

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0406 BLA

RHONDA G. COOPER)
(Widow of MICHAEL COOPER))
)
Claimant-Petitioner)

v.)

JERICOL MINING, INCORPORATED)

and)

LIBERTY MUTUAL INSURANCE)
COMPANY)

DATE ISSUED: 05/20/2019

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 Denying Benefits of Scott R. Morris,
Administrative Law Judge, United States Department of Labor.

Rhonda G. Cooper, Inez, Kentucky.

R. Luke Widener (Penn, Stuart & Eskridge), Bristol, Virginia, for
employer/carrier.

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

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel,² the Decision and Order Denying Benefits (2016-BLA-06045) of Administrative Law Judge Scott R. Morris, rendered on a survivor's claim filed on September 22, 2015, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with 14.07 years of underground coal mine employment and found there is no evidence to establish he was totally disabled. Thus, he concluded claimant did not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).³ Considering claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found the miner suffered from clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. §718.202(a)(2),(4), 718.203(b). He further found, however, that claimant did not establish the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and therefore denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer/carrier (employer) responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board must affirm the findings and determinations of the administrative law judge if they are rational,

¹ Claimant is the widow of the miner, who died on August 20, 2015. Director's Exhibit 8.

² Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

³ Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis if she establishes that the miner had at least fifteen years in underground coal mine employment, or in 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.

supported by substantial evidence, and are in accordance with applicable law.⁴ 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).

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge correctly found that there are no pulmonary function or arterial blood gas studies in the record to establish total disability and no evidence to establish that the miner had cor pulmonale. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 8 n.10. Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge correctly found that none of the medical opinions indicates the miner was totally disabled by a respiratory or pulmonary impairment. Decision and Order at 8 n. 10. He further found the miner’s treatment records “do not document any pulmonary disability or impairment” and focus on the miner’s treatment for respiratory symptoms associated with asthma, chronic bronchitis, and pneumonia. *Id.* Additionally, the administrative law judge correctly observed that he was unable to rely solely on claimant’s hearing testimony to establish total disability. 20 C.F.R. 718.305(b)(4); 20 C.F.R. §718.204(d)(3); Decision and Order at 8 n.10. We therefore affirm the administrative law judge’s finding that claimant did not establish the miner’s total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2) and we affirm his finding that claimant did not invoke the Section 411(c)(4) presumption.⁵ 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

⁴ Because the miner’s coal mine employment was in Kentucky, 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); Director’s Exhibit 5.

⁵ Because we affirm the administrative law judge’s finding that the miner was not totally disabled, we need not address the administrative law judge’s determination

Entitlement Under Part 718

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis.⁶ See 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). A miner's death will be considered to be due to pneumoconiosis if it was a substantially contributing cause of the miner's death, the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable,⁷ or the presumption set forth at 20 C.F.R. §718.305 is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303-04 (6th Cir. 2010); see *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003).

As noted by the administrative law judge, employer stipulated that the miner had simple coal workers' pneumoconiosis. Decision and Order at 9; Employer's Closing Argument Brief at 12. The administrative law judge properly found, however, that there is no evidence in the record to establish that either clinical pneumoconiosis or legal

regarding the length of the miner's coal mine employment. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

⁶ Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l). Claimant cannot benefit from this provision, as the record does not indicate the miner filed a claim during his lifetime.

⁷ Because the record contains no evidence that the miner had complicated pneumoconiosis, claimant is not able to invoke the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 14.

pneumoconiosis⁸ caused or substantially contributed to the miner's death.⁹ *See Conley*, 595 F.3d at 303-04.

The death certificate completed by Dr. Eubank, the miner's treating physician, indicates the miner died on August 20, 2015 from "chronic lymphocytic leukemia."¹⁰ Director's Exhibit 8. There is no mention of pneumoconiosis. *Id.* Dr. Gale conducted the autopsy and noted simple coal workers' pneumoconiosis but he did not address whether the disease contributed to the miner's death. Director's Exhibit 9. Dr. Caffrey reviewed the autopsy slides and diagnosed simple coal workers' pneumoconiosis, acute passive congestion with petechial hemorrhages, focal emphysema, and "rare foci of proliferating lymphocytes" consistent with lymphocytic leukemia. Employers' Exhibit 1. He stated that without clinical information and the results of objective studies, he was unable to give an opinion as to whether simple coal workers' pneumoconiosis caused any respiratory impairment or contributed to the miner's death. *Id.* He could not be specific about the cause of the miner's death, as lymphocytic leukemia was present in multiple organs. *Id.* Drs. Fino and Basheda each reviewed the medical evidence and opined the miner's death was unrelated to simple clinical pneumoconiosis or coal mine dust exposure. Employer's Exhibits 43, 44.

⁸ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *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). 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). The definition includes "any chronic pulmonary disease or respiratory impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁹ Although the administrative law judge did not specifically address whether the miner had legal pneumoconiosis, this error is harmless as none of the physicians diagnosed a respiratory or pulmonary impairment significantly related to, or substantially aggravated by, coal dust exposure, such to satisfy the definition of legal pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

¹⁰ The miner's treatment records include a history of acute respiratory infection in February 2012, seasonal allergies, asthma, calcified granulomas of the lung, and chronic lymphocytic leukemia. Claimant's Exhibit 1; Employer's Exhibits 2-10.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). As there is no evidence to satisfy claimant's burden of proof, we affirm the administrative law judge's finding that claimant is not entitled to survivor's benefits because she did not establish the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge