

BRB No. 00-1099 BLA

NELDA A. ATKINS)
(Widow of WILLIAM R. ATKINS))

Claimant-Petitioner)

v.)

BETHENERGY MINES,)
INCORPORATED)

Employer-Respondent)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)

DATE ISSUED:

DECISION AND ORDER

Party-in-Interest

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

Nelda A. Atkins, Orgas, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and

¹ Claimant is the widow of the miner, William R. Atkins, who died on April 7, 1997. Director's Exhibit 7. The miner filed his initial application for benefits on December 22, 1983, the denial of which was affirmed by the Board in a decision

Order

issued February 19, 1991. *Atkins v. Bethlehem Mines Corp.*, BRB No. 89-1675 BLA (Feb. 19, 1991)(unpub.); Director's Exhibit 20 at DX 1, DX 65. The miner filed a request for modification with the Department of Labor, the denial of which was affirmed by the Board on February 27, 1996, holding that the administrative law judge reasonably found that the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Atkins v. Bethenergy Mines, Inc.*, BRB No. 95-1504 BLA (Feb. 27, 1996)(unpub.); Director's Exhibit 20. Claimant filed her survivor's claim on July 7, 1997, Director's Exhibit 1, and the survivor's claim is the only claim presently before the Board.

² Claimant was not represented by counsel at the hearing before the administrative law judge. The administrative law judge, however, questioned claimant regarding her intention to proceed without an attorney, and afforded her the opportunity to submit evidence on her own behalf, testify, provide statements and question witnesses. Consequently, there was a valid waiver of claimant's right to representation and the hearing before the administrative law judge was properly conducted. 20 C.F.R. §725.362(b) (2000); *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

Denying Benefits (98-BLA-1183) of Administrative Law Judge Richard A. Morgan 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).³ The administrative law judge credited the miner with eighteen years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718, based on claimant's July 7, 1997 filing of her survivor's claim. Addressing the merits of entitlement, the administrative law judge found the evidence of record supports employer's concession of the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). The administrative law judge further found that the evidence of record did not rebut the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). However, the administrative law judge found the medical evidence of record insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). The administrative law judge also found the evidence insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied this survivor's claim. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating

³ The 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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

that he will not file a response brief in this appeal.⁴

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Benefits are payable on a survivor’s claim filed on or after January 1, 1982 only when claimant meets her burden of establishing that the miner’s death was due to pneumoconiosis arising out of coal mine employment and where pneumoconiosis was a substantially contributing cause of death or where complicated pneumoconiosis is established. 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *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. 65 Fed. Reg. 80,050 (2000)(to be codified at 20 C.F.R. §718.205(c)(5)); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

⁴ The parties do not challenge the administrative law judge’s decision to credit the miner with eighteen years of coal mine employment, his determination that Bethenergy Mines, Inc. is the responsible operator, or his findings under 20 C.F.R. §§718.202(a) and 718.203(b) (2000). Inasmuch as these findings are not adverse to claimant, they are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that the miner's death was not due to pneumoconiosis pursuant to Section 718.205(c) (2000). The administrative law judge considered all of the medical evidence of record regarding the cause of the miner's death, including the death certificate, autopsy report, objective evidence and medical reports reviewing this evidence. Decision and Order at 9-15; Director's Exhibits 7-9; Claimant's Exhibits 1, 2; Employer's Exhibits 1-16. After weighing the relevant evidence of record, the administrative law judge permissibly found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(1) (2000). The administrative law judge rationally found that the death certificate, which stated that the immediate cause of the miner's death was respiratory failure due to lung cancer with metastases, did not support a finding that the miner's death was due to pneumoconiosis.⁵ Director's Exhibit 7. In addition, the administrative law judge correctly determined that none of the physicians of record opined that the miner's death was due to pneumoconiosis, but rather, that the cause of the miner's death was his cancer with metastases. Decision and Order at 19; Director's Exhibits 8, 9; Claimant's Exhibits 1, 2; Employer's Exhibits 1-16; 20 C.F.R. §718.205(c)(1) (2000). Consequently, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis. *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

⁵ The record also contains the autopsy report by Dr. Carrington, which included findings on gross and microscopic examination of history of small cell carcinoma in the lymph nodes, bilateral chronic pneumonia, bilateral pulmonary edema and congestion, bilateral focal fibrosis, anthracosilicosis of lymph nodes (paratracheal) and hyalinized old granulomata. Dr. Carrington also provided a clinical diagnosis of respiratory failure secondary to non-small cell lung carcinoma with metastases, but did not otherwise provide an opinion as to the cause of death. Director's Exhibit 8; Claimant's Exhibit 1.

In addition, we affirm the administrative law judge's finding that the weight of the medical evidence of record is insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 (2000). As the administrative law judge correctly found, the sole evidence supportive of a diagnosis of complicated pneumoconiosis is the January 18, 1998 medical report of Dr. Naeye, wherein the physician stated that there were lesions present large enough to qualify as progressive massive fibrosis (PMF), but whether they truly were PMF depended on their location. In his report, Dr. Naeye further stated that if all of the lesions were in the lymph nodes, PMF was absent and the diagnosis of the remaining pulmonary lesions would be mild simple coal workers' pneumoconiosis. Director's Exhibit 9; Claimant's Exhibit 2. Following the review of additional medical records in subsequent reports, including chest x-rays, pulmonary function study evidence and medical reports, Dr. Naeye revised his opinion, stating that complicated pneumoconiosis was not present, but rather, that the miner was suffering from mild, simple coal workers' pneumoconiosis, which played no role in the miner's disability during his lifetime nor any role in his death. Employer's Exhibits 6, 9, 14. Within a reasonable exercise of his discretion, the administrative law judge credited the later reports of Dr. Naeye, that complicated pneumoconiosis was not present, based on his review of additional material. Decision and Order at 19; *compare* Director's Exhibit 9, Claimant's Exhibit 2 with Employer's Exhibits 6, 9, 14; *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *see generally Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984). Inasmuch as the administrative law judge properly found that the record contains no other evidence supportive of a finding of complicated pneumoconiosis, we affirm his finding that claimant has not established the existence of complicated pneumoconiosis and, thus does not invoke the irrebuttable presumption of death due to pneumoconiosis.⁶ Decision and Order at 19; 20 C.F.R. §§718.304, 718.205(c)(3) (2000); *see generally Sumner v. Blue Diamond Coal Corp.*, 12 BLR 1-74 (1988).

The administrative law judge also reasonably found that the evidence of record is insufficient to establish that pneumoconiosis was a substantially

⁶ The administrative law judge also found that there was no evidence of complicated pneumoconiosis submitted in connection with the miner's claim, a finding affirmed by the Board in its February 27, 1996 Decision and Order. Decision and Order at 19; *see Bethenergy Mines, Inc.*, BRB No. 95-1504 BLA, slip op. at 3, n.1 (Feb. 27, 1996) (unpub.).

contributing cause of the miner's death or that the miner's death was hastened by pneumoconiosis. As the administrative law judge properly found, the only evidence supportive of a finding that pneumoconiosis was a substantially contributing cause of the miner's death was the January 1998 medical report of Dr. Naeye, wherein the physician opined that coal workers' pneumoconiosis contributed to the miner's death in that he would have lived longer had coal workers' pneumoconiosis been absent. Director's Exhibit 9; Claimant's Exhibit 2. However, as the administrative law judge found, Dr. Naeye revised his opinion upon review of additional evidence of record, stating that coal workers' pneumoconiosis played no role in the miner's death. Decision and Order at 21; Employer's Exhibits 6, 9, 14. The administrative law judge further found that no other physician "stated that CWP, as defined by the Act and regulations, caused, contributed to or hastened his death in any manner." Decision and Order at 21; see Director's Exhibits 7-9; Claimant's Exhibits 1-2; Employer's Exhibits 1-16. Inasmuch as the administrative law judge considered all of the relevant evidence of record and properly found that none of the physicians of record opined that pneumoconiosis contributed to or hastened the miner's death, we affirm his finding that claimant failed to establish, by a preponderance of the evidence, that pneumoconiosis was a substantially contributing cause of the miner's death. Decision and Order at 21; 20 C.F.R. §718.205(c)(2), (2000); *Shuff, supra*; see also *Trumbo, supra*; *Neeley, supra*.

Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. See *Shuff, supra*; *Trumbo, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge