

BRB No. 12-0029 BLA

EDITH L. FREE)	
(Widow of WILLIAM E. FREE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PITTSBURG & MIDWAY COAL MINING)	
COMPANY)	DATE ISSUED: 10/12/2012
)	
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 on Remand and the Denial of Motion for Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Keith A. Utley (Morton Law LLC), Henderson, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and the Denial of Motion for Reconsideration (2008-BLA-05059) of Administrative Law Judge Daniel F. Solomon denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case,

involving a survivor's claim filed on December 18, 2006, is before the Board for the second time.¹

In his original decision, the administrative law judge credited the miner with at least thirty-eight years of coal mine employment,² and found that the x-ray evidence established that the miner suffered from clinical pneumoconiosis³ pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge further found that the medical opinion evidence did not establish that the miner suffered from legal pneumoconiosis⁴ pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the administrative law judge 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), and he determined that employer did not rebut that presumption. However, the administrative law judge 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, the administrative law judge 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

¹ Claimant is the widow of the miner, who died on October 18, 2006. Director's Exhibit 13.

² 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 Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 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).

that his death was due to pneumoconiosis.⁵ 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be 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 the administrative law judge's denial of benefits, and remanded the case for further consideration. *Free v. Pittsburg & Midway Coal Mining Co.*, BRB No. 10-0334 BLA (Feb. 23, 2011)(unpub.). The Board instructed the administrative law judge, on remand, to determine whether claimant was entitled to invocation of the Section 411(c)(4) presumption and, if so, whether employer rebutted the presumption. *Id.*

On remand,⁶ the administrative law judge found that the evidence did not establish that the miner had a totally disabling respiratory 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 reiterated his prior findings that the x-ray evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge 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.

Claimant moved for reconsideration, attaching a brief that she contended she had timely filed in response to the administrative law judge's Order on remand, directing the parties to file briefs addressing whether the miner was totally disabled. In that brief, claimant argued that the evidence established that the miner was totally disabled by a

⁵ Section 1556 of Public Law No. 111-148 also revived Section 422(l) of the Act, 30 U.S.C. §932(l), providing that a survivor is automatically entitled to benefits if 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 claim for benefits was denied. Unmarked Exhibit.

⁶ By Order dated June 28, 2011, the administrative law judge directed the parties to file briefs by July 29, 2011, addressing whether the miner was totally disabled by a respiratory or pulmonary impairment. In his Decision and Order on Remand, issued on August 18, 2011, the administrative law judge stated that only employer filed a brief. Decision and Order on Remand at 2.

respiratory or pulmonary impairment. On reconsideration, the administrative law judge determined that claimant's brief was untimely filed. Alternatively, he found that, even if claimant's brief were timely, claimant failed to establish that the miner had a totally disabling respiratory impairment. Denial of Motion for Reconsideration at 2-3. Accordingly, the administrative law judge denied benefits.

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 she 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, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, claimant reiterates her previous contentions.

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 (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, 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, 24 BLR 2-257 (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 determining that claimant did not

⁷ Claimant does not challenge the administrative law judge's findings that she did not establish total disability based on pulmonary function studies or arterial blood gas studies pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), or by establishing that the miner had cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R.

invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Claimant specifically contends that the administrative law judge erred in determining that the opinion of Dr. Sparks did not support a finding of total disability, when Dr. Sparks testified that the miner experienced shortness of breath, was immobile, and at times needed oxygen after he moved into a nursing home in July 2004. Claimant's Brief at 2-4; Claimant's Reply Brief at 1. Claimant argues further that the administrative law judge erred, because it can be inferred from the medical treatment records of Drs. Simpao and McGhee that the miner suffered from a totally disabling respiratory impairment. We disagree. The administrative law judge accurately noted that no physician opined that the miner was totally disabled from a respiratory standpoint during his lifetime. The administrative law judge further noted that no physician made an assessment of the miner's impairment that the administrative law judge could compare with the exertional requirements of the miner's usual coal mine employment, in order to determine whether the impairment rendered the miner totally disabled. *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir. 1996); Decision and Order at 3-4.

Moreover, we reject claimant's assertion that the administrative law judge erred in finding that her testimony, and that of the miner's son, did not establish total disability.⁸ Lay testimony on the issue of total disability may be sufficient to establish that the miner was totally disabled only if there is no medical evidence on the issue. *See* 20 C.F.R. §718.204(d)(3). As claimant raises no other contentions of error regarding the medical opinion evidence, we affirm the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Accordingly, we affirm the administrative law judge's finding that claimant failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Therefore, we also affirm the administrative law judge's 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). Dr. Sparks opined that the miner died of a "CVA" and prostate

§718.204(b)(2)(iii). Decision and Order on Remand at 3. Accordingly, we affirm those findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁸ Claimant and her son testified that the miner coughed and wheezed, was short of breath, and was given oxygen after he moved to a nursing home. Hearing Transcript at 17-24, 38-43.

cancer. Claimant's Exhibit 1, Deposition at 32. Dr. Sparks further opined that pneumoconiosis⁹ hastened the miner's death because the miner's lung condition weakened him and caused shortness of breath, which in turn contributed to the miner's immobility. Dr. Sparks opined that the miner's "immobility is what killed him, as it kills a lot of people, and it was multifactorial." Claimant's Exhibit 1, Deposition at 48-49. Dr. Simpao opined that the miner's pneumoconiosis hastened his death by leaving him in a weakened state that prevented him from regaining "functional capacity" after he had a stroke. Director's Exhibit 18 at 2-3. Dr. Selby opined that the miner did not have pneumoconiosis and therefore, it did not hasten his death. Dr. Selby stated further that the miner's multiple illnesses in his final years were unrelated to coal mine dust exposure. Employer's Exhibit 1.

The administrative law judge discounted Dr. Sparks's opinion that legal pneumoconiosis weakened the miner and hastened his death, because he found that claimant failed to establish the existence of legal pneumoconiosis.¹⁰ Further, the administrative law judge incorporated the reasoning from his original decision, in which he discredited the opinions of Drs. Sparks and Simpao, because the physicians did not explain how, or to what extent, the miner's pneumoconiosis hastened his death by an "estimable time." See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); Decision and Order on Remand at 4; 2010 Decision and Order at 17.

Claimant argues that the administrative law judge erred in discounting Dr. Spark's death causation opinion on the ground that claimant did not establish that the miner had legal pneumoconiosis, when Dr. Sparks clearly diagnosed the miner with legal pneumoconiosis. Claimant's Brief at 2-3; Claimant's Reply Brief at 2-4. Claimant, however, has not alleged any error in the administrative law judge's reiterated determination that Dr. Sparks's diagnosis of legal pneumoconiosis was not well-reasoned, because Dr. Sparks did not consider the miner's smoking history, and because it was unclear whether Dr. Sparks based his conclusions on objective evidence or merely reiterated diagnoses that were listed by earlier treating physicians in the miner's records.

⁹ Dr. Sparks opined that the miner had clinical pneumoconiosis, and legal pneumoconiosis, in the form of chronic obstructive pulmonary disease caused or aggravated by coal mine dust exposure. Claimant's Exhibit 1.

¹⁰ In so finding, the administrative law judge relied on his analysis in his original decision, in which he determined that claimant failed to establish the existence of legal pneumoconiosis, because he found that the opinions of Drs. Sparks and Simpao, that the miner had legal pneumoconiosis, were not well-reasoned. Decision and Order on Remand at 4; 2010 Decision and Order at 15.

Decision and Order on Remand at 4; 2010 Decision and Order at 15. That credibility determination is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Therefore, we reject claimant's contention that the administrative law judge erred in discounting Dr. Spark's death causation opinion to the extent it was based on Dr. Spark's conclusion that the miner suffered from legal pneumoconiosis.

Claimant argues further that the administrative law judge erred in discounting the opinions of Drs. Sparks and Simpao that pneumoconiosis hastened the miner's death. We disagree. As the administrative law judge noted, pneumoconiosis hastens a miner's death only if it does so through a specifically defined process that reduces the miner's life by an estimable time. *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Merely asserting that pneumoconiosis weakened the miner and made the miner less resistant to some other trauma or condition is insufficient to establish that pneumoconiosis hastened death. *See Conley*, 595 F.3d at 303-04, 24 BLR at 2-266-67; *Williams*, 338 F.3d at 517-18, 22 BLR at 2-654-55. Here, the administrative law judge reasonably discounted the opinions of Drs. Sparks and Simpao, because neither physician specifically explained how, or to what extent, pneumoconiosis hastened the miner's death by an estimable time. *See Conley*, 595 F.3d at 303, 24 BLR at 2-266-67; *Williams*, 338 F.3d at 517-18, 22 BLR at 2-655. Therefore, we affirm the administrative law judge's finding that claimant failed to establish that pneumoconiosis caused or contributed to the miner's death, pursuant to 20 C.F.R. §718.205(c).

In light of our affirmance of the finding that claimant failed to establish that the miner's death was due to pneumoconiosis, an essential element in a survivor's claim, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

Accordingly, the administrative law judge's Decision and Order on Remand and Denial of Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge