

BRB No. 08-0775 BLA

S. C.)
(Widow of J. C.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 08/20/2009
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for
claimant.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James,
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, HALL and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-05389) of
Administrative Law Judge Janice K. Bullard rendered 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). The miner died on January 4,
2006,¹ and claimant, the miner's widow, filed her application for survivor's benefits on

¹ The miner filed a claim for benefits on June 5, 1990 and ultimately received
benefits by Decision and Order on Remand Awarding Benefits dated September 5, 2001.

February 23, 2006.² Director's Exhibits 2, 9. The administrative law judge found that the prior determination In the living miner's claim of at least thirty years of coal mine employment is supported by the evidence of record and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that the evidence failed 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 contends that the administrative law judge erred in finding that claimant did not establish the existence of pneumoconiosis. Claimant argues that the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant established the existence of pneumoconiosis and that the finding of pneumoconiosis in the living miner's claim precluded relitigation of the issue of pneumoconiosis in the survivor's claim. Claimant also alleges that the denial of survivor's benefits is premised on the administrative law judge's erroneous finding that because the miner did not have pneumoconiosis, his death could not be due to pneumoconiosis. The Director concedes that claimant established the existence of pneumoconiosis, but argues that remand of this case is unnecessary because the administrative law judge's determination that the record lacks any reasoned medical opinion evidence linking the miner's death to pneumoconiosis is independent of her finding that claimant did not establish the existence of pneumoconiosis and is sufficient to support the denial of benefits. Citing *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987) and *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), the Director argues that claimant did not challenge the administrative law judge's finding that the death certificate is not credible and, therefore, her denial must be affirmed.³

The Board affirmed the award of benefits. [*J.T.C.*] *v. Bethenergy Mines, Inc.*, BRB No. 02-0122 BLA (Sept. 25, 2002)(unpub.).

² The administrative law judge scheduled a hearing for September 12, 2007, but at the parties' request, he cancelled the hearing and decided the case on the record.

³ The administrative law judge's finding that the record contains no evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 is affirmed, as unchallenged by the parties on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

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.⁴ 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).

To establish entitlement to survivor's benefits, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Initially, we agree with claimant and the Director, that the issue of pneumoconiosis arising out of the miner's coal mine employment was never contested in the survivor's claim. Moreover, the Director has conceded that he only contested whether pneumoconiosis caused or hastened the miner's death. Director's Exhibit 23; Director's Brief at 2. We, therefore, reverse the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a), 718.203(b).

In considering the medical evidence of record relevant to the cause of the miner's death, the administrative law judge discussed the miner's death certificate, signed by Dr. Zaldivar, and the autopsy report of Dr. Sawyer. Decision and Order at 3-4, 7-8. Dr. Zaldivar listed respiratory failure, pneumonia, lung cancer and coal workers'

⁴ The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 2. Accordingly, contrary to the administrative law judge's finding, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); *[J.T.C.] v. Bethenergy Mines, Inc.*, BRB No. 02-0122 BLA (Sept. 25, 2002)(unpub.).

pneumoconiosis as the immediate causes of the miner's death, and coronary artery disease and diabetes as other significant conditions contributing to the miner's death. Director's Exhibit 9. Dr. Sawyer conducted the autopsy on January 5, 2004 and concluded that the autopsy findings revealed organizing pneumonia of the right upper lung lobe, and acute pneumonia of the left upper and right lower lung lobes. He further determined that the "most likely cause of death is due to pneumonia present within two lung lobes in a patient with significant cardiovascular compromise." Director's Exhibit 10.

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge determined that the evidence did not establish that pneumoconiosis was the cause of the miner's death. The administrative law judge acted within her discretion as the fact-finder when she determined that Dr. Zaldivar's notation on the death certificate, that coal workers' pneumoconiosis caused the miner's death was conclusory, unexplained and, by itself, not a reasoned medical opinion sufficient to establish death due to pneumoconiosis. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-264; Decision and Order at 8; Director's Exhibit 9. The administrative law judge explained that, although Dr. Zaldivar may have treated the miner during his lifetime, she was unable to accord his inclusion of pneumoconiosis in the death certificate significant weight, without additional evidence. Decision and Order at 8. The administrative law judge, therefore, permissibly found that Dr. Zaldivar's conclusion is "entirely without support in the record, particularly when considered with an autopsy report that does not diagnose the presence of pneumoconiosis" and identified pneumonia as the miner's cause of death. *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); Decision and Order at 8.

Moreover, we agree with the Director that claimant did not challenge the administrative law judge's finding that the death certificate is not credible, or her finding that the record lacks any reasoned medical opinion evidence linking the miner's death to pneumoconiosis. *Sarf*, 10 BLR at 1-120; *Skrack*, 6 BLR at 1-711; Director's Exhibit 2. Further, we reject claimant's argument that "[t]he denial in this case is all premised upon the [administrative law judge's] erroneous ruling that [the miner] did not have coal workers' pneumoconiosis." Claimant's Brief at 2. The administrative law judge's finding that claimant has failed to establish that the miner's death was due to pneumoconiosis is independent of her finding that claimant did not establish the existence of pneumoconiosis.

Because the administrative law judge properly discounted the only evidence of record supportive of a finding that pneumoconiosis caused the miner's death, and there is no evidence supportive of a finding that pneumoconiosis contributed to, or hastened, the miner's death, we affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). We must also affirm, therefore, the denial of survivor's benefits. *See Shuff*, 967 F.2d at 987, 16 BLR at 2-92.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge