

BRB No. 07-0718 BLA

D.P.	)	
(Widow of L.P.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BSB COAL COMPANY	)	DATE ISSUED: 04/29/2008
	)	
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 Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John Crockett Carter, Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order Denying Benefits (06-BLA-05215) of Administrative Law Judge Robert D. Kaplan 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). The administrative law judge initially credited the miner with twenty years of qualifying coal mine employment and found that employer was the responsible operator. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(a)(4) and 718.203(b) and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>1</sup> Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to find pneumoconiosis established in this claim, when the Kentucky Workers Compensation Board found pneumoconiosis established on the miner's state claim. Claimant also asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide the miner with a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406, as required under the Act. In response, employer urges affirmance of the administrative law judge's Decision and Order denying benefits because claimant has failed to provide a basis to disturb the administrative law judge's findings. The Director has filed a letter stating that he will not provide a substantive response on the merits. The Director, however, responds to claimant's assertion that he did not provide claimant with a complete pulmonary evaluation under Section 725.406, stating that Section 725.406 addresses medical examinations provided to living miners and that claimant's argument on this issue should therefore be rejected.

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c),

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<sup>1</sup> The miner filed a claim for benefits with the Department of Labor on October 20, 1983. Administrative Law Judge Paul H. Teitler found that, although the miner established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), he failed to establish total respiratory disability at 20 C.F.R. §718.204(c)(2000). Benefits were accordingly denied on October 28, 1987, and the claim was not pursued. Closed LM-1 Claim. The miner died on May 29, 2004. Director's Exhibit 8. Claimant filed her survivor's claim on January 4, 2005. Director's Exhibit 2.

718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Pneumoconiosis is a “substantially contributing cause” of the miner’s death if it hastened the miner’s death. 20 C.F.R. §718.205(c)(5); *see also Griffith v. Director, OWCP*, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989).

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.<sup>2</sup> 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).

Claimant first contends that the administrative law judge erred in failing to consider the Kentucky Workers’ Compensation Board’s finding of pneumoconiosis. We disagree. Although the decision of the Kentucky Workers’ Compensation Board awarding benefits on the miner’s state claim is contained in the record of the living miner’s claim, that claim was never made a part of the record in the survivor’s claim.<sup>3</sup> *See* 20 C.F.R. §718.206. The administrative law judge did not, therefore, err in failing to consider it. We further note that even if the state decision had been admitted it would not have been binding on the administrative law judge. *Schegan v. Waste Management and Processors, Inc.*, 18 BLR 1-41 (1994). Accordingly, claimant’s argument on this issue is rejected.

Moreover, we note that claimant does not challenge the administrative law judge’s findings that the medical evidence submitted as part of the survivor’s claim failed to establish the existence of pneumoconiosis. Accordingly, as claimant has not challenged the administrative law judge’s finding that the medical evidence in this case fails to establish the existence of pneumoconiosis, that finding must be affirmed.<sup>4</sup> *See Cox v.*

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<sup>2</sup> The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

<sup>3</sup> Claimant was notified that while the case file contained the evidence submitted in support of the living miner’s claim, that evidence would not be considered unless it was submitted by claimant pursuant to 20 C.F.R. §725.414(a)(1)-(3) or it was a part of the miner’s hospitalization or treatment records pursuant to 20 C.F.R. §725.414(a)(4).

<sup>4</sup> In finding that claimant failed to establish the existence of pneumoconiosis, the administrative law judge properly found that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1) as the only x-ray submitted in support of the survivor’s claim was interpreted as negative for pneumoconiosis. The administrative law judge properly found

*Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4) is, therefore, affirmed.

Claimant next contends that the Director did not provide the miner with a complete, pulmonary evaluation under 20 C.F.R. §725.406. We agree with the Director, however, that the duty to provide a medical evaluation in a miner's claim does not extend to survivor's claims. 20 C.F.R. §725.406. Claimant's argument on the issue is, therefore, rejected. Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, the administrative law judge properly found that benefits were precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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that pneumoconiosis could not be established at 20 C.F.R. §718.202(a)(2), because the record contained no biopsy or autopsy evidence. Further, the administrative law judge found that claimant could not establish pneumoconiosis at 20 C.F.R. §718.202(a)(3) as none of the presumptions contained therein was applicable. Finally, turning to the medical opinion evidence, the administrative law judge found that those opinions that found that the miner had pneumoconiosis were insufficiently reasoned and documented to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4).