



BRB No. 17-0445 BLA

LEAH H. SHAW )  
(Widow of HAROLD D. SHAW) )  
 )  
 Claimant-Petitioner )

v. )

DATE ISSUED: 05/16/2018

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
 Respondent )

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta,  
Administrative Law Judge, United States Department of Labor.

Leah H. Shaw, Bellefonte, Pennsylvania.

Rita Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher,  
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, Chief Administrative Appeals Judge, BOGGS and  
GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2006-BLA-5100) of Administrative Law Judge Natalie A. Appetta, rendered on a survivor's claim filed on October 28, 2004, 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, at most, thirteen years of coal mine employment and accepted the concession by the Director, Office of Workers' Compensation Programs (the Director), that the miner had clinical pneumoconiosis<sup>2</sup> arising from his coal mine employment. However, the administrative law judge further found that claimant was not entitled to the irrebuttable presumption of death due to pneumoconiosis set forth at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and did not otherwise establish that the miner's death was due to pneumoconiosis. Accordingly, she denied benefits.<sup>3</sup>

On appeal, claimant generally challenges the administrative law judge's decision to deny benefits. The Director responds, urging affirmance of the denial.

In an appeal filed by a claimant without the assistance of counsel,<sup>4</sup> the Board considers the issue to be whether the Decision and Order below is supported by substantial

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<sup>1</sup> Claimant is the widow of the miner, who died on April 15, 2004. Director's Exhibit 9. The miner filed a federal black lung claim during his lifetime that was finally denied. Director's Exhibit 2. Accordingly, claimant is not entitled to automatic survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012).

<sup>2</sup> 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

<sup>3</sup> The administrative law judge correctly determined, based on her finding of less than fifteen years of coal mine employment and the filing date of the claim, that claimant could not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(a), (b)(1)(i); Decision and Order at 10.

<sup>4</sup> At the hearing, the administrative law judge properly informed claimant of her right to be represented by an attorney of her choice, without charge to her. 20 C.F.R. §725.362(b); *Shapell v. Director, OWCP*, 7 BLR 1-304, 1-307 (1984); Hearing Transcript

evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are rational and are in accordance with applicable law.<sup>5</sup> 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).

### **I. Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis**

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yielded one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yielded massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

In this case, the administrative law judge considered Dr. Solic’s report of an examination of the miner on September 14, 2001, which appears in the miner’s treatment records. Decision and Order at 12-13; Claimant’s Exhibit 1. Dr. Solic noted that the miner’s chest x-ray showed a density above the left hilum and stated, “[I] question whether this is a large opacity of pneumoconiosis or whether it could be some other etiology.” Claimant’s Exhibit 1. He recommended a CT scan and other follow-up to clarify the nature of the density observed on x-ray. *Id.* The administrative law judge accurately determined, however, that “[s]ubsequent treatment records, including x-rays, CT scans, a biopsy, and chemotherapy treatment records demonstrate that this opacity was caused by lung cancer rather than pneumoconiosis.” Decision and Order at 15. We therefore affirm the administrative law judge’s finding that claimant failed to invoke the irrebuttable presumption that the miner’s death was due to pneumoconiosis, as it is rational and supported by substantial evidence. 20 C.F.R. §718.304; *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc); *Truitt v. North American Coal Corp.*, 2 BLR

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at 5-10. Moreover, the administrative law judge conducted a thorough examination of claimant, eliciting testimony on the elements of entitlement in the survivor’s claim. Hearing Transcript at 23-31. Accordingly, the administrative law judge complied with the requirements of 20 C.F.R. §725.362(b) in conducting the hearing. *Shapell*, 7 BLR at 1-307.

<sup>5</sup> Because the miner’s coal mine employment was in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 6.

1-199, 1-203-04 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980); Decision and Order at 15.

## **II. Establishing Entitlement Without Benefit of the Statutory Presumptions**

In a survivor's claim where the Section 411(c)(3) and Section 411(c)(4) statutory presumptions are not invoked, a claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that pneumoconiosis caused or was a substantially contributing cause of the miner's death. *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). 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 Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989).

### **A. The Existence of Legal Pneumoconiosis**

The administrative law judge considered whether claimant established the existence of legal pneumoconiosis<sup>6</sup> based on his weighing of the miner's treatment records, Dr. Sherman's medical opinion, and claimant's submission of a print-out of a web page containing the statement that "coal dust exposure is one of the causes of lung cancer." Decision and Order at 12-15; Director's Exhibits 10-14, 75; Claimant's Exhibit 3. The administrative law judge acted within her discretion in discrediting the web page statement provided by claimant, as there is no accompanying rationale or any evidence from which she could conclude that the information on the web page was reliable. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); Decision and Order at 15-16. Moreover, the administrative law judge permissibly accorded greater weight to Dr. Sherman's conclusion that the miner did not have legal pneumoconiosis, based on his status as a Board-certified pulmonologist; his thorough explanation of "why he currently excludes lung cancer from the definition of legal pneumoconiosis;" and his citation of medical literature in support of his view. Decision and Order at 15-16; *see Lango v. Director, OWCP*, 104 F.3d 573, 577-78, 21 BLR 2-12, 2-20-21 (3d Cir. 1997).

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<sup>6</sup> Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." The regulation further provides that this definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). We address legal pneumoconiosis, despite the concession by the Director, Office of Workers' Compensation Programs, that the miner had clinical pneumoconiosis arising out of coal mine employment, because it is relevant to the administrative law judge's consideration of death causation at 20 C.F.R. §718.205(b).

We therefore affirm the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a).

### **B. Death Due to Pneumoconiosis**

The evidence relevant to the cause of the miner's death consists of a death certificate, prepared by Dr. Ford, and the medical report of Dr. Sherman. Dr. Ford identified lung cancer as the sole cause of the miner's death, listing no other conditions or causes on the death certificate. Director's Exhibit 9. Dr. Sherman reviewed the death certificate and the miner's medical records and concluded that the miner's death was caused by lung cancer. Director's Exhibit 75. Dr. Sherman further indicated that there was no evidence that pneumoconiosis contributed to the miner's death and that there is no medical literature supporting the existence of a causal connection between coal mine dust exposure and lung cancer. *Id.*

We therefore affirm the administrative law judge's determination that because "no physicians opined that [] pneumoconiosis was a substantially contributing cause of the miner's death," claimant did not satisfy her burden to establish death due to pneumoconiosis under 20 C.F.R. §718.205(b). Decision and Order at 18-19; *see Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-108. Specifically, the administrative law judge considered the death certificate and rationally determined that it did not constitute a reasoned medical opinion because Dr. Ford did not provide any explanation for his identification of lung cancer as the sole cause of the miner's death. *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order at 18. Regarding Dr. Sherman's opinion that clinical pneumoconiosis did not cause or hasten the miner's death, the administrative law judge accorded it controlling weight. Decision and Order at 18. We affirm this finding as rational and supported by substantial evidence. *See Lango*, 104 F.3d at 577-78, 21 BLR at 2-20-21. The administrative law judge correctly observed that Dr. Sherman identified "several factors that demonstrate that the miner's pneumoconiosis did not affect his cancer treatments," including that the miner's chemotherapy was not "held or modified" due to the presence of clinical pneumoconiosis. Decision and Order at 18; Director's Exhibit 75. The administrative law judge also noted accurately that Dr. Sherman explained that the miner's normal blood gas study results and ability "to continue his usual activities well into his course of chemotherapy," established that clinical pneumoconiosis did not cause a pulmonary impairment that contributed to the miner's death from lung cancer. *Id.*

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