

BRB No. 97-1018 BLA

VIRGIE M. ROLLINS)
(Widow of JACK ROLLINS))

Claimant-Petitioner)

v.)

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

Respondent)

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.

Virgie M. Rollins, McArthur, Ohio, *pro se*.

Gary K. Stearman (Marvin Krislov, Deputy Solicitor for National Operations; 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 BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order

¹ Claimant is the widow of the miner, Jack Rollins, who died on April 9, 1994. Director's Exhibit 3. The miner was in payment status at the time of his death, based on the award of benefits by Administrative Law Judge Glenn Robert Lawrence in a Decision and Order issued on November 1, 1989. Director's Exhibit 14. Inasmuch as the miner's claim was filed after January 1, 1982, claimant is not entitled to derivative survivor's benefits pursuant to Section 401(a) of the Act, 30 U.S.C. §901(a); 20 C.F.R. §§725.1, 725.212; *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Denying Benefits (95-BLA-1667) 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).² The administrative law judge found that benefits had been awarded in a miner's claim filed in November 1983, thereby establishing the existence of pneumoconiosis and that the miner was totally disabled due to pneumoconiosis. However, the administrative law judge found that the medical evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1)-(3). Accordingly, the administrative law judge denied benefits in this survivor's claim. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.

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 due to pneumoconiosis arising out of coal mine employment, where pneumoconiosis was a substantially contributing cause of 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). Moreover, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that, pursuant to Section

² Based on a request by the parties, the administrative law judge issued an Order dated January 17, 1997, stating that the parties agreed to a decision based on the documentary evidence of record and waived their right to a formal hearing. In a January 18, 1997 response to the administrative law judge's Order, claimant confirmed her desire to waive her right to a hearing and agreed to a decision based on the documentary evidence of record. In light of the fact that the administrative law judge informed claimant of her right to a hearing and claimant filed a written waiver of her right to appear before the administrative law judge, it was within the administrative law judge's discretion to consider entitlement based on the documentary evidence before him. See 20 C.F.R. §725.461(a); *Morgan v. Carbon Fuel Co.*, 3 BRBS 302 (1976); see generally *Churpak v. Director, OWCP*, 9 BLR 1-71 (1986).

718.205(c)(2), pneumoconiosis is considered to have substantially contributed to death if it hastens the miner's death. *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

We affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(1). Decision and Order at 3. Inasmuch as the administrative law judge reviewed all of the evidence and correctly found that there is no evidence that the miner's death was due to pneumoconiosis, we affirm his finding pursuant to Section 718.205(c)(1).³ 20 C.F.R. §718.205(c)(1); Decision and Order at 3; see *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985).

Moreover, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that pneumoconiosis hastened the miner's death and thus was a substantially contributing cause of the miner's death pursuant to Section

³ The miner's death certificate lists the cause of death as acute myocardial infarction and notes that no autopsy was performed. Director's Exhibit 3. Dr. Foglesong, stating that he had seen the miner on two occasions, opined that the miner's death was apparently due to complications [of coronary artery disease] and an acute myocardial infarction, which he could not "relate directly to being caused by pneumoconiosis." Director's Exhibit 6. Likewise, Dr. Long, based only on the death certificate, opined that the miner's death was due to an acute myocardial infarction. Dr. Long concluded that the miner's death was neither caused by, contributed to, or hastened by coal workers' pneumoconiosis. Director's Exhibit 5. Dr. Hunter stated that he saw the miner from April 1988 until December 1992 and that the cause of death from the death certificate was acute myocardial infarction. Director's Exhibit 4. In addition, he stated that, knowing the patient, he was sure that the miner's lung disease was a contributing factor in the cause of his death. However, Dr. Hunter also stated he had "no way of supporting this except by his prior examination." *Id.*

718.205(c)(2). Decision and Order at 4. The administrative law judge correctly found Drs. Foglesong and Long opined that there was no evidence that pneumoconiosis contributed to the miner's death. Decision and Order at 4; Director's Exhibits 5, 6. In a reasonable exercise of his discretion as trier-of-fact, the administrative law judge found that Dr. Hunter's opinion, that the miner's lung condition contributed to his death, was not sufficient to establish that the miner's pneumoconiosis hastened his death inasmuch as Dr. Hunter admitted that there was no medical evidence to support his opinion. Decision and Order at 4; Director's Exhibit 4; see *Lafferty v. Cannerton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Consequently, inasmuch as the administrative law judge reasonably found the opinion of Dr. Hunter, the only opinion supportive of claimant's burden, insufficient to establish that pneumoconiosis hastened the miner's death, we affirm the administrative law judge's finding at Section 718.205(c)(2). 20 C.F.R. §718.205(c)(2); see *Brown, supra*; see also *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Kuchwara, supra*.

However, we vacate the administrative law judge's denial of benefits and remand the case to the administrative law judge for further consideration of the evidence pursuant to Section 718.205(c)(3). The administrative law judge found that the record contains no evidence of complicated pneumoconiosis and, therefore, that the irrebuttable presumption of death due to pneumoconiosis provided at Section 718.205(c)(3) was inapplicable. Decision and Order at 3-4. Contrary to the administrative law judge's conclusion, the record contains an x-ray interpretation by Dr. Aycoth, dated February 8, 1979, that diagnoses Type A Large Opacities, that is, complicated pneumoconiosis. 20 C.F.R. §§718.205(c)(3), 718.304; Director's Exhibit 14 at pp. 130-131. In view of the administrative law judge's failure to consider this evidence, we vacate the administrative law judge's finding that there is no evidence of complicated pneumoconiosis and, thus, that Section 718.205(c)(3) is inapplicable. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Burks v. Hawley Coal Mining Corp.*, 2 BLR 1-323 (1979). Consequently, we remand the case to the administrative law judge for consideration of this evidence, as well as all of the other relevant evidence of record, to determine whether it is sufficient to establish the existence of complicated pneumoconiosis. 20 C.F.R. §§718.205(c)(3), 718.304; see *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Sumner v. Blue Diamond Coal Corp.*, 12 BLR 1-74 (1988); see also *Trent, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge