

BRB No. 00-1199 BLA

HELEN P. THOMAS)
(Widow of JOE WINSTON THOMAS))

Claimant-Petitioner)

v.)

DATE ISSUED:

EASTERN ASSOCIATED COAL)
COMPANY)

and)

OLD REPUBLIC INSURANCE COMPANY)

Employer/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 on Remand of Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

John P. Scherer (File, Payne, Scherer & File), Beckley, West Virginia, for
claimant.

Laura Metcoff Klaus (Greenburg Traurig, LLP), Washington, D.C., for
employer.

Michelle S. Gerdano (Howard M. Radzely, 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2000-BLA-0260) of Administrative Law Judge Jeffrey Tureck denying benefits on 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).¹ The administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief on the merits of this appeal.²

¹Claimant, Helen P. Thomas, is the surviving spouse of the deceased miner, Joe Winston Thomas, who died on December 8, 1998. Director's Exhibit 9. The miner's claim was denied by the Office of Workers' Compensation Programs on November 9, 1994. Director's Exhibit 25. This survivor's claim was filed on March 11, 1999. Director's Exhibit 1.

²The 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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

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 survivor's benefits under 20 C.F.R. Part 718, in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and 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 the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *see 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). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 65 Fed. Reg. 80,050 (2000) (to be codified at 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. Denied*, 113 S.Ct. 969 (1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that the miner's death was not due to pneumoconiosis pursuant to Section 718.205(c)(2000). Contrary to claimant's contentions, the administrative law judge acknowledged Dr. Bembalkar's status as the miner's treating physician and correctly found that Dr. Bembalkar did not discuss the cause of the miner's death. Decision and Order at 4; Claimant's Exhibit 1. The administrative law judge reasonably found that Dr. Bembalkar's opinion, that the miner's coal mining work was a contributing factor in his illness, "says nothing about whether he believes decedent's coal mining work contributed to his death." *Id.* Further, although the administrative law judge did not consider Dr. Patel's positive reading, the x-ray report may not establish that the miner's death was caused by pneumoconiosis inasmuch as Dr. Patel did not diagnose complicated pneumoconiosis or attribute the miner's death to pneumoconiosis.³ 20 C.F.R. §

³The record contains the miner's death certificate, by Dr Harake, listing the immediate cause of death as acute respiratory distress syndrome due to pneumonia with relapsing lymphoma as a significant condition contributing to death, but not resulting in the underlying cause. Director's Exhibit 9. The administrative law judge found the autopsy report by Dr. Koh indicated that the miner's death was due to acute respiratory distress syndrome superimposed on diffuse alveolar damage and diagnosed pulmonary anthracosis. Decision and Order at 3; Director's Exhibit 10. The administrative law judge further found that Dr. Koh did not relate the miner's death to anthracosis. *Id.*

718.205(c) (2000); Director's Exhibit 21.

Further, we reject claimant's contention that the administrative law judge "committed error in relying on the unreliable opinions of Dr. Fino and Dr. Naeye, who relied on the completely unreliable autopsy report in this case...." Claimant's Brief at 8. Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Oggero v. Director, OWCP* 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge correctly found that there is no evidence linking pneumoconiosis to the miner's death, we affirm his finding that claimant failed to establish that the miner's death was due to pneumoconiosis under Section 718.205(c). *See Shuff, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge