

BRB No. 09-0250 BLA

M. S.)
(Widow of B. S.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 09/30/2009
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

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

M. S., Lorain, Ohio, *pro se*.

Richard A. Seid (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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (2005-BLA-05530) of Administrative Law Judge Donald W. Mosser 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). Claimant filed her application for benefits on April 2, 2004.¹ The administrative law judge found

¹ Claimant is the widow of the miner, who died on September 20, 2003. Director's Exhibit 5. The miner filed applications for benefits on March 1, 1994 and September 22, 1999, which the district director denied because the miner did not establish any of the requisite elements of entitlement. Director's Exhibit 1. At the

that the miner had five years of coal mine employment, and determined that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).² Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has responded, urging the Board to affirm the administrative law judge's denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.³ 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).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *see 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 to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable.

miner's request, a formal hearing, scheduled for June 20, 2001, was cancelled and the case was remanded to the district director to allow the miner additional time to obtain counsel and to supplement the record with more recent medical evidence. *Id.* Because the miner took no further action, the miner's claim was administratively closed. *Id.*

² At the parties' request, and by Order issued on August 8, 2008, the administrative law judge cancelled the hearing scheduled for August 13, 2008, and issued a decision on the record.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 4.

20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Pursuant to Section 718.205(c), the administrative law judge considered the miner's death certificate, the opinion of Dr. Kirby and the miner's treatment records. Decision and Order at 5-6. On the miner's death certificate, Dr. Lavertu identified the cause of the miner's death as lung metastasis due to, or as a consequence of, soft palate cancer. Director's Exhibit 5. In a letter dated October 26, 2004, Dr. Kirby, a physician who had treated the miner, stated:

There is no question in my mind that [the miner] was adversely affected by his exposure to coal dust and chemicals during his mining experience. This resulted in significant lung damage and emphysema, which I found at the time of his surgery in May 1999. There is no question in my mind that [the miner's] underlying lung disease hastened his death.

Claimant's Exhibit 4. The miner's treatment records do not contain any statements linking the miner's death to pneumoconiosis. Director's Exhibits 6-8.

The administrative law judge weighed this evidence and rationally concluded that the death certificate does not support a finding that pneumoconiosis played a role in the miner's death, as Dr. Lavertu identified cancer as the sole cause of the miner's demise. *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Decision and Order at 6; Director's Exhibit 5. The administrative law judge also determined correctly that the miner's treatment records contain no statements attributing the miner's death to any pulmonary disease related to coal dust inhalation. *See Trumbo*, 17 BLR at 1-87-88; Decision and Order at 6; Director's Exhibits 6-8. With respect to Dr. Kirby's opinion, the administrative law judge acted within his discretion in finding that it is insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), as Dr. Kirby "failed to state the cause of the miner's death or explain the extent that pneumoconiosis was a contributing cause or factor leading to the death." Decision and Order at 6; *Griffith*, 49 F.3d at 186, 19 BLR at 2-116; *Brown*, 996 F.2d at 817, 17 BLR at 2-140; Claimant's Exhibit 4. Because the administrative law judge properly determined that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis, we affirm his finding that claimant did not satisfy her burden of proving death due to pneumoconiosis under Section 718.205(c). *Griffith*, 49 F.3d at 186, 19 BLR at 2-116; *Brown*, 996 F.2d at 817, 17 BLR at 2-140. In light of our affirmance of the administrative law judge's finding that claimant did not establish this essential element of

entitlement, we must also affirm the denial of benefits.⁴ *See* 20 C.F.R. §718.205(c); *Trumbo*, 17 BLR at 1-87.

Accordingly, we affirm the administrative law judge's Decision and Order – Denying Benefits.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁴ We need not address the administrative law judge's determination that claimant did not prove that the miner had pneumoconiosis. Decision and Order at 4-6. Error, if any, in the administrative law judge's findings under 20 C.F.R. §718.202(a) is harmless, based upon our affirmance of the administrative law judge's determination that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205, an essential element of entitlement. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).