

BRB No. 00-0783 BLA

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|-------------------------------|---|--------------------|
| PAULINE BROWN                 | ) |                    |
| (Widow of BILL BROWN)         | ) | )                  |
|                               | ) |                    |
| Claimant-Petitioner           | ) |                    |
|                               | ) |                    |
| v.                            | ) |                    |
|                               | ) |                    |
| LANGLEY & MORGAN CORPORATION  | ) | DATE ISSUED:       |
|                               | ) |                    |
| 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 of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan and Edmond Collett, Hyden, Kentucky, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (99-BLA-0522) of Administrative Law Judge Edward Terhune Miller denying benefits on a claim 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.

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<sup>1</sup> Claimant is the widow of the miner, Bill Brown, who died on May 13, 1997. Director's Exhibits 1, 6. The miner's claim, which was filed on May 21, 1979, was finally denied by Administrative Law Judge Daniel J. Rokenek on September 9, 1992. Director's Exhibit 19 at 1, and 728. No appeal was taken on this claim. Claimant filed her survivor's claim on December 16, 1997. Director's Exhibit 1.

§901 *et seq.* (the Act).<sup>2</sup> In this survivor's claim, the administrative law judge credited the miner with fifty years and three months of coal mine employment and found the evidence of record insufficient to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find that the existence of pneumoconiosis and death due to pneumoconiosis were established based on the evidence of record. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not respond in this appeal.<sup>3</sup>

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which the Director and employer have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the parties' briefs and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

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<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> The findings of the administrative law judge on the length of coal mine employment and at 20 C.F.R. §§718.202(a)(2), (3)(2000), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death that death was caused by complications of pneumoconiosis, or that death was hastened by pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); see also *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), cert. denied 113 S.Ct. 969 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

Claimant first generally contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established by x-ray evidence. Contrary to claimant's argument, in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly determined that the overwhelming weight of the x-ray evidence and all of the x-ray evidence submitted in support of the survivor's claim was negative for the existence of pneumoconiosis. Director's Exhibits 1-16, 22-24, 26-28, Decision and Order at 6. The administrative law judge, therefore, properly found that claimant failed to establish the existence of pneumoconiosis by x-ray evidence, see 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), aff'g sub nom. *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and we affirm that finding as supported by substantial evidence.

Claimant next asserts that the administrative law judge erred in not finding the existence of pneumoconiosis established based on the documented and reasoned opinion of Dr. Dalloul which found significant coal miner's pneumoconiosis. The administrative law judge acknowledged that Dr. Dalloul examined the miner on several occasions and prepared his death certificate on May 20, 1997. The administrative law judge, however, found that Dr. Dalloul never mentioned pneumoconiosis in any of the numerous reports prepared after examining the miner on several occasions, although such reports contained "exhaustive lists of the miner's past and present illnesses." Decision and Order at 6. Further, the administrative law judge noted that pneumoconiosis was not listed as a diagnosis on the death discharge summary or death certificate completed by Dr. Dalloul. Director's Exhibit 6;

Employer's Exhibits 13, 17, 25.<sup>4</sup> Rather, the administrative law judge noted that Dr. Dalloul opined that the miner had significant coal miners' pneumoconiosis which contributed to his death for the first time in a letter dated November 26, 1997, subsequent to the miner's death. Director's Exhibit 7. The administrative law judge, however, found that Dr. Dalloul failed to support this finding of pneumoconiosis with objective evidence or sufficient reasoning. Accordingly, we conclude that the administrative law judge rationally accorded little weight to Dr. Dalloul's opinion. Decision and Order at 6, *see Trumbo, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and affirm the administrative law judge's finding. 20 C.F.R. §718.202(a)(4).

As claimant has failed to establish the existence of pneumoconiosis, she has failed to establish one of the essential elements of entitlement at Part 718, and the administrative law judge properly denied benefits in this survivor's claim. *See Trumbo, supra.*

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting

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<sup>4</sup> Although "COPD" is listed as one of the significant factors leading to the immediate cause of the miner's death *i.e.* intra cerebral bleeding [due] to a fall, "the cause of COPD is not given. Director's Exhibit 6. *See* 20 C.F.R. §718.201.

## Administrative Appeals Judge