BRB No. 13-0008 BLA

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| ORLENA DAVIS<br>(On behalf of EWELL DAVIS)<br><br>Claimant-Petitioner<br><br>v.<br><br>LESLIE COAL/ROBERT COAL COMPANY<br><br>and<br><br>OLD REPUBLIC INSURANCE COMPANY<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 09/26/2013<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Subsequent Claim Denying Benefits of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Subsequent Claim Denying Benefits (2010-BLA-05697) of Administrative Law Judge Stephen M. Reilly, rendered on a

miner's subsequent claim, filed on November 3, 2005,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Adjudicating this claim pursuant to the regulations contained in 20 C.F.R. Part 718, the administrative law judge credited claimant with 14.82 months of coal mine employment and determined, based on employer's stipulation, that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge also determined that the rebuttable presumption of total disability due to pneumoconiosis, set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), is not applicable in this case, as the miner had less than fifteen years of coal mine employment.[2] The administrative law judge further found that claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant alleges that the administrative law judge did not apply the law of the appropriate United States Court of Appeals in finding that claimant did not establish the existence of legal pneumoconiosis or total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response unless specifically requested to do so by the Board.[3]

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[1] Claimant is the widow of Ewell Davis, the deceased miner, and she is pursuing the miner's subsequent claim on behalf of his estate. Director's Exhibits 3, 73. The miner's initial claim was filed on April 17, 1981, and was denied by the district director on June 19, 1981, as the miner did not establish the existence of pneumoconiosis or that he was totally disabled. Director's Exhibit 1. Regarding the subsequent claim, which is the subject of this appeal, the district director issued a Proposed Decision and Order awarding benefits on June 8, 2006, and employer requested a hearing. Director's Exhibits 20, 25. The miner died on February 14, 2009, while the case was pending before the Office of Administrative Law Judges. Director's Exhibit 73.

[2] Relevant to this 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 Section 411(c)(4), if a miner 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 establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 14.82 months of underground coal mine employment, that the

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant asserts that, because the miner worked in West Virginia and Kentucky, the administrative law judge could have properly applied the law of the United States Court of Appeals for the Fourth Circuit or the United States Court of Appeals for the Sixth Circuit.[4] With respect to the issue of total disability causation, claimant contends that the administrative law judge should have used the standard set forth by the Fourth Circuit in *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006) and *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), which merely requires proof that pneumoconiosis was at least a contributing cause of the miner's totally disabling respiratory impairment. Claimant further alleges that Dr. Rasmussen's opinion is sufficient to meet this standard.

Claimant's arguments initially raise the issues of the proper standard to be used in determining whether claimant established that the miner in this case was totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c) and which circuit's laws apply. The terms of 20 C.F.R. §718.204(c) provide:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment.

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amended Section 411(c)(4) presumption does not apply in this case and that claimant failed to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3-5, 10-12.

[4] In summarizing the case law on this issue, claimant acknowledges that the miner last worked in Kentucky, which falls within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Brief on Behalf of Claimant at 12.

> Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). The meaning of the phrase "substantially contributing cause" has been discussed in the comments made by the Department of Labor (DOL) when the revisions to 20 C.F.R. §718.204 were proposed. The DOL noted:

> Several courts have addressed the issue, and formulated various standards: *Robinson v. Pickands Mather & Co./Leslie Coal Co.*, 914 F.2d 35, 38 (4th Cir. 1990) ("contributing cause"); *Shelton v. Director, OWCP,* 899 F.2d 690, 693 (7th Cir. 1990) (necessary though not sufficient cause); *Lollar v. Alabama By-Products*, 893 F.2d 1258, 1265 (11th Cir. 1990) ("substantial contributing factor"); *Adams v. Director, OWCP,* 886 F.2d 818, 825 (6th Cir. 1989) (disability "due at least in part" to pneumoconiosis); *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 733 (3d Cir. 1989) ("substantial contributor"); *Mangus v. Director, OWCP,* 882 F.2d 1527, 1531 (10th Cir. 1989) (at least a "contributing cause"). *Few, if any, practical differences exist in the various expressions of the contribution standard.*

62 Fed. Reg. 3,345 (Jan. 22, 1997) (emphasis added). On publishing the final version of 20 C.F.R. §718.204(c)(1), the DOL stated:

> The Department did not mean to alter the current law through its proposals, however, or to suggest that *any* adverse effect, no matter how limited, was sufficient to establish total disability due to pneumoconiosis. Rather, *the Department meant only to codify the numerous decisions of the courts of appeals* which, in the process of deciding when a miner is totally disabled due to pneumoconiosis, have also ruled on what evidence is legally sufficient to establish that element of entitlement. In order to clarify this consistent intent, the Department has added the word "material'' to § 718.204(c)(1)(i) and "materially" to § 718.204(c)(1)(ii). In so doing, *the Department intends merely to implement the holdings of the courts of appeals.* Thus, evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability

> is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability.

65 Fed. Reg. 79,946 (Dec. 20, 2000) (emphasis added). These statements make clear that, in DOL's view, the "substantially contributing cause" language used in 20 C.F.R. §718.204(c)(1) reflected the nearly uniform standard already used by the circuit courts.

In published decisions issued subsequent to January 19, 2001, the effective date of the revised version of 20 C.F.R. §718.204(c), the Fourth Circuit has cited, with approval, decisions in which the panels have held that a miner must establish that pneumoconiosis is a contributing cause of his or her total disability. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006), *citing Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237-38 (4th Cir. 2004); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). The Sixth Circuit has stated that, prior to the 2001 revisions to 20 C.F.R. §718.204, the court required that a "miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment." *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288, 2-303 (6th Cir. 2001), *quoting Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-186 (6th Cir. 1997). The Sixth Circuit further held, however, that this formulation does not conflict with the "substantially contributing cause" standard set forth in 20 C.F.R. §718.204(c). *Kirk*, 264 F.3d at 611, 22 BLR at 2-303. Thus, the standards used by the Fourth Circuit and the Sixth Circuit do not vary significantly from either the language of the regulation at issue or from each other. In this case, the administrative law judge stated that "[a]s the miner last engaged in coal mine employment in the Commonwealth of Kentucky, appellate jurisdiction of this matter lies with the United States Court of Appeals for the Sixth Circuit." Decision and Order at 3. In rendering his finding on the issue of total disability causation, however, the administrative law judge did not cite any case law, but rather relied on the language of 20 C.F.R. §718.204(c)(1). *Id*. at 14. Because the circuits' interpretations of 20 C.F.R. §718.204(c)(1) are compatible, we reject claimant's contention of error. *See Mahon v. National Coal Mining Co.*, 7 BLR 1-749, 1-751 n.4 (1985).

Claimant also argues that the administrative law judge erred in finding that Dr. Rasmussen's opinion was insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's total disability. Dr. Rasmussen examined the miner on February 7, 2006 and diagnosed a totally disabling obstructive impairment caused by smoking and coal dust exposure. Director's Exhibit 13. When deposed, Dr. Rasmussen stated that coal dust exposure was a "minimal contributor" to the miner's lung disease and that he was "not sure whether it's significant or not." Claimant's Exhibit 4 at 31, 95.

The administrative law judge determined that Dr. Rasmussen "is the only doctor that found some relationship between any possible legal pneumoconiosis and [the miner's] disability."[5] Decision and Order at 15; Director's Exhibit 13; Claimant's Exhibit 4. The administrative law judge rationally found, however, that "[t]his opinion cannot support a finding that coal mine dust exposure contributed to [the miner's] pulmonary impairment, because a minimal contributor does not constitute a "substantially contributing cause" and Dr. Rasmussen was unsure if any possible legal pneumoconiosis was a significant contributor." Decision and Order at 15; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). We affirm, therefore, the administrative law judge's finding that claimant did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), an essential element of entitlement.[6] *See Perry*, 9 BLR at 1-2.

[5] The administrative law judge noted that Drs. Dahhan and Jarboe opined that the miner was totally disabled due to obstructive lung disease caused by cigarette smoking. *See* Decision and Order at 14-15; Director's Exhibits 14, 70; Employer's Exhibits 6, 10, 11.

[6] Because we have affirmed the administrative law judge's determination that claimant did not meet her burden of establishing total disability due to pneumoconiosis under 20 C.F.R. §718.204(c), we need not address claimant's allegations of error regarding the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge