

BRB Nos. 09-0520 BLA  
and 09-0615 BLA

TONDA NAPIER	)	
(o/b/o and Widow of SAM NAPIER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY,	)	
INCORPORATED	)	DATE ISSUED: 03/17/2010
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Janice K. Bullard, and the Decision and Order of Kenneth A. Krantz, Administrative Law Judges, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

James M. Kennedy and Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order on Remand (04-BLA-6674) of Administrative Law Judge Janice K. Bullard, and the Decision and Order (08-BLA-5169)

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<sup>1</sup> Claimant is the surviving spouse of the deceased miner, who died on December 7, 2006. Director's Exhibit 9 (Survivor's Claim).

of Administrative Law Judge Kenneth A. Krantz, rendered on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case involves a miner's claim filed on June 27, 2003, and a survivor's claim filed on December 28, 2006.

In a Decision and Order dated January 23, 2007, Administrative Law Judge Paul H. Teitler adjudicated the miner's claim. After crediting the miner with eighteen years of coal mine employment,<sup>2</sup> Judge Teitler found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).<sup>3</sup> However, Judge Teitler found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Judge Teitler also found that the evidence established that the miner was totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(b)(2), (c). Accordingly, Judge Teitler awarded benefits in the miner's claim.

Pursuant to employer's appeal, the Board vacated Judge Teitler's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *S.N. [Napier] v. Shamrock Coal Co.*, BRB No. 07-0439 BLA (Feb. 29, 2008) (unpub.). The Board also vacated Judge Teitler's findings pursuant to 20 C.F.R. §718.204(b)(2), (c), and remanded the case to Judge Teitler for further consideration. *Id.*

On remand, due to Judge Teitler's unavailability, the case was reassigned, without objection, to Administrative Law Judge Janice K. Bullard. In a Decision and Order on Remand dated March 3, 2009, Judge Bullard found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R.

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<sup>2</sup> The record reflects that the miner's most recent coal mine employment was in Kentucky. Director's Exhibits 5, 19 at 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup> A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses." 20 C.F.R. §718.201(a)(1). This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id.* "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).

§718.202(a)(4).<sup>4</sup> Judge Bullard further found that the evidence did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, Judge Bullard denied benefits in the miner's claim.

In a Decision and Order dated May 4, 2009, Administrative Law Judge Kenneth A. Krantz adjudicated claimant's survivor's claim. After crediting the miner with at least eighteen years of coal mine employment, Judge Krantz found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Krantz denied benefits in the survivor's claim.

Claimant appeals Judge Bullard's denial of benefits in the miner's claim and Judge Krantz's denial of benefits in the survivor's claim.<sup>5</sup> In separate briefs, claimant contends that both Judge Bullard and Judge Krantz erred in finding that the evidence did not establish the existence of pneumoconiosis. Employer responds in support of the denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has not filed a response brief in regard to either claim. Claimant has filed a reply brief in the miner's claim, reiterating her previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

### **The Miner's Claim**

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

Claimant contends that Judge Bullard erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R.

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<sup>4</sup> The Board previously affirmed Administrative Law Judge Paul H. Teitler's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *S.N. [Napier] v. Shamrock Coal Co.*, BRB No. 07-0439 BLA (Feb. 29, 2008) (unpub.).

<sup>5</sup> By Order dated June 19, 2009, the Board consolidated claimant's appeals in BRB No. 09-0520 BLA and BRB No. 09-0615 BLA for purposes of decision only.

§718.202(a)(4). Specifically, claimant contends that Judge Bullard erred in according less weight to Dr. Baker's opinion, that the miner suffered from a respiratory impairment attributable to cigarette smoking and coal dust exposure, because the doctor did not consider an accurate smoking history and did not adequately account for the miner's history of asthma. Contrary to claimant's contention, Judge Bullard permissibly accorded less weight to Dr. Baker's opinion.

In a January 24, 2006 report, Dr. Baker recorded a thirty pack-year smoking history, but noted that the miner had "not smoked any since 2002, except for an occasional cigarette." Claimant's Exhibit 1. However, as noted by Judge Bullard, Dr. Broudy opined that the miner's May 11, 2005 arterial blood gas study showed a marked elevation of carboxyhemoglobin, indicating that the miner was "still having continued heavy exposure to smoke . . . ." Employer's Exhibit 1. Consequently, Judge Bullard found that "Dr. Baker relied upon a smoking history that was contradicted by objective test results that revealed that [the miner] continued to smoke at a greater rate than he reported after allegedly quitting in 2002." Decision and Order on Remand at 12. Consequently, in assessing the credibility of Dr. Baker's medical opinion, Judge Bullard permissibly took into account Dr. Baker's reliance on an inaccurate smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988).

Additionally, Judge Bullard reasonably found that Dr. Baker did not resolve a discrepancy regarding the miner's reported history of asthma. In a March 23, 2002 report, Dr. Baker indicated that the miner reported being told that he "may have some degree of asthma."<sup>6</sup> Director's Exhibit 12. However, in a January 24, 2006 report, Dr. Baker indicated that there was no history of asthma. Claimant's Exhibit 1. Judge Bullard found that Dr. Baker's failure to resolve this inconsistency was significant because the record evidence indicated that asthma is a condition that can affect pulmonary function. Decision and Order on Remand at 12. Specifically, Judge Bullard found that Dr. Broudy "credibly explained [that] asthma can produce symptoms such as those reported by [the miner], and can be responsible in part for the respiratory impairment shown on testing."<sup>7</sup> *Id.* Consequently, Judge Bullard permissibly accorded less weight to Dr. Baker's

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<sup>6</sup> In the March 23, 2002 report, Dr. Baker also stated that the miner's "breathing is aggravated by exertion, damp or rainy weather as well as various dusts, odors and fumes." Director's Exhibit 12.

<sup>7</sup> Dr. Broudy noted that claimant stated that "some of his doctors have diagnosed asthma." Employer's Exhibit 1. Dr. Broudy diagnosed chronic obstructive asthma and opined that the miner's pulmonary impairment was due to a combination of chronic obstructive asthma and cigarette smoking. *Id.*

opinion, because Dr. Baker failed to adequately explain why he excluded asthma as a potential cause of the miner's pulmonary impairment. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, BLR 2-99, 2-103 (6th Cir. 1983); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Because claimant does not allege any additional error, we affirm Judge Bullard's finding that the medical opinion evidence in the miner's claim did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In light of our affirmance of Judge Bullard's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm Judge Bullard's denial of benefits in the miner's claim under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

### **The Survivor's Claim**

Benefits are payable on survivors' claims filed on or after January 1, 1982 only 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); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Trumbo*, 17 BLR at 1-88.

In regard to the survivor's claim, claimant's brief does not provide an adequate basis for review. Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. In this case, claimant's statements, regarding Judge Krantz's adjudication of the survivor's claim, do not raise any substantive issue or identify any specific error on the part of Judge Krantz in determining that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).<sup>8</sup> *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm Judge Krantz's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). We,

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<sup>8</sup> In regard to the survivor's claim, claimant notes that the miner was employed for more than ten years in the coal mines and died from a respirable disease. Claimant, therefore, contends that she is entitled to the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at 20 C.F.R. §718.303. Claimant's contention lacks merit. Section 718.303 is not applicable to any claim filed on or after January 1, 1982. 20 C.F.R. §718.303(c).

therefore, affirm Judge Krantz's denial of benefits in the survivor's claim. *Trumbo*, 17 BLR at 1-88.

Accordingly, Judge Bullard's Decision and Order on Remand denying benefits in the miner's claim, and Judge Krantz's Decision and Order denying benefits in the survivor's claim, are 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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BETTY JEAN HALL  
Administrative Appeals Judge