U.S. Department of Labor

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

BRB No. 16-0665 BLA

DELLA ASHER (Widow of HOBART ASHER) Claimant-Petitioner v. FOUR ACES MINING and LIBERTY MUTUAL MIDDLE MARKET Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/31/2017 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William J. King, Administrative Law Judge, United States Department of Labor.

Della M. Asher, Warbranch, Kentucky.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Michelle S. Gerdano (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the

Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2013-BLA-05724) of Administrative Law Judge William J. King, rendered on a survivor's claim filed on April 5, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] The administrative law judge credited the miner with at least fifteen years of coal mine employment based on employer's stipulation at the hearing, but found that claimant did not establish that the miner was totally disabled. Therefore, the administrative law judge determined that claimant is unable to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge then found that claimant did not establish that the miner had pneumoconiosis. Moreover, the administrative law judge concluded that even if claimant established the existence of pneumoconiosis, she did not prove that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

[1] Claimant is the widow of the miner, who died on June 11, 2010. Director's Exhibit 10. Although the miner filed three claims for federal black lung benefits during his lifetime, there is no evidence that the miner was awarded benefits. Living Miner Director's Exhibits 1-3. Therefore, Section 422(*l*) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, is not applicable in this case. 30 U.S.C. §932(*l*) (2012).

[2] Robin Napier, a lay representative with Stone Mountain Health Services of St. Charles, Virginia, filed a letter requesting that the Board review the administrative law judge's decision, but she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co*., 19 BLR 1-88 (1995) (Order).

[3] Under Section 411(c)(4) of the Act, a miner's death is presumed to be due to pneumoconiosis if he or she 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

On appeal, claimant generally challenges the denial of benefits. Employer/carrier (employer) responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), has also responded, acknowledging that the administrative law judge's admission of Dr. Gaziano's medical report was in error because the Director mistakenly submitted the report. However, the Director further maintains that this error was harmless, as the administrative law judge properly found that no evidence supported a finding of total disability.[4] Moreover, the Director contends that the administrative law judge's other findings and determinations are supportable and his decision denying benefits should be affirmed.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

I. Admission of Dr. Gaziano's Medical Report

On September 18, 2015, the Director submitted Dr. Gaziano's medical report as part of a pilot program launched by the Department of Labor (DOL) "aimed at strengthening the medical opinions provided to certain miners." Director's Exhibit 48. According to the Director, the pilot program allows the submission of supplemental medical reports by physicians who conduct the DOL-sponsored medical examinations pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b).[6] *Id*. The administrative law

[4] We affirm, as unchallenged on appeal, the administrative law judge's decision to credit the miner with at least fifteen years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2; Employer's Brief at 3; Hearing Transcript at 5. Moreover, employer concedes that this employment was underground. Employer's Brief at 3.

[5] The miner's last coal mine employment was in Kentucky. Director's Exhibit 4. 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, 1-202 (1989) (en banc).

[6] Dr. Gaziano reviewed the miner's medical records and concluded that the material he reviewed did not support a diagnosis of pneumoconiosis in any form. Director's Exhibit 48. He further indicated that pneumoconiosis did not cause or contribute to the miner's death. *Id.*

judge admitted Dr. Gaziano's report into the record at the hearing. Hearing Transcript at 7-8. The Director now acknowledges that the submission and admission of the report was in error, stating that "because this is a survivor's claim, there was no report submitted by a Section 413(b) physician to supplement and the pilot program does not apply." Director's Brief at 1. We agree with the Director, however, that any error as to the admission of Dr. Gaziano's report was harmless. The administrative law judge properly determined that the evidence was insufficient to establish total disability, and that the medical opinion evidence did not support a finding of pneumoconiosis based on the permissible discrediting of Dr. Cornett's diagnosis as unexplained and unsupported by the other medical records. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 9, 14.

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

In the absence of contrary probative evidence, claimant can establish the miner's total disability by: (i) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R. Part 718; (ii) arterial blood-gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; (iii) the miner had pneumoconiosis and also suffered from cor pulmonale with right-sided congestive heart failure; or (iv) a physician exercising reasoned medical judgment concludes that the miner's respiratory or pulmonary condition was totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge accurately found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i) because the pulmonary function studies in the record, dated January 9, 2007, October 23, 2007, and March 18, 2010, did not produce qualifying values.[7] Decision and Order at 5-6; Director's Exhibits 22, 28. The administrative law judge also permissibly determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii) because the only blood-gas studies of record were conducted during a period when the miner was on a ventilator.[8] Decision and Order

[7] A "qualifying" pulmonary function study or blood-gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The quality standards applicable to blood-gas studies mandate that they "not be performed during or soon after an acute respiratory or cardiac illness." 20 C.F.R. Part 718, Appendix C. Under 20 C.F.R. §718.105(d), blood-gas studies performed during a hospitalization that ends in the miner's death must be "accompanied by a physician's

at 6; Director's Exhibit 24 at 569-70. In addition, the administrative law judge correctly found that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii) because there is no evidence indicating that the miner had cor pulmonale with right-sided congestive heart failure. Decision and Order at 6. Accordingly, we affirm the administrative law judge's determination that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the medical opinions of Drs. Cornett, Castle, Rosenberg and Gaziano. Decision and Order at 7-8; Director's Exhibits 26-27, 48; Employer's Exhibit 1. Dr. Cornett stated that the miner was her patient for several years, and that he had "well[-]documented Coal Worker's Pneumoconiosis," in addition to coronary artery disease, hypertension and chronic low back pain. Director's Exhibit 26. Dr. Cornett reported that, the miner "was pancytopenic and developed pneumonia, pulmonary edema, and respiratory failure from which he was unable to recover [to] be treated for his newly diagnosed leukemia. His rapid demise from leukemia was undoubtedly hastened by his underlying lung disease."[9] *Id*. Dr. Castle reviewed the miner's medical records and observed that the miner was hospitalized in May 2010 with acute myelogenous leukemia (AML),[10] complicated by pneumonia, respiratory failure and sepsis. Director's Exhibit 27. Referring to the pulmonary function tests in the miner's records, Dr. Castle stated, "[t]he physiologic studies, while technically invalid . . . were all entirely normal showing no evidence of any impairment from any cause . . . ."[11] *Id*. Dr. Rosenberg performed a medical record

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report that the test results were produced by a chronic respiratory or pulmonary condition." 20 C.F.R. §718.105(d). No such report was submitted in this case.

[9] The record reflects that the miner was treated at St. Joseph – London from May 16, 2010 to June 2, 2010, when he was transferred to the Markey Cancer Treatment Center at the University of Kentucky Medical Center. While at St. Joseph – London, he was found to have pancytopenia and leukemia. Director's Exhibit 24 at 770, 772-775. The miner was discharged from the Markey Cancer Treatment Center on June 10, 2010 and died at home on June 11, 2010. Director's Exhibits 10, 24A at 2.

[10] Acute myelogenous leukemia (AML) is defined as "an aggressive form of cancer in which too many myeloblasts (immature white blood cells) are found in the bone marrow and blood." National Cancer Institute, *Dictionary of Cancer Terms*, https://www.cancer.gov/publications/dictionaries/cancer-terms?cdrid=46347.

[11] Dr. Castle found the miner's March 28, 2010 pulmonary function study technically invalid because of less than maximal effort. He found the two studies conducted in 2007 technically invalid because of an inadequate number of forced vital capacity maneuvers and flow volume loops. Director's Exhibit 27.

review and concluded that the pulmonary function studies and blood gas studies done prior to the miner's May 2010 hospitalization supported a determination that the miner was not disabled from a pulmonary perspective. Employer's Exhibit 1. Dr. Rosenberg stated, "[a]s outlined above, [the miner] had no functional impairment. . . . The acute onset and marked pulmonary changes that developed during the terminal portion of his life related to process of the whole person disorder of AML with superimposed infection." *Id*. Dr. Gaziano also reviewed the miner's medical records and noted that the pulmonary function studies and blood-gas studies obtained prior to the miner's May 2010 hospitalization were normal. Director's Exhibit 48. Dr. Gaziano further stated that the miner developed a severe respiratory and systemic infection related to the damage to his immune system attributable to AML. *Id*. The administrative law judge concluded that the medical opinion evidence did not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), and further determined that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) by a preponderance of the evidence considered as a whole. Decision and Order at 8-9.

The Director urges the Board to affirm the finding rendered by the administrative law judge, asserting that "because no evidence supported a finding of total pulmonary disability, the [administrative law judge] correctly found that [claimant] failed to invoke the presumption. . . ." Director's Brief at 2. We agree with the Director that substantial evidence supports the administrative law judge's determination. As indicated *supra*, Drs. Castle and Gaziano found the results of the miner's objective tests to be normal and did not diagnose a totally disabling respiratory or pulmonary impairment. [12] Director's Exhibits 27, 48. Dr. Rosenberg stated that because the miner's objective testing showed "no airflow obstruction" and "normal gas exchange," the miner "had no functional impairment." Employer's Exhibit 1. Furthermore, the administrative law judge reasonably determined that Dr. Cornett's opinion did not contain a diagnosis of total disability under 20 C.F.R. §718.204(b)(2)(iv). Dr. Cornett listed a variety of conditions that the miner had, i.e., pancytopenia, respiratory failure,[13] and leukemia, but she did not

[12] Because Drs. Cornett, Castle, and Rosenberg did not diagnose a totally disabling respiratory or pulmonary impairment, Dr. Gaziano's opinion was not necessary to the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). Thus, any error created by his consideration of this opinion does not constitute error requiring remand. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[13] The miner's records from St. Joseph – London reflect: the diagnosis of "acute respiratory failure" due to pneumonia and sepsis on May 19, 2010; intubation on May 19, 2010; positive cultures for streptococcal bacteria and treatment with antibiotics; a statement that the respiratory failure had "resolved" on May 27, 2010; extubation on the

identify any one of these as a pulmonary or respiratory impairment which, standing alone, was totally disabling.[14] 20 C.F.R. §718.204(b)(1); Director's Exhibit 26. Drs. Castle, Rosenberg and Gaziano also did not diagnose the miner with this type of impairment, stating instead that the miner suffered from AML, pneumonia and respiratory failure. Director's Exhibits 27, 48; Employer's Exhibit 1.

Accordingly, we affirm the administrative law judge's determination that the medical opinion evidence was insufficient to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), as it is rational, supported by substantial evidence, and in accordance with the regulation.[15] *See Onderko v. Director,*

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morning of May 27, 2010; a consulting cardiologist's notation that the miner developed atrial fibrillation at approximately 3:00 pm on May 27, 2010, which was "most likely" secondary to acute respiratory failure and sepsis; a description of the miner on May 30, 2010, as having no significant shortness of breath and an oxygen saturation of one-hundred percent on room air; an observation of dyspnea on May 31, 2010; a report indicating the miner's status on June 1, 2010, was post-acute respiratory failure secondary to pneumonia; a statement dated June 2, 2010 that the miner's respiratory failure had resolved and he was experiencing no significant shortness of breath at rest; and a diagnosis of "respiratory distress" on June 4, 2010, two days after the miner was transferred from St. Joseph – London to the Markey Cancer Treatment Center. Director's Exhibits 24 (at 57, 115-16, 161, 185, 188, 193 and 199), 24A at 3-4.

[14] The regulations provide that "a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, *standing alone*, prevents or prevented the miner from engaging" in his or her usual coal mine employment or comparable and gainful employment. 20 C.F.R. §718.204(b)(1) (emphasis added).

[15] The administrative law judge's conclusion that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) also accords with the position advanced before the Board by the Director, Office of Workers' Compensation Programs (the Director), in *Ferrell v. Peabody Coal Co.*, BRB No. 15-0252 BLA, slip op. at 7 (May 5, 2017) (unpub.). The Director stated in *Ferrell* that the diagnosis of an acute condition threatening the miner's life, i.e., pneumonia, does not establish that the miner had a chronic disabling respiratory or pulmonary impairment, a finding that is required to prove total disability by medical opinion under 20 C.F.R. §718.204(b)(2). The Director's position is consistent with the quality standards for pulmonary function studies and blood-gas studies which, as previously indicated, require that these tests not be performed during an acute respiratory or cardiac illness, and that they reflect a chronic respiratory or pulmonary impairment. 20 C.F.R. §718.105(d); 20 C.F.R. Part 718 Appendix B at ¶(2)(i), Appendix C.

OWCP, 14 BLR 1-2, 1-4 (1989); *Budash v Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc); Decision and Order at 8. We further affirm the administrative law judge's determination that when considered as a whole, the evidence was insufficient to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(b)(2), in light of the administrative law judge's appropriate findings under 20 C.F.R. §718.204(b)(2)(i)-(iv).[16] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 9. Accordingly, we also affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.305(b)(1)(iii), (c)(2).

III. Establishing Entitlement Without Benefit of the Presumption

In a survivor's claim, where no statutory presumption applies, claimant must establish, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (2). 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). Failure to establish any one of the requisite elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88.

As an initial matter, we affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), as they are rational and supported by substantial evidence. The administrative law judge accurately determined that claimant did not establish the existence of clinical pneumoconiosis[17] based on x-ray evidence pursuant to 20 C.F.R.

[16] Because Drs. Cornett, Castle, Rosenberg, and Gaziano did not diagnose a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge's exclusion of Dr. Gaziano's opinion would not have affected the extent to which there was evidence supportive of claimant's burden to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2). *See Larioni*, 6 BLR at 1-1278.

[17] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent

§718.202(a)(1) because the record does not contain any x-rays classified under the ILO system. 20 C.F.R. §718.102(d)(1) ("To establish the existence of pneumoconiosis, a film chest x-ray must be classified as Category 1, 2, 3, A, B, or C, in accordance with the [ILO] classification system[.]"); Decision and Order at 9. The administrative law judge also considered the x-ray reports in the miner's hospital and treatment records and permissibly found that they were insufficient to establish the existence of pneumoconiosis because "[n]one of these x-ray reports mention the presence of pneumoconiosis." Decision and Order at 9; *see Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (the significance of narrative x-ray readings that make no mention of pneumoconiosis is an issue to be resolved by the administrative law judge in the exercise of his or her discretion as fact-finder); Director's Exhibits 24, 24A, 21. The administrative law judge further stated correctly that because the record does not contain any biopsy or autopsy evidence, claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 9. With respect to the statutory presumptions cited in 20 C.F.R. §718.202(a)(3), the administrative law judge properly found that they were not available in this case because claimant did not establish total respiratory or pulmonary disability, or the existence of complicated pneumoconiosis. 20 C.F.R. §§718.304, 718.305; Decision and Order at 10.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinion of Dr. Cornett, who indicated that the miner had coal workers' pneumoconiosis, and the medical opinions of Drs. Castle, Rosenberg, and Gaziano, who concluded that the miner did not have either clinical or legal pneumoconiosis.[18] Decision and Order at 13-14; Director's Exhibits 26-27, 48; Employer's Exhibit 1. The administrative law judge initially considered whether to give determinative weight to the opinion of Dr. Cornett under 20 C.F.R. §718.104(d)(5), based on her status as a treating physician. Decision and Order at 13; Director's Exhibit 26. He permissibly declined to do so because Dr. Cornett did not provide sufficient details about the nature, length, frequency, and extent of her treatment of the miner. 20 C.F.R. §718.104(d)(1)-(4); *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir.

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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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

[18] 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).

2003); Decision and Order at 13. The administrative law judge also permissibly determined that Dr. Cornett did not adequately document her opinion because she did not identify test results or examination findings that support her statement that the miner had "well-documented coal workers' pneumoconiosis." Director's Exhibit 26; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; Decision and Order at 13. Based on the administrative law judge's rational discrediting of Dr. Cornett's opinion, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) by a reasoned and documented medical opinion.[19] *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); Decision and Order at 13.

The administrative law judge also considered readings of CT scans performed between December 21, 2006 and June 5, 2010, and hospital records dating from May 16, 2010 to June 10, 2010. Decision and Order at 10; Director's Exhibits 24, 24-A, 25. The administrative law judge reasonably determined that the CT scan readings did not assist claimant in satisfying her burden because "none of the CT reports includes findings of coal workers' pneumoconiosis."[20] Decision and Order at 10; *see Stephens*, 298 F.3d at 522, 22 BLR at 2-512; Director's Exhibits 24, 24-A, 25. In addition, the administrative law judge evaluated records from St. Joseph – London, dating from May 16, 2010 to June 2, 2010, and from the Markey Cancer Treatment Center, dating from June 2, 2010 to June 10, 2010. Decision and Order at 11; Director's Exhibits 24, 24-A. The administrative law judge permissibly found that the notations of a history of coal workers' pneumoconiosis that appeared in some of the records were conclusory, and therefore

[19] Because the administrative law judge found that Dr. Cornett's diagnosis of pneumoconiosis was not credible, and there are no other opinions in the record diagnosing pneumoconiosis, any error by the administrative law judge in considering Dr. Gaziano's opinion is harmless. Even if the administrative law judge had excluded Dr. Gaziano's opinion from the record, Dr. Cornett's non-credible opinion, and the opinions of Drs. Castle and Rosenberg that the miner did not have pneumoconiosis, do not support claimant's burden to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Larioni*, 6 BLR at 1-1278.

[20] The administrative law judge observed that the report of a May 17, 2010 CT scan contained a notation of "bilateral pulmonary nodules and septal thickening" and stated "[d]ifferential includes silicosis, sarcoidosis, [tuberculosis] or fungal disease with minimal bilateral pleural effusion." Director's Exhibit 24-62. The administrative law judge found that a subsequent CT scan in June 2010 attributing the nodules to "intra-leukemic infiltration in the lungs or a superimposed bacterial or fungal infection" did not mention a possible diagnosis of coal workers' pneumoconiosis. Decision and Order at 10-11, *quoting* Director's Exhibits 24, 24-A.

insufficient to establish that the miner had pneumoconiosis, because the statements were "without any discussion and without any support in the various test results associated with those medical records." Decision and Order at 13; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). We therefore affirm the administrative law judge's determination that claimant did not prove the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), we also affirm the administrative law judge's conclusion that, when weighed together, the evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-217-18 (6th Cir. 2012). Because claimant did not establish that the

miner had pneumoconiosis, an essential element of entitlement, she is not entitled to an award of benefits.[21] *See Trumbo*, 17 BLR at 1-87-88. Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

JUDITH S. BOGGS
Administrative Appeals Judge

[21] Based on this holding, we need not address the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits. I would hold that claimant is entitled to the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.305(b)(1), (c)(2). On remand, I would instruct the administrative law judge to consider whether employer rebutted the presumption. 20 C.F.R. §718.305(d)(2); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013); *Copley v. Buffalo Mining Co.*, 25 BLR, 1-81, 1-89 (2012).

In a survivor's claim, claimant is entitled to invoke the Section 411(c)(4) presumption if she establishes that the miner had at least fifteen years of underground or substantially similar coal mine employment, and had "at the time of his death, a totally disabling respiratory or pulmonary impairment." 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i), (iii). Claimant satisfied the first requirement, as employer stipulated that the miner had fifteen years of underground coal mine employment. Decision and Order at 2; Hearing Transcript at 5; Brief on Behalf of Employer [to Administrative Law Judge] at 3. As it relates to the second requirement, the administrative law judge inexplicably determined that the miner did not suffer from a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), despite clear and uncontradicted evidence that the miner was in respiratory failure in the days and weeks leading up to this death.

The miner was admitted to St. Joseph – London hospital on May 16, 2010 after becoming disoriented and nearly passing out at home. Director's Exhibit 24 at 50, 52. The day after his admission, the miner complained of "shortness of breath" and exhibited "decreased breath sounds" on examination. *Id*. at 64, 76. By May 19, 2010, the miner was in "respiratory failure" that required intubation. *Id*. at 115. On May 27, 2010, he was "weaned off the ventilator for further treatment of his [newly-diagnosed leukemia]." Director's Exhibits 24 at 115; 24A at 3. Although the miner's respiratory failure was noted to be "resolved," Director's Exhibit 24 at 185, he continued to experience "respiratory distress" both at St. Joseph – London hospital and after being transferred to the University of Kentucky Medical Center on June 2, 2010. Director's Exhibits 24 at 57; 24A at 3-4. Notably, on June 4, 2010, the miner "went into atrial fibrillation . . . with more respiratory distress[,]" prompting a "code status" discussion with his family.[22] Director's Exhibit 24A at 3. Over the next several days, the miner had "continued pulmonary nodularity and worsening pneumonia" and, on June 10, 2010, the day of his

[22] During this discussion, the miner's family informed the treating physicians that "he did not want to ever be placed on a ventilator again and would not want [] defibrillation if it came to that." Director's Exhibit 24A at 4.

discharge, it was reported that he "continued to have . . . respiratory distress with a high oxygen requirement." *Id*. at 4. The miner died at home the following day. Director's Exhibit 10. The cause of death was listed as acute myeloid leukemia. *Id*.

The two physicians whose medical opinions are at issue in this case, Dr. Cornett and Dr. Rosenberg, are in agreement that the miner was in respiratory failure at the time of his death.[23] Dr. Cornett opined that the miner "was pancytopenic and developed pneumonia, pulmonary edema, and respiratory failure from which he was unable to recover [to] be treated for his newly diagnosed leukemia." Director's Exhibit 26. Dr. Rosenberg similarly opined, "Surrounding [the miner's] death, he had the onset of pancytopenia . . . Associated with his pancytopenia, he developed respiratory failure related to a fungal, bacterial, or viral infection (or a combination of all three)." Employer's Exhibit 1 at 7. He further stated that the "overwhelming infectious process" in the miner's lungs "radiographically caused the appearance of increased nodularity, infiltrates and effusions." *Id*. He concluded that "[t]hese changes progressed throughout [the miner's] terminal hospital course[.]" *Id*.

The administrative law judge rejected Dr. Cornett's opinion because she "did not address the miner's pulmonary capacity prior to his death[,]" and credited Dr. Rosenberg's "unchallenged opinion" that the miner "was not totally disabled by his pulmonary condition prior to the development of his leukemia." Decision and Order at 8. As a result, the administrative law judge found that the miner did not have a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) and, therefore, found that claimant is not entitled to invoke the Section 411(c)(4) presumption.

The administrative law judge erred in characterizing Dr. Cornett's opinion as lacking an assessment of the miner's respiratory capacity prior to and at the time of his death. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *McCune v. Central*

[23] Dr. Castle and Dr. Gaziano also offered opinions on the miner's respiratory condition, with both acknowledging that the miner was in respiratory failure and respiratory distress in the weeks leading up to his death. Director's Exhibits 27 at 8; 48 at 4. However, as the Director concedes, Dr. Gaziano's opinion should not have been admitted into the record because this claim is not eligible for the Department of Labor's medical evidence pilot program, under which Dr. Gaziano's opinion was procured. Director's Brief at 1; *see* Black Lung Benefits Act (BLBA) Bulletin 14-05 (Feb. 24, 2014). Moreover, the administrative law judge rationally determined that Dr. Castle "did not address the miner's pulmonary capacity prior to his death" based on Dr. Castle's admission that the hospitalization records he reviewed were incomplete and "did not contain any information surrounding [the miner's] death." Decision and Order at 8; Director's Exhibit 27 at 8.

Appalachian Coal Co., 6 BLR 1-996, 1-998 (1984). Dr. Cornett stated without equivocation that the miner "was pancytopenic and developed . . . *respiratory failure from which he was unable to recover*[.]" Director's Exhibit 26 (emphasis added). Moreover, the administrative law judge failed to consider that Dr. Cornett's opinion is fully consistent with the miner's hospitalization records.[24] *See* 30 U.S.C. §923(b) (administrative law judge must consider "all relevant evidence"); *Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011) ("[F]ailure to consider all of the relevant evidence on the disability issue . . . constitutes a clear violation of controlling law and regulations.").

In crediting Dr. Rosenberg's opinion that the miner "was not totally disabled by his pulmonary condition prior to the development of his leukemia[,]" the administrative law judge applied the wrong legal analysis. By focusing on the relationship between the onset of the miner's respiratory failure and his leukemia, the administrative law judge conflated the issue of the *presence* of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), with the separate issue of the *cause* of that impairment at 20 C.F.R. §718.204(c). Although Drs. Cornett and Rosenberg may disagree as to whether the miner had pneumoconiosis, and on the ultimate cause of his death,[25] they are in agreement that he was in respiratory failure in the days and weeks leading up to his death, thus supporting claimant's burden to establish total disability at 20 C.F.R. §§718.204(b)(2), 718.305(b)(1)(iii). Director's Exhibit 26; Employer's Exhibit 1.

The majority affirms the administrative law judge's finding that the miner was not totally disabled, in part because Drs. Castle, Rosenberg, and Gaziano opined that the miner's objective studies did not reveal a totally disabling impairment.[26] *See* slip op. at

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[24] The administrative law judge discussed the miner's hospitalization records when considering whether the miner had pneumoconiosis, but neglected to discuss these records when considering whether the miner was totally disabled at the time of his death. Decision and Order at 6-9, 11-14.

[25] Dr. Cornett opined that the miner had "well documented Coal Worker's Pneumoconiosis" and that his "rapid demise from leukemia was undoubtedly hastened by his underlying lung disease." Director's Exhibit 26. Dr. Rosenberg opined that the miner did not have clinical or legal pneumoconiosis; his respiratory failure was due to fungal, bacterial, or viral infection; and the "marked pulmonary changes that developed during the terminal portion of his life related to [the] process of the whole person disorder of [leukemia] with superimposed infection." Employer's Exhibit 1 at 7.

[26] I disagree with the majority's assertion that the Director clearly urged the Board to affirm the administrative law judge's finding that the miner was not totally disabled at

6-7. In relying on objective testing that was conducted nearly three months, and in some cases several years, before the miner's death,[27] the majority fails to account for the other, more probative evidence of record. The proper inquiry for invocation of the Section 411(c)(4) presumption in a survivor's claim is whether the miner was totally disabled "at the time of his death." 20 C.F.R. §718.305(b)(1)(iii). The medical opinions and hospitalization records that document the miner's worsening respiratory condition during the three-week period immediately preceding the miner's death are central to understanding whether the miner was totally disabled at the time of death.[28] *See*

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the time of his death. *See* slip op. at 6. The Director stated that he filed his brief "primarily to acknowledge the Director's improper submission of [Dr. Gaziano's report] in this case." Director's Brief at 1. Thus, the crux of the Director's argument is that the erroneous admission of Dr. Gaziano's report is harmless, in light of the administrative law judge's determination that the other evidence of record does not support a finding of total disability. *Id*. at 1-2. Furthermore, the majority's reliance on Dr. Gaziano's opinion, as constituting substantial evidence in support of the administrative law judge's findings, is contrary to the Director's concession that Dr. Gaziano's report should not have been admitted into the record. *Id*. Similarly, the majority's reliance on Dr. Castle's opinion is inconsistent with the administrative law judge's finding that Dr. Castle "did not address the miner's pulmonary capacity prior to his death." Decision and Order at 8.

[27] The three pulmonary function studies that were admitted into the record and reviewed by Drs. Castle, Rosenberg, and Gaziano were conducted on January 9, 2007, October 23, 2007, and March 18, 2010. Decision and Order at 5; Employer's Exhibit 1; Director's Exhibits 27; 48. The miner died on June 11, 2010. Director's Exhibit 10.

[27] Any inference that claimant can establish total disability only by showing that the miner's totally disabling respiratory or pulmonary impairment was of a longer duration, or was "chronic," is without merit. *See* slip op. at 7 n.15. Whereas the establishment of pneumoconiosis requires a showing that the miner had "a *chronic* dust disease of the lung . . . arising out of coal mine employment," 20 C.F.R. §718.201(a) (emphasis added), the establishment of total disability requires only a showing that "the miner ha[d] a pulmonary or respiratory impairment which, standing alone" prevented him from performing his usual coal mine work, 20 C.F.R. §718.204(b)(1). *See generally Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (existence of pneumoconiosis not relevant to separate issue of total disability). Thus, the chronic nature of the miner's condition is not relevant when considering whether he is totally disabled; it is properly addressed in considering whether the miner had pneumoconiosis and, consequently, whether pneumoconiosis caused his total disability or death. *See* 20 C.F.R. §§718.204(c), 718.205.

generally Price v. Califano, 468 F.Supp. 428 (N.D. W.Va. 1979) (proper inquiry under Section 411(c)(4) is whether the miner was totally disabled "at the time of death," not some point in time "prior to death"); *Lloyd v. Mathews*, 413 F.Supp. 1161 (E.D. Pa. 1976) (Because pneumoconiosis is a progressive disease, evidence that the miner was not disabled one month before his death "is not controlling if, in the space of those final weeks [of life], his physical condition deteriorated to the extent that he became 'totally disabled.'").

The majority's reliance on the regulations' limited use of the terms "chronic" and "acute," ostensibly in reference to the issue of total disability, does not support reading into the definition of total disability a requirement that such disability be chronic. *See* slip op. at 7 n.15, *citing* 20 C.F.R. §718.105(d), Appendices B and C to 20 C.F.R. Part 718. As an initial matter, it must be presumed that the Department of Labor acted intentionally when it used the term "chronic" to describe the parameters under which certain types of objective testing can be considered, *e.g.*, limitations on the admission of "deathbed" blood gas studies at 20 C.F.R. §718.105(d), but not when defining the actual term "total disability." *See Russello v. United States*, 464 U.S. 16, 23 (1983) (It is presumed that "the disparate inclusion or exclusion" of language is done "intentionally and purposely."). Moreover, by their express terms, the regulatory provisions cited by the majority do not apply to medical opinions at 20 C.F.R. §718.204(b)(2)(iv), which is the type of evidence at issue in this case, nor do they create a rule that total disability can be established only with evidence that the disability is chronic. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936 (4th Cir. 1980) (rejecting employer's argument that the miner's totally disabling cancer was "acute" rather than "chronic," reasoning that because these terms are not defined, "no such technical distinction should be made").

Finally, such an interpretation is inconsistent with the plain language of Section 411(c)(4) of the Act. If claimant establishes fifteen years of qualifying coal mine employment and "the existence of a totally disabling respiratory or pulmonary impairment," she is entitled to a presumption that the miner's death was caused by pneumoconiosis. 30 U.S.C. §921(c)(4). Nothing in the Act or regulations requires a showing that the miner's total disability was chronic in order to invoke the presumption. *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). In *Tanner*, the Board squarely addressed this issue, holding that, "Under the plain language of Section 411(c)(4) of the Act and the implementing regulation . . . claimant is not required to establish that his totally disabling respiratory or pulmonary impairment is chronic." *Tanner*, 10 BLR at 1-86. Rather than requiring claimant to establish a long-term or "chronic" disability, Section 411(c)(4) *presumes* that a "chronic lung disease," i.e., pneumoconiosis, caused the miner's disability or death. 20 C.F.R. §§718.202(a)(3), 718.204(c)(2), 718.205(b)(4). It then becomes employer's burden to disprove that fact. 20 C.F.R. §718.305(d).

The majority further concludes that the opinions of Dr. Cornett and Dr. Rosenberg are insufficient as a matter of law to establish total disability because neither physician explicitly stated that the miner's "respiratory failure" is "a pulmonary or respiratory impairment which, standing alone, was totally disabling." *See* slip op. at 6-7. Contrary to the majority's holding, a physician need not phrase his or her opinion specifically in terms of "total disability." *See Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 507 (7th Cir. 1991) ("It is not essential for a physician to state specifically that an individual is totally impaired . . ."). Rather, a medical opinion may support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that the miner was unable to do his last coal mine job. *See Scott v. Mason Coal Co*., 60 F.3d 1138, 1141 (4th Cir. 1995); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000).

Under the facts of this case, it can hardly be disputed that the miner's respiratory failure, which required him to be hooked up to a ventilator, followed by his continued respiratory distress "with a high oxygen requirement," was anything but a totally disabling respiratory or pulmonary impairment. Director's Exhibits 24; 24A. Based on these conditions, as documented by the miner's treatment records, Dr. Cornett concluded that the miner developed respiratory failure "from which he was unable to recover[.]" Director's Exhibit 26. Dr. Rosenberg opined that "surrounding [the miner's] death," the miner had the onset of pancytopenia, "developed respiratory failure," had an "overwhelming infectious process within his lungs" that radiographically caused "the appearance of increased nodularity," and concluded that "[t]hese changes progressed throughout his terminal hospital course[.]" Employer's Exhibit 1 at 7.

Based on the clear and uncontradicted medical opinion evidence and hospitalization records establishing that the miner was in respiratory failure and distress during the three week period leading up to his death, including on the day before he died, I would reverse the administrative law judge's determination that claimant did not establish that the miner was totally disabled at the time of his death. 20 C.F.R. §§718.204(b), 718.305(b)(1)(iii); *see generally Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (reversal appropriate where no factual issues remain). Because employer stipulated to fifteen years of underground coal mine employment, claimant has established invocation of the Section 411(c)(4) presumption. I would

therefore remand this claim for consideration of whether employer rebutted the presumption.[29] 20 C.F.R. §718.305(d)(2); *see Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

GREG J. BUZZARD
Administrative Appeals Judge

[29] I agree with the majority that, with the burden of proof placed on claimant, the administrative law judge rationally determined that Dr. Cornett's opinion is insufficient to affirmatively establish that the miner had pneumoconiosis. *See* slip op. at 10. Claimant's failure to establish the existence of pneumoconiosis, a requisite element of entitlement in a survivor's claim without the benefit of the Section 411(c)(4) presumption, would preclude an award of benefits. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).