

BRB No. 98-0677 BLA

AGNES L. CATALDO)	
(Widow of ERNEST CATALDO))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: <u>4/20/99</u>
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

George L. Dagher, St. Marys, Pennsylvania, for claimant.

Helen H. Cox (Henry L. Solano, 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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the deceased miner's widow, appeals¹ the Decision and Order Denying

¹ Claimant is the surviving spouse of the deceased miner who originally applied for benefits on March 10, 1980. After an administrative hearing, the miner was awarded benefits on that claim, but that determination was reversed by the Board in 1986. No further action was taken on this claim. The miner filed a second claim in 1988, which was denied by the Office of Workers' Compensation Programs (OWCP). That determination was not appealed. The miner died on March 16, 1996, and on May 17, 1996, the miner's widow (hereinafter "claimant") filed a claim for survivor's benefits. This claim was denied by the OWCP and subsequently referred

Benefits (97-BLA-0682) of Administrative Law Judge Richard A. Morgan 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). The administrative law judge credited claimant with “at least 5 years” of coal mine employment. Decision and Order at 3. He noted that the parties stipulated to the fact that “the miner suffered from simple pneumoconiosis, which was caused by his coal mine employment,” and found ample evidence to support the stipulation. Decision and Order at 4. However, the administrative law judge concluded that pneumoconiosis did not cause or contribute to the miner’s death. Decision and Order at 8. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in accepting certain evidence into the record and in declining to find that pneumoconiosis contributed to the miner’s death. The Director, Office of Workers’ Compensation Programs (the Director), has filed a brief seeking affirmance of the administrative law judge’s Decision and Order.

The Board’s scope of review is defined by statute. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a). If the administrative law judge’s findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding on the Board and may not be disturbed. *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor’s benefits in a claim filed on or after January 1, 1982, 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.² 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

This case arises within the jurisdiction of the United States Court of Appeals for the

to the Office of Administrative Law Judges for hearing.

² In the instant case, the record does not contain any evidence of complicated pneumoconiosis, and the parties do not raise this issue on appeal. See 20 C.F.R. §§718.205(c)(3); 718.304.

Third Circuit, inasmuch as the miner's coal mine employment occurred in Pennsylvania. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Thus, evidence that establishes that pneumoconiosis hastened the miner's death satisfies the portion of Section 718.205(c)(2) which requires proof that pneumoconiosis was a substantially contributing cause or factor in the miner's death. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

On appeal, claimant initially contends that the administrative law judge erred by considering evidence which was not made available to claimant prior to the hearing.³ Specifically, claimant argues that the administrative law judge should not have considered the medical report of Dr. Costa in finding that pneumoconiosis did not contribute to the miner's death because claimant was not aware of the existence of Dr. Costa's report until the issuance of the administrative law judge's Decision and Order. Claimant's Brief at 3.

First, we note that the administrative law judge did not rely on Dr. Costa's opinion in resolving the issues in this case. Dr. Costa, the autopsy prosector, listed in his final diagnosis the following impairments: severe coronary artery disease, acute pulmonary congestion, changes consistent with simple coal workers' pneumoconiosis, pulmonary emphysema, generalized arteriosclerosis, mild splenomegaly, enlarged mediastinal lymph nodes with anthracosis, diverticulitis (colon), and mild, benign prostatic hypertrophy. Director's Exhibit 6. After receiving this autopsy report, the Office of Workers' Compensation Programs sent a letter to Dr. Costa asking him to expound on his final diagnosis. Director's Exhibit 7. Specifically, Dr. Costa was asked whether pneumoconiosis or its sequela caused, contributed to, or hastened the miner's death. *Id.* In his response letter, Dr. Costa declined to answer any questions about the miner's autopsy. *Id.* The administrative law judge noted that "Dr. Costa's opinion regarding contribution of pneumoconiosis to death is not apparent from the autopsy report and he refused to elaborate." Decision and Order at 8. Thus, the

³ Pursuant to 20 C.F.R. §725.456(b)(1), the parties are required to exchange documentary evidence "at least 20 days before a hearing." Where a medical report is not exchanged as required under subsection (b)(1), it will be admitted only where "the hearing record is kept open for at least 30 days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence." 20 C.F.R. §725.456(b)(3).

administrative law judge did not consider Dr. Costa's opinion on the question of the cause of the miner's death. Therefore, the fact that claimant was unaware of Dr. Costa's letter does not amount to reversible error in that the matter has no bearing on the ultimate disposition of the case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant next contends that the administrative law judge erred in failing to find that pneumoconiosis contributed to the miner's death and thus erred in failing to award benefits. Although the miner was adjudicated totally disabled by pneumoconiosis on the basis of his 1980 claim, that finding of entitlement was reversed by the Board in its 1986 review of the claim, and the miner was not receiving benefits at the time of his death. *See n.1, supra*. Therefore, the surviving spouse is not entitled to derivative benefits. *See Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); 20 C.F.R. §718.1(a). In addition, since the date of filing of the instant claim is not prior to January 1, 1982, claimant cannot establish entitlement by showing that the miner was totally disabled due to pneumoconiosis during his lifetime. *Id.*

In finding that claimant failed to carry her burden to establish by a preponderance of the evidence that pneumoconiosis caused, contributed to, or hastened the miner's death at 20 C.F.R. §718.205(c), the administrative law judge credited the opinion of Dr. Naeye. Dr. Naeye observed eleven slides with tissue removed at autopsy, consisting of six samples of lung tissue. Director's Exhibit 8. He also reviewed the autopsy report, a letter from Dr. Minter and objective studies conducted in 1981. *Id.* Based on the medical data, Dr. Naeye concluded that:

[t]he findings of mild, simple coal worker's pneumoconiosis (CWP) are present...[it] is definitely too mild to have produced impairments in lung function that would have prevented this man from doing hard physical work in the coal mining industry...it is too mild to have...increased the work of his heart or hastened his death. Death was due to a cardiac arrhythmia which in turn was due to severe arteriosclerotic coronary artery disease.

Id. In crediting this conclusion, the administrative law judge noted that Dr. Naeye's "opinion that the miner died due to acute myocardial infarction resulting from long-standing heart disease, unrelated to coal mining employment, is uncontradicted in the record and is accorded much weight." Decision and Order at 9. In addition to crediting Dr. Naeye's opinion, the administrative law judge also correctly observed that "the death certificate...did not list any lung disease of any origin as a factor contributing to death."⁴ Decision and Order at 8.

⁴ The death certificate lists the miner's cause of death as "cardiogenic shock" due to, or as a consequence of, "acute interior myocardial infarction" and "coronary artery disease." Director's Exhibit 5.

Inasmuch as the burden is on claimant to establish the elements of entitlement and claimant has failed to present any evidence to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c), we affirm the administrative law judge's findings thereunder. *See Lukosevicz, supra.*

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

