

BRB No. 05-0895 BLA

RUBY PENNINGTON	)	
(Widow of HENRY PENNINGTON)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/27/2006
	)	
KENTUCKY MOUNTAIN COAL	)	
COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
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 – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Francesca L. Maggard (Lewis and Lewis Law Office), Hazard, Kentucky, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Rejection of Claim (03-BLA-6514) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) with respect to 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).<sup>1</sup> The administrative law judge noted that the parties stipulated to sixteen years of coal mine employment and he adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was insufficient to establish that pneumoconiosis caused the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits on the survivor's claim.

On appeal, claimant contends that the evidence of record supports a determination that the miner's death was due to pneumoconiosis. In response, employer urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has stated that he will not respond on the merits of claimant's appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death.<sup>2</sup> 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.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes

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<sup>1</sup> Claimant is Rose Pennington, the widow of the miner, Henry Pennington, who died on December 6, 1999. Director's Exhibit 13. Claimant filed her application for benefits on August 6, 2001. Director's Exhibit 3. The miner filed three applications for benefits during his lifetime. The last claim was finally denied in 1996.

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.205(c), claimant argues that because the physicians who treated the miner during his hospitalizations diagnosed chronic obstructive pulmonary disease (COPD) and indicated that the miner suffered from pulmonary failure, the administrative law judge should have inferred that the miner had pneumoconiosis, which contributed to his death from cardiac arrest. Claimant's contention is without merit. The terms of Section 718.205(c) require claimant to prove, by a preponderance of the medical evidence, that the miner's death was due to pneumoconiosis or its complications, or that pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. §718.205(a)(3), (c); *see Griffith*, 49 F.3d at 186, 19 BLR at 2-116; *Trumbo*, 17 BLR at 1-87-88. Although an administrative law judge, as fact-finder, is permitted to make reasonable inferences concerning whether a claimant has established the requisite elements of entitlement, these inferences must be supported by substantial medical evidence in the record. *Id.*

In this case, the administrative law judge rationally found that the medical evidence was insufficient to establish the necessary causal relationship between pneumoconiosis and the miner's death. The administrative law judge determined correctly that none of the physicians of record stated that the miner's COPD constituted pneumoconiosis as defined in 20 C.F.R. §718.201(a) nor did they indicate that any coal dust related condition played a role in the miner's demise.<sup>3</sup> Decision and Order at 5-6; Director's Exhibit 16; 20 C.F.R. §718.205(a)(3), (c); *see Griffith*, 49 F.3d at 186, 19 BLR at 2-116; *Trumbo*, 17 BLR at 1-87-88. The administrative law judge also acted within his discretion as fact-finder in determining that, absent diagnoses which establish a causal relationship between coal dust exposure and the conditions which led to the miner's death, the treating physician status of the doctors who diagnosed COPD has no significance in this case. 20 C.F.R. §718.104(d); *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP*

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<sup>3</sup> Pursuant to 20 C.F.R. §718.201(a), pneumoconiosis is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. §718.201(a). Section 718.201(a)(1) provides in relevant part that the term "clinical pneumoconiosis" designates "those diseases recognized by the medical community as pneumoconioses" and "includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). Pursuant to Section 718.202(a)(2), chronic obstructive pulmonary disease falls within the definition of "legal pneumoconiosis" if it arises out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). We therefore affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c); *see Griffith*, 49 F.3d at 186, 19 BLR 2-116; *Trumbo*, 17 BLR at 1-87-88. Consequently, we affirm the denial of benefits in the survivor's claim.<sup>4</sup>

Accordingly, the administrative law judge's Decision and Order – Rejection of Claim is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>4</sup> As we indicated in our previously issued Order, we decline to address employer's arguments regarding the identification of Liberty Mutual Insurance Group as the proper carrier, as employer did not raise them in a cross-appeal. *Pennington v. Kentucky Mountain Coal*, BRB No. 05-0845 BLA (Nov. 10, 2005)(unpub. Order); *see* 20 C.F.R. §802.212(b); Employer's Brief at 17-19.