

BRB No. 00-0871 BLA

ANGELYN SCOTT )  
(Widow of HAYES SCOTT) )

Claimant-Petitioner )

v. )

PEABODY COAL COMPANY )

and )

OLD REPUBLIC INSURANCE COMPANY )

Employer/Carrier- )  
Respondents )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Party-in-Interest )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser,  
Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for  
claimant.

Laura Metcoff Klaus and Darren E. Pogoda (Arter & Hadden LLP),  
Washington, D.C., for employer/carrier.

Timothy S. Williams (Judith E. Kramer, Acting Solicitor of Labor; Donald S.  
Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;  
Richard A. Seid and 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: SMITH and McGRANERY, Administrative Appeals Judges, and  
NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order - Denying Benefits (99-BLA-1321) of Administrative Law Judge Donald W. Mosser 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).<sup>2</sup> This case involves a survivor's claim filed on July 31, 1998, which the administrative law judge properly considered under the regulations at 20 C.F.R. Part 718.<sup>3</sup> After noting that employer conceded that the miner suffered from pneumoconiosis

---

<sup>1</sup>Claimant is the surviving spouse of the miner, who died on February 28, 1998. Director's Exhibit 8.

<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 miner filed a claim on September 21, 1983. Director's Exhibit 26. In a Decision and Order dated January 28, 1988, Administrative Law Judge Robert E. Kendrick credited

arising out of forty years of coal mine employment, the administrative law judge found the evidence in the record insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000) and, accordingly, denied benefits. On appeal, claimant contends that the administrative law judge erred in failing to find the evidence sufficient to establish that the miner's death was hastened by pneumoconiosis and that pneumoconiosis was, consequently, a substantially contributing cause of the miner's death under Section 718.205(c)(2) (2000). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she does not intend to participate in this appeal.<sup>4</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 Ass'n 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 in an Order issued on March 9, 2001, to which claimant, employer and the

---

the miner with forty-seven years of coal mine employment, and determined that the miner established the presence of pneumoconiosis arising out of coal mine employment. *Id.* Judge Kendrick further determined, however, that the miner failed to establish that he was totally disabled and, consequently, denied benefits on the miner's claim. *Id.* The miner took no further action on his claim subsequent to that denial.

<sup>4</sup>We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1) and (c)(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4-5.

Director have responded. All parties agree that the new regulations would not affect the affect the outcome of this case. The issue on appeal in the present case is whether the administrative law judge properly found the evidence of record insufficient to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c)(2) by establishing that the miner's death was hastened by the disease. As the parties recognize, the new regulation pertaining to establishing pneumoconiosis as a substantially contributing cause of a miner's death codifies the "hastening death" standard adopted by the United States Court of Appeals for the Sixth Circuit in *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations, inasmuch as the new regulation at Section 718.205(c)(2) is consistent with controlling precedent in the Sixth Circuit. Therefore, the Board will adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis or where complicated pneumoconiosis is established. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises,<sup>5</sup> has held that pneumoconiosis is considered a "substantially contributing cause" of the miner's death if it hastens the miner's death. See 20 C.F.R. §718.205(c)(2) (2000); *Brown, supra*; see also 20 C.F.R. §718.205(c)(5).

---

<sup>5</sup>Because the miner's coal mine employment occurred in Kentucky, the instant 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 (1989)(*en banc*).

On appeal, claimant generally argues that the administrative law judge erred in failing to determine that the miner's death was hastened by pneumoconiosis. Claimant's contention lacks merit. In concluding that claimant failed to establish that the miner's death was due to pneumoconiosis, the administrative law judge correctly noted that there is no evidence of record indicating that pneumoconiosis hastened the miner's death in any way.<sup>6</sup> 20 C.F.R.

---

<sup>6</sup>Claimant contends that the dissenting opinion in *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-113 (6th Cir. 1995), constitutes persuasive authority in support of her argument that the record contains sufficient evidence that the miner's death was hastened by pneumoconiosis. *See* Claimant's Brief at 4-7. Claimant generally argues that the evidence in her case is at least as strong as the evidence which the dissent in *Griffith* found sufficient to satisfy the "hastening death" standard. Claimant's contention lacks merit, however, as the evidence referred to by the dissent in *Griffith* was, in fact, probative of whether pneumoconiosis contributed to the miner's death. The dissent in *Griffith* noted that one physician, Dr. David, affirmatively stated that the miner's chronic lung disease contributed to the miner's demise by increasing the work load on his heart. *See Griffith, supra*, at 189, 19 BLR 2-119. In marked contrast, although the record in the instant case contains evidence developed while the miner was living which indicates that the miner had pneumoconiosis, the record includes no evidence specifically addressing what role, if any, pneumoconiosis played in causing the miner's death.

§718.205(c)(2) (2000); Decision and Order and 4-5. Specifically, the administrative law judge properly found that the miner's death certificate and an emergency room report from the date of the miner's death indicated that cardiac arrest was the immediate cause of the miner's death, and that no other causes of death were listed on either report.<sup>7</sup> Decision and Order at 4-5; Director's Exhibits 8, 10. Inasmuch as the administrative law judge properly stated that the record is devoid of evidence that supports claimant's burden of establishing that pneumoconiosis hastened the miner's death, we affirm the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis under Section 718.205(c)(2) (2000). *See* 20 C.F.R. §718.205(c)(2) (2000); 20 C.F.R. §718.205(c)(5); *Brown, supra*.

---

<sup>7</sup>The emergency room report, dated February 28, 1998, indicated that the miner was brought to the emergency room after having experienced cardiopulmonary arrest at home. Director's Exhibit 10. The miner died at the hospital emergency room on February 28, 1998. *Id.* The miner's death certificate, signed by a lay person, listed a myocardial infarction as the only cause of death. Director's Exhibit 8.

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

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge