

BRB No. 04-0438 BLA

ANNA ELIZABETH MORGAN)
(Widow of EUGENE MORGAN))
)
 Claimant-Petitioner)
)
 v.)
)
) DATE ISSUED: 02/18/2005
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denial of Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Anna Elizabeth Morgan, Elkhorn City, Kentucky, *pro se*.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order – Denial of Request for Modification (03-BLA-5478) of Administrative Law Judge Robert

¹Claimant is Anna Elizabeth Morgan, the widow of the miner, who filed her survivor's claim for benefits on January 31, 2001. Director's Exhibit 2. On November

L. Hillyard in a survivor's 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. §901 *et seq.* (the Act). The administrative law judge credited the miner with thirty-three years of coal mine employment. Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). *Id.* at 7-11. Therefore, the administrative law judge found that claimant failed to demonstrate a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

13, 2001, the district director denied the survivor's claim. Director's Exhibit 18. Claimant subsequently submitted additional evidence, which was treated as a request for modification and denied by the district director. Director's Exhibits 20, 22.

The miner previously filed two claims for benefits on June 29, 1973 and March 14, 1983. Director's Exhibits 1, 2. The 1973 claim was finally denied by the United States Department of Labor on October 14, 1981. Director's Exhibit 1. On May 14, 1985, the miner indicated he was no longer interested in pursuing his 1983 claim. Director's Exhibit 2.

²Susie Davis, a benefits counselor with the Kentucky Black Lung Coalminers & Widows Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Prior to considering the evidence in this case, the administrative law judge considered the Director's objections to claimant's submission into evidence of Dr. Valera's September 20, 2001 letter and Dr. Quddus' December 5, 2001 letter. Decision and Order at 2. In his brief, the Director notes that he objected to the admission of Dr. Quddus' letter because it was not submitted twenty days prior to the date the hearing was scheduled pursuant to 20 C.F.R. §725.456(b)(2). Director's Brief at 2 n.1. Pursuant to the parties' request, the hearing in this case, which was scheduled to be held on October 30, 2003, was cancelled and a decision was made on the record.

In his Decision and Order, the administrative law judge overruled the Director's objection to the admission of Dr. Valera's letter. *Id.* at 3. However, the administrative law judge sustained the Director's objection to Dr. Quddus' letter. *Id.* In doing so, the administrative law judge stated that "[a]s the Claimant did not respond to the Director's objections either directly or through a closing brief, I presume that the Claimant waived any argument in support of its position."³ *Id.* Moreover, the administrative law judge noted that Dr. Quddus' letter was never received by his office. *Id.* An administrative law judge is given broad discretion to handle procedural matters. *Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A (June 28, 2004)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). On the facts of this case, we hold that the administrative law judge did not abuse his discretion in sustaining the Director's objection to Dr. Quddus' letter.

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (c)(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Pursuant to Section 718.205(c), the administrative law judge considered the only relevant piece of evidence contained in the record regarding the cause of death, the miner's death certificate. Decision and Order at 11. The death certificate, signed by Dr. Quddus, lists the immediate cause of the miner's death on April 12, 1999 as "ventricular [illegible]" due to "Ischemic [illegible] cardiomyopathy" due to "severe coronary artery

³Claimant was represented by the aforementioned Susie Davis while this case was pending before the administrative law judge. *See* n.2.

disease.” Director’s Exhibit 8. The administrative law judge properly found that “[t]he Death Certificate lists no conditions related to pneumoconiosis which caused or contributed to the Miner’s death” and noted that “there is no medical evidence in the record which states that the Miner’s death was caused by or hastened due to coal workers’ pneumoconiosis.” Decision and Order at 11. Accordingly, the administrative law judge concluded that claimant “failed to show that the Miner’s death was caused or hastened by coal workers’ pneumoconiosis” because there is no “competent medical evidence” which establishes “a link between cause or hastening of death and pneumoconiosis.” *Id.*

Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if her evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because the administrative law judge properly found that the medical evidence is insufficient to establish that pneumoconiosis caused or substantially contributed to the miner’s death, we affirm the administrative law judge’s finding pursuant to 20 C.F.R. §718.205(c). *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); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Because we affirm the administrative law judge’s finding that claimant failed to establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c), *see Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993), an essential element of entitlement in a survivor’s claim, we also affirm his denial of survivor’s benefits under 20 C.F.R. Part 718,⁴ *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*); *see also Trumbo*, 17 BLR at 1-87-88.

⁴In light of the foregoing, we decline to address any error the administrative law judge may have made in considering the evidence regarding the existence of pneumoconiosis, as a finding of entitlement is precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order – Denial of Request for Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge