

BRB No. 04-0238 BLA

IDA MAE TACKETT )  
(Widow of VIRGIL TACKETT) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 BAILEY MINING COMPANY, )  
 INCORPORATED )  
 )  
 and )  
 )  
 TLT MINING COMPANY, ) DATE ISSUED: 10/20/2004  
 INCORPORATED )  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY )  
 )  
 Employers/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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Ida Mae Tackett, Virgie, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for Bailey Mining Company, Incorporated.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> representing herself, appeals the Decision and Order (02-BLA-0428) of Administrative Law Judge Thomas F. Phalen, Jr. 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. §901 *et seq.* (the Act). This case involves a survivor's claim filed on August 9, 2000.<sup>2</sup> After crediting the miner with thirty-six years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

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<sup>1</sup> Claimant is the surviving spouse of the deceased miner who died on May 21, 1996. Director's Exhibit 7.

<sup>2</sup> The miner filed a claim for benefits on February 12, 1979. Director's Exhibit 34. The district director denied the claim on October 17, 2001. *Id.* There is no indication that the miner took any further action in regard to his 1979 claim.

The miner filed a second claim on September 14, 1982. Director's Exhibit 35. The district director denied the claim on August 17, 1983. *Id.* Claimant filed a third claim on July 19, 1984. Because claimant's 1984 claim was filed within one year of the issuance of the last denial of his 1982 claim, the 1984 claim constituted a timely request for modification of the 1982 claim. *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). By letter dated July 24, 1984, the Department of Labor advised the miner that all additional evidence had to be submitted within thirty days. Director's Exhibit 35. The Department of Labor further advised the miner that if no additional evidence was submitted, his claim would remain denied and would be closed by reason of abandonment. *Id.* There is no evidence that the miner submitted any additional evidence or took any further action in regard to his 1982 claim.

Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>3</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(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(c)(5); see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); see also *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

The administrative law judge properly found that there is no evidence in the record supportive of a finding that the miner's death was due to pneumoconiosis. The miner's

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<sup>3</sup> Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) 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).

death certificate does not support a finding of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>4</sup> Moreover, none of the hospital records or reports indicates that pneumoconiosis caused or hastened the miner's death in any way.<sup>5</sup> *Id.* The administrative law judge correctly found that Drs. Rosenberg and Vuskovich opined that the miner's death was unrelated to his coal mine employment.<sup>6</sup> Decision and Order at 8; Employer's Exhibits 1-2. Consequently, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>7</sup>

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we need not address the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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<sup>4</sup> Dr. Johnson completed the miner's death certificate. Dr. Johnson attributed the miner's death to cardiogenic shock due to an acute inferior wall myocardial infarction, arteriosclerotic heart disease and chronic renal failure. Director's Exhibit 7. Dr. Johnson listed cardiomyopathy, insulin-dependent diabetes mellitus, a history of stroke and an intracerebral hemorrhage as other significant conditions that contributed to the miner's death. *Id.*

<sup>5</sup> In a Death Summary dated June 5, 1996, Dr. Johnson noted that the miner had a "down hill course and finally had cardiac arrest." Director's Exhibit 11. Although Dr. Johnson noted that the miner was treated for heart failure and "expired with pulmonary edema," he did not otherwise address the cause of the miner's death. *Id.*

<sup>6</sup> In a report dated March 4, 2003, Dr. Rosenberg opined that coal workers' pneumoconiosis did not cause, contribute to, or hasten the miner's death. Employer's Exhibit 2. In a report dated March 8, 2003, Dr. Vuskovich opined that coal workers' pneumoconiosis did not cause or hasten the miner's death. Employer's Exhibit 1.

<sup>7</sup> Because there is no evidence of complicated pneumoconiosis in the record, claimant is precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge