

U.S. Department of Labor

Benefits Review Board  
P.O. Box 37601  
Washington, DC 20013-7601



BRB No. 17-0325 BLA

CATHLENE TINCHER o/b/o	)	
Estate of DAVID H. TINCHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 12/26/2017
COMPANY	)	
	)	
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 Denying Benefits of Carrie Bland,  
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia,  
for employer.

Before: Hall, Chief Administrative Appeals Judge, BOGGS and  
GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (2013-BLA-05822) of Administrative Law Judge Carrie Bland rendered 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 a miner's subsequent claim filed on June 27, 2012.<sup>2</sup>

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),<sup>3</sup> the administrative law judge credited the miner with at least fifteen years of underground coal mine employment,<sup>4</sup> but found the new medical evidence insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge concluded that claimant could not invoke the rebuttable presumption that the miner was totally disabled due to pneumoconiosis under Section 411(c)(4). The administrative law judge also found that although the new medical evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), it established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).<sup>5</sup> Thus, the administrative law

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<sup>1</sup> Claimant is the widow of the miner who died on August 9, 2012. Director's Exhibit 14. Claimant is pursuing the miner's claim on his behalf. Director's Exhibit 32.

<sup>2</sup> The miner's initial claim, filed on June 1, 1993, was finally denied by the district director on November 10, 1993, for failure to establish any of the elements of entitlement. Director's Exhibit 1. No further action was taken on this claim. The miner's second claim, filed on March 18, 2004, was finally denied on March 21, 2007 by Administrative Law Judge Richard T. Stansell-Gamm because the miner failed to establish a change in an applicable condition of entitlement. Director's Exhibit 2; *see* 20 C.F.R. §725.309(d)(3) (2007). The miner took no further action until he filed his current claim on June 27, 2012. Director's Exhibit 4.

<sup>3</sup> Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis if the miner had fifteen or more years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

<sup>4</sup> The administrative law judge credited the miner with fifteen years and five months of underground coal mine employment. Decision and Order at 4-6.

<sup>5</sup> "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as

judge found that claimant established a change in an applicable condition of entitlement since the denial of the miner's prior claim. *See* 20 C.F.R. §725.309(c). Considering the claim on the merits, the administrative law judge again found that claimant established the existence of clinical, but not legal, pneumoconiosis, and that the clinical pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found, however, that claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment before his death, pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.<sup>6</sup>

On appeal,<sup>7</sup> claimant challenges the administrative law judge's finding that claimant failed to establish the existence of legal pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.

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,

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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).

<sup>6</sup> After the February 16, 2017 Decision and Order Denying Benefits was issued, claimant filed a Motion for Reconsideration of the administrative law judge's decision, asserting that the administrative law judge had issued the decision before the deadline to file closing briefs had passed, and requesting that the decision be set aside so that closing briefs could be filed. Claimant's February 28, 2017 Motion for Reconsideration. In an order dated March 13, 2017, the administrative law judge denied claimant's request for reconsideration finding, that contrary to claimant's argument, the date for the submission of closing briefs, which had been set at the hearing, had passed, and that claimant had not demonstrated a valid basis for the administrative law judge to set aside the February 16, 2017 Decision and Order Denying Benefits. March 13, 2017 Order Denying Claimant's Motion for Reconsideration.

<sup>7</sup> In an Order dated July 31, 2017, the Board accepted claimant's brief captioned "Claimant's Response Brief" as claimant's Petition for Review and Brief in this case.

and in accordance with applicable law.<sup>8</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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Claimant asserts that the administrative law judge erred in her evaluation of the medical opinion evidence to find that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant’s Brief at 6-8. Claimant acknowledges, however, that the administrative law judge found the existence of clinical pneumoconiosis established, but denied benefits “[b]ased on the fact that the claimant did not establish that the miner had a totally disabling pulmonary impairment before his death . . . .” Claimant’s Brief at 5. Despite this fact, as employer correctly asserts, claimant raises no challenge to the administrative law judge’s finding that neither the new evidence nor the evidence considered in conjunction with the prior claims establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 41, 47; Employer’s Brief at 10-12. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if the evidence does not establish a requisite element of entitlement. *See Anderson*, 12 BLR at 1-112; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because we have affirmed the administrative law judge’s finding that claimant failed to establish that the miner was totally disabled, a requisite element of entitlement under both Section 411(c)(4) and 20

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<sup>8</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant’s coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 6; Hearing Transcript at 21.

C.F.R. Part 718, an award of benefits is precluded.<sup>9</sup> *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

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<sup>9</sup> In light of this disposition, we need not address claimant's allegations of error regarding the administrative law judge's finding that claimant failed to establish the existence of legal pneumoconiosis because error, if any, is harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).