker's pneumoconiosis and coronary artery disease. I do think that his death was related to his coal worker's pneumoconiosis, which contributed to his problem.

Director's Exhibit 11.

⁶ "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).

⁷ "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Dr. Bluemink, the autopsy prosector, diagnosed carcinoma of the lung, atherosclerotic heart disease, coal workers' pneumoconiosis, emphysema, bronchopneumonia, diabetes, and arthritis. Director's Exhibit 9. Although Dr. Bluemink did not directly address the cause of the miner's death, he noted that "the final medical complication which compromised [the miner's] ability to survive was the bronchopneumonia." *Id.*

Dr. Miller, a treating physician, opined that the miner died "due to metastatic lung carcinoma complicating chronic obstructive lung disease, [c]oal [w]orker's pneumoconiosis and coronary artery disease." Director's Exhibit 11. Dr. Miller noted that "[b]ecause of his severe shortness of breath associated with his [c]oal [w]orker's pneumoconiosis, [the miner] was quite symptomatic throughout the terminal course of his disease and it was difficult for him to tolerate the chemotherapy which we tried to give him." *Id.* Dr. Miller further stated that:

My chart notes indicate that [the miner] became progressively weaker with increased difficulty breathing and coughing. I am sure that his [c]oal [w]orker's pneumoconiosis contributed to these symptoms and made it harder for him to tolerate his adenocarcinoma of the lung which had occurred in the same area as his Coal Worker's pneumoconiosis.

Director's Exhibit 11.

Dr. Naeye reviewed the miner's autopsy slides, and opined that:

Findings of only very mild, simple coal worker's pneumoconiosis (CWP) are present in the lungs of [the miner]. [Coal workers' pneumoconiosis] lesions occupy far too little lung tissue to have had any measureable effects on his lung functions. They certainly did not have any role in causing disability nor did they contribute in any way to death. The paucity of very tiny, birefringent crystals of toxic silica in his lung tissues indicates that the mine dust to which he was exposed had very low if any toxic silica crystals in it. Lung cancer, the consequence of many years of cigarette smoking, was the cause of this man's death. Coal mine dust, in the absence of large numbers of toxic silica crystals[,] is not carcinogenic.

Director's Exhibit 10.

Drs. Caffrey, Hippensteel and Castle each opined that the miner's death was due to lung cancer, and that coal worker's pneumoconiosis played no role in his death. Director's Exhibits 31, 32; Employer's Exhibit 3.

After noting that all of the physicians agreed that the direct cause of the miner's death was metastatic lung cancer, the administrative law judge considered whether employer established that the miner's lung cancer was not attributable to his coal mine dust exposure. The administrative law judge stated that, while Dr. Miller implied that the miner's clinical pneumoconiosis caused, or facilitated, the development of his lung cancer,⁸ Drs. Caffrey, Hippensteel, and Castle opined that the miner's lung cancer was not attributable to his coal mine dust exposure. Decision and Order at 34. The administrative law judge found that the opinions of Drs. Caffrey and Hippensteel were better reasoned than that of Dr. Miller, noting that they explained how the co-location of the miner's pneumoconiosis and lung cancer did not establish a causal relationship. *Id.* at 34-35. The administrative law judge also found that Drs. Caffrey and Hippensteel explained that their opinions, that the miner's lung cancer was not due to coal mine dust exposure, were supported by the fact that the lung tissue slides contained no evidence of silicosis. *Id.* The administrative law judge also found that Drs. Caffrey, Hippensteel, and Castle supported their opinions with medical studies demonstrating the absence of a connection between lung cancer and coal mine dust exposure. *Id.* In weighing the conflicting medical opinion evidence, the administrative law judge permissibly credited the opinions of Drs. Caffrey, Hippensteel and Castle, that the miner's lung cancer was not attributable to his coal mine dust exposure, over that of Dr. Miller, because he found that they were better reasoned. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). We, therefore, affirm the administrative law judge's determination that employer established that the miner's lung cancer, the direct cause of his death, was not due to his coal mine dust exposure.

The administrative law judge next addressed whether employer established that the miner's clinical pneumoconiosis played no part in causing the miner's death. The administrative law judge permissibly determined that the opinions of Drs. Shamiyeh and Miller, that the miner's clinical pneumoconiosis contributed to his death, were not sufficiently reasoned.⁹ See *Hicks*, 138 F.3d 524 at 533, 21 BLR at 2-335; *Akers*, 131 F.3d

⁸ Dr. Miller stated that the original pathology specimen from June of 1992 revealed that the miner's carcinoma was associated with fibrosis and contained anthracotic pigment diagnostic of coal workers' pneumoconiosis. Director's Exhibit 11. Dr. Miller observed that the miner "had recurrent cancer in the same area on June 18, 2004," with a pathologist indicating that the carcinoma had arisen in an area of coal workers' pneumoconiosis. *Id.*

⁹ The administrative law judge found that Dr. Shamiyeh did not provide any explanation for his opinion that the miner's death was due, in part, to his clinical pneumoconiosis. Decision and Order at 36. The administrative law judge found that, Dr.

at 441, 21 BLR at 2-275-76. Conversely, the administrative law judge found that Drs. Naeye, Caffrey, Hippensteel and Castle persuasively explained that the miner's clinical pneumoconiosis was too mild to have played any role in his death. *Id.*; Director's Exhibits 10, 32; Employer's Exhibit 3. The administrative law judge permissibly found that their opinions were well-reasoned, and sufficient to establish that the miner's clinical pneumoconiosis did not contribute to, or hasten, his death. *Id.* Because it is supported by substantial evidence, this finding is affirmed.

Although the administrative law judge found that employer proved that no part of the miner's death was caused by clinical pneumoconiosis, the regulations promulgated subsequent to the administrative law judge's decision make clear that an employer, in order to establish rebuttal, must establish that "no part of the miner's death was caused by *pneumoconiosis as defined in 20 C.F.R. §718.201.*" 20 C.F.R. §718.305(d)(2) (emphasis added). Section 718.201 encompasses both clinical and legal pneumoconiosis. 20 C.F.R. §718.201(a)(1), (2). In this case, the administrative law judge found that the preponderance of the pathology evidence was positive for the presence of legal pneumoconiosis, specifically finding that "Dr. Caffrey's observation of some focal emphysema associated with coal dust macules support[ed] a finding of legal pneumoconiosis." Decision and Order at 33. Because the administrative law judge has not addressed whether employer has established that no part of the miner's death was caused by his legal pneumoconiosis, we vacate his determination that employer established rebuttal of the Section 411(c)(4) presumption, and remand the case for further consideration. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Miller, in suggesting that shortness of breath caused by clinical pneumoconiosis may have contributed to the miner's death, by interfering with his chemotherapy, failed to discuss the severity of the miner's clinical pneumoconiosis, or explain why it was of such severity as to cause a significant pulmonary impairment. *Id.* The administrative law judge also found that Dr. Miller, in attributing the miner's breathing problems to his clinical pneumoconiosis, did not address the role of the miner's cancer and other pulmonary diseases. *Id.*

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge