

BRB No. 12-0149 BLA

BERTHA WEST)
(Widow of JAMES WEST))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 11/19/2012
)
 QUICK SILVER MINING,)
 INCORPORATED)
)
 and)
)
 KENTUCKY COAL PRODUCERS SELF-)
 INSURANCE FUND)
)
 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 on Remand Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for claimant.

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand Denying Benefits (07-BLA-5714) 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 (Supp. 2011) (the Act). This case, involving a survivor's claim filed on June 29, 2006, is before the Board for the second time.

In the initial decision, Administrative Law Judge Donald W. Mosser credited the miner with seventeen years of coal mine employment,² and found that the weight of the evidence established the existence of simple clinical pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a)(1), (4). Judge Mosser also found that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), which employer did not rebut. However, Judge Mosser found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Mosser denied benefits.

In considering claimant's appeal, the Board noted that Congress had recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he had a totally disabling respiratory impairment, there will be a rebuttable presumption that his death was due to pneumoconiosis.⁴ 30 U.S.C. §921(c)(4), *amended by Pub. L.*

¹ Claimant is the widow of the miner, who died on April 26, 2006. Director's Exhibit 11; Hearing Transcript at 10.

² The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. 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).

³ Clinical pneumoconiosis is defined as "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).

⁴ Section 1556 of Public Law No. 111-148 also reinstated Section 422(l) of the Act, 30 U.S.C. §932(l), providing that a survivor is automatically entitled to benefits if

No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

In light of the potential applicability of the Section 411(c)(4) presumption, the Board vacated Judge Mosser's denial of benefits, and remanded the case for further consideration.⁵ *West v. Quick Silver Mining, Inc.*, BRB No. 09-0680 BLA (June 14, 2010) (unpub.). The Board instructed Judge Mosser, on remand, to determine whether claimant was entitled to invocation of the Section 411(c)(4) presumption. *Id.*

On remand, because Judge Mosser was unavailable, the case was reassigned, without objection, to Administrative Law Judge John P. Sellers, III, (the administrative law judge).⁶ The administrative law judge found that claimant did not establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant failed to invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge also found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, found that claimant was not entitled to benefits under 20 C.F.R. Part 718.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish that the miner had a totally disabling respiratory impairment and, therefore, erred in finding that claimant did not invoke the Section 411(c)(4) presumption. 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 pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the

the miner was determined to be eligible to receive benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's claims for benefits were denied. Director's Exhibit 1.

⁵ The Board affirmed, as unchallenged on appeal, the administrative law judge's finding of seventeen years of coal mine employment. *West v. Quick Silver Mining, Inc.*, BRB No. 09-0680 BLA (June 14, 2010) (unpub.), slip op. at 2 n.3.

⁶ On remand, the administrative law judge reopened the record so that the parties could submit additional evidence in response to the change in the law. The parties submitted additional evidence, which the administrative law judge admitted into the record, with the exception of an x-ray reading submitted by claimant that the administrative law judge found to be in excess of the evidentiary limitations at 20 C.F.R. §725.414. Decision and Order on Remand at 2-3.

administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive 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'Keefe 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(c); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). If the Section 411(c)(4) presumption is invoked and is not rebutted, a miner's death will be considered to be due to pneumoconiosis. See 30 U.S.C. §921(c)(4). Alternatively, 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, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c); *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04, 24 BLR 2-257, 2-266-67 (6th Cir. 2010).

Claimant initially contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv),⁷ and therefore erred in finding that claimant did not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge considered the medical opinions of Drs. Baker, Simpao, Dahhan, and Fino regarding whether the miner was totally disabled.

In a medical report dated February 23, 2004, Dr. Baker reported that the miner's pulmonary function study was "normal," and that his blood gas study reflected "mild" hypoxemia. Claimant's Exhibit 2. In a supplemental report, Dr. Baker specified that the miner had "the respiratory [capacity] to perform the work of a coal miner or comparable work in a dust free environment. This is based on normal pulmonary function studies and mild resting arterial hypoxemia. . . ." Claimant's Exhibit 3. Approximately four months after Dr. Baker's examination, Dr. Simpao examined and tested the miner on June 14,

⁷ Claimant does not challenge 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). Those findings are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

2004. Dr. Simpao reported that the miner's pulmonary function study reflected a "moderate" restrictive and obstructive impairment, and that his blood gas study was "normal." Claimant's Exhibit 4 at 3. Dr. Simpao checked "No," in response to the question of whether the miner had the respiratory capacity to perform his usual coal mine employment. Claimant's Exhibit 4 at 4. Drs. Dahhan and Fino reviewed the miner's medical treatment records, and reported that those records contained no valid objective studies that could be used to assess the miner's lung function. Director's Exhibits 21, 22.

Comparing the opinions of Drs. Baker and Simpao, the administrative law judge found that Dr. Simpao's failure to explain his diagnosis of total disability "detract[ed] from the force of his opinion." Decision and Order on Remand at 14. Further, the administrative law judge found that Dr. Baker's opinion, that the miner was not totally disabled, was "essentially contemporaneous," and he determined that Dr. Baker was more highly qualified, in view of his Board-certifications in Internal Medicine and Pulmonary Disease, whereas Dr. Simpao's qualifications were not of record. *Id.* The administrative law judge therefore determined that Dr. Simpao's opinion did not establish that the miner was totally disabled.

Claimant contends that Dr. Simpao's opinion is well-reasoned, and should not have been rejected for the reasons the administrative law judge provided. Claimant's Brief at 4. We disagree. The administrative law judge acted within his discretion in discounting Dr. Simpao's opinion as inadequately explained, and in finding that Dr. Simpao's opinion was outweighed by the contrary opinion of Dr. Baker, in view of Dr. Baker's documented qualifications. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 14. We, therefore, affirm 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). In light of our affirmance of 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)-(iv), we affirm his determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Next, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge considered the miner's death certificate, a letter from Dr. Harper, who treated the miner for the last two months of his life, and the medical opinions of Drs. Dahhan and Fino.⁸ On the death certificate, Dr. Harper identified the immediate cause of death as "acute myelogenous leukemia," and

⁸ The opinions of Drs. Simpao and Baker did not address the cause of the miner's death. Claimant's Exhibits 2-4.

listed no other causes or conditions. Director's Exhibit 11. In a July 24, 2006 letter "To Whom It May Concern," Dr. Harper stated that, because of the miner's "comorbidities," including coronary artery disease and obstructive lung disease,⁹ he did not receive "induction chemotherapy." Director's Exhibit 13. Dr. Harper concluded that the miner "died from complications of neutropenic fever of pulmonary origin." *Id.* Drs. Dahhan and Fino opined that the miner's death was unrelated to pneumoconiosis or coal mine dust exposure. Director's Exhibits 21, 22.

The administrative law judge found that there was no evidence that the miner's death was caused or hastened by his pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). Decision and Order on Remand at 17. Substantial evidence supports the administrative law judge's determination. Therefore, claimant's argument that "it appears that Judge Sellers may have 'selectively analyzed' the medical evidence," lacks merit. Claimant's Brief at 5. Thus, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to or hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Conley*, 595 F.3d at 303-04, 24 BLR at 2-266-67; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 517-18, 22 BLR 2-625, 2-654-65 (6th Cir. 2003). We, therefore, affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.

⁹ Dr. Harper did not discuss the etiology of the miner's obstructive lung disease. Director's Exhibit 13; *see* 20 C.F.R. §718.201(a)(2).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge