

BRB No.97-1525 BLA

SUSAN LIS)
(Widow of MIKE LIS))
)
 Claimant-Petitioner)
)
 v.)
)
WINDSOR COAL COMPANY)
)
 Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF) DATE ISSUED:
LABOR)
)
 Party-in-Interest) DECISION AND ORDER
Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

Susan Lis, Avella, Pennsylvania, *pro se*.

Douglas G. Lee (Steptoe & Johnson), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY,
Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order - Denying Benefits (96-BLA-1588) of Administrative Law Judge Daniel L. Leland 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 Claimant is the widow of the miner, Mike Lis, who died on May 8, 1991. Director's Exhibit 6.

The administrative law judge credited the miner with thirty-three and one-third years of coal mine employment, based on a stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's initial filing date of November 19, 1991.² Addressing the merits of entitlement, the

² Claimant filed her initial application for benefits on November 19, 1991, which was denied by the district director on March 26, 1992. Director's Exhibit 19. By letter dated May 11, 1992, claimant indicated that she would submit additional evidence in support of her claim. *Id.* In a May 18, 1992 letter by the district director, claimant was given an additional sixty days in which to submit the additional evidence. *Id.* The record does not contain an indication that any additional evidence was submitted.

Claimant filed a second application for survivor's benefits on May 12, 1995, Director's Exhibit 1, which was denied by the district director on October 3, 1995, as a duplicate survivor's claim. Director's Exhibit 8. The claim was again denied by the district director on April 11, 1996 and the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 17, 18. By Order dated January 23, 1997, the administrative law judge denied employer's motion for summary judgment,

administrative law judge found the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, the administrative law judge found the relevant evidence of record 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. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.³

In an appeal by a claimant filed 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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'Keefe 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 when claimant meets her burden of establishing that the miner's death was

finding that claimant's first survivor's claim was still pending at the time the second application was filed and, therefore, the two claims merged.

³ Inasmuch as the parties do not challenge the administrative law judge's decision to credit the miner with thirty-three and one-third years of coal mine employment or his finding pursuant to 20 C.F.R. §718.202(a)(4), these findings are affirmed as they are not adverse to claimant. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

due to pneumoconiosis arising out of coal mine employment, where pneumoconiosis was substantially contributing cause of the miner's death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established. 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if pneumoconiosis hastens death in any way, it is a substantially contributing cause of death pursuant to Section 718.205(c)(2). *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *see generally Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In finding the evidence of record insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c),⁴ the administrative law judge properly found that the death certificate, which attributed the miner's death to "carcinoma of the prostate, metastatic to the bone," was insufficient to establish that pneumoconiosis caused or hastened the miner's death. Decision and Order at 8; Director's Exhibit 6; *see Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *see also Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). In addition, the administrative law judge correctly noted that the discharge summary associated with the miner's last hospitalization in March 1991 included diagnoses of congestive heart failure, metastatic prostate carcinoma, anemia, atrial fibrillation, hypokalemia and hearing loss, but did not include any mention of pneumoconiosis or chronic obstructive pulmonary disease. Decision and Order at 8; Director's

⁴ The administrative law judge excluded the medical opinion of Dr. Slomiany and an x-ray reading by Dr. Behun, submitted by claimant's lay representative after the January 30, 1997 hearing, finding that this evidence violated the twenty-day rule for submission of evidence. 20 C.F.R. §725.456(b)(1). The administrative law judge noted, in excluding this evidence, that the x-ray report by Dr. Behun was previously submitted as part of Director's Exhibit 19 and Dr. Slomiany's opinion does not specifically address the cause of the miner's death and, therefore, would not have changed any legal conclusion rendered in this case. Inasmuch as this evidence was not properly submitted pursuant to Section 725.456(b)(1), we affirm the administrative law judge's decision to exclude this post-hearing evidence as within a rational exercise of discretion as fact-finder. 20 C.F.R. §725.456(b)(1), (b)(2); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428 (1984); *see also Covert v. Westmoreland Coal Co.*, 6 BLR 1-1111 (1984).

Exhibit 19; see *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Likewise, the administrative law judge properly found that the consultative opinion of Dr. Morgan, Employer's Exhibit 1, in which he reviewed the hospital reports of record and the miner's death certificate, and stated that the miner's death was due to metastatic prostate cancer and arteriosclerotic cardiovascular disease, insufficient to establish that the miner's death was due to, or hastened by, pneumoconiosis. *Id.* Finally, the administrative law judge reasonably exercised his discretion as fact-finder, in finding that the letter from Mr. Jerome Stefkovich, Funeral Director and Deputy Coroner, Claimant's Exhibit 1, was not a reasoned and documented medical opinion inasmuch as there is no evidence in the record that Mr. Stefkovich is a medical doctor.⁵ 20 C.F.R. §§718.107, 718.206; see generally *Addison v. Director*,

⁵ Mr Stefkovich, in his letter dated January 29, 1997, stated:

I am writing this letter on behalf of the late Mike Lis. As you can tell by his death certificate, the immediate cause of his death was Prostate Cancer.

I was a friend of Mike's for thirty years. During the last sixteen to eighteen years, it was obvious to me that Mike had a condition which caused difficulty breathing.

OWCP, 11 BLR 1-68 (1988); *Gonzales v. Director, OWCP*, 4 BLR 1-571, 575 (1981). We, therefore, affirm the administrative law judge's finding that the miner's death was not caused, or hastened, by pneumoconiosis pursuant to Section 718.205(c)(1) and (c)(2).⁶ *Shuff, supra*; see also *Lukosevich, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Since claimant has not established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), a necessary element of entitlement under Part 718, an award of benefits in this survivor's claim is precluded. *Shuff, supra*; see also *Trumbo, supra*; *Smith, supra*; *Neeley, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

As a professional, I feel that his breathing condition contributed to his death in 1991.

Claimant's Exhibit 1.

⁶ In addition, the irrebuttable presumption of death due to pneumoconiosis is inapplicable because the record contains no evidence of complicated pneumoconiosis, see Decision and Order at 8. See 20 C.F.R. §§718.205(c)(3); 718.304.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge