

BRB No. 00-0703 BLA

JANIVA D. SEXTON)
(Widow of COLEMAN SEXTON))

Claimant-Petitioner)

v.)

BIG ELK CREEK COAL COMPANY,)
INCORPORATED)

DATE ISSUED:

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 Robert L. Hillyard,
Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Michael J. Pollack (Arter & Hadden LLP), Washington, D.C., for
employer.

Sarah M. Hurley (Judith E. Kramer, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (97-BLA-0067) of Administrative Law Judge Robert L. Hillyard denying benefits 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 This case, involving a 1996 survivor's claim, is before the Board for the second time. In the initial decision, the administrative law judge considered both the miner's 1995 duplicate claim and claimant's 1996 survivor's claim. After crediting the miner with twenty-three and three quarter years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits on both the miner's claim and the survivor's claim. By Decision and Order dated November 24, 1998, the Board vacated the administrative law judge's length of coal mine employment finding and remanded the case for further consideration. *Sexton v. Big Elk Creek Coal Co.*, BRB No. 98-0335 BLA (Nov. 24, 1998) (unpublished). The Board, however, affirmed the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis.³ *Id.* Inasmuch as claimant did not assert any other contentions of error in regard to the administrative law judge's adjudication of the miner's claim, the Board affirmed the administrative law judge's denial of the miner's claim. *Id.* The Board, however, held that the administrative law judge, in his adjudication of the survivor's claim, should have considered all of the evidence of record. *Id.* The Board, therefore, vacated the administrative

¹Claimant is the surviving spouse of the deceased miner who died on December 21, 1995. Director's Exhibit 8.

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.

³The Board noted that the administrative law judge's error in his calculation of the length of the miner's coal mine employment did not undermine his consideration of whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis. *Sexton v. Big Elk Creek Coal Co.*, BRB No. 98-0335 BLA (Nov. 24, 1998) (unpublished).

law judge's denial of the survivor's claim and remanded the case for further consideration. *Id.* The Board subsequently denied employer's motion for reconsideration. *Sexton v. Big Elk Creek Coal Co.*, BRB No. 90-0976 BLA (May 14, 1999) (Order on Recon.) (unpublished).

On remand, the administrative law judge, after crediting the miner with twenty-eight and one-half years of coal mine employment, found that the evidence was insufficient to establish the existence of pneumoconiosis. The administrative law judge also found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.⁴ Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with

⁴Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, is construed as a position that the challenged regulations will not affect the outcome of this case.

applicable law. 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).

Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁵ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). 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); see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

⁵Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

Claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Claimant specifically argues that the administrative law judge erred in finding that Dr. Younes's opinion was insufficient to establish that the miner's death was due to pneumoconiosis. In his consideration of whether the medical evidence was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge properly discredited Dr. Younes's opinion because Dr. Younes failed to provide a valid basis for his finding that pneumoconiosis contributed to the miner's death.⁶ See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 10; Director's Exhibit 15. Drs. Branscomb and Broudy opined that the miner's death was not due to pneumoconiosis. Director's Exhibits 38, 41; Employer's Exhibit 2. Neither Dr. Gilbert, the physician who completed the miner's death certificate, nor Dr. Fino, opined that the miner's death was due to pneumoconiosis.⁷ Director's Exhibits 8, 39. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis. See 20 C.F.R. §718.205(c).

In light of our affirmance of the administrative law judge's finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis, we need not address claimant's contentions of error regarding the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁶In its 1998 Decision and Order, the Board held that the administrative law judge properly found Dr. Younes's opinion insufficient to establish the existence of pneumoconiosis. *Sexton v. Big Elk Creek Coal Co.*, BRB No. 98-0335 BLA (Nov. 24, 1998) (unpublished). The Board held that the administrative law judge acted within his discretion in according less weight to Dr. Younes's opinion because he failed to explain his basis for finding that the miner suffered from pneumoconiosis. *Id.*

⁷Dr. Gilbert attributed the miner's death to pneumonia and end stage chronic obstructive pulmonary disease. Director's Exhibit 8. Dr. Gilbert listed atherosclerotic heart disease, renal cancer, nephrosclerosis and insulin dependent diabetes mellitus as other significant conditions which contributed to the miner's death. *Id.*

Dr. Fino opined that there was insufficient objective medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis. Director's Exhibit 39. Dr. Fino further opined that the miner did not suffer from an occupationally acquired pulmonary condition. *Id.* Dr. Fino attributed the miner's death to severe lung disease. *Id.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge