

BRB No. 06-0969 BLA

A.D.)
(Widow of J.D.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 08/16/2007
)
TENNESSEE CONSOLIDATED COAL)
COMPANY)
)
and)
)
A.T. MASSEY)
)
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 Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

Jesse W. Dalton (Tennessee Valley Legal Services), Chattanooga,
Tennessee, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for
employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, HALL, and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-06122) of
Administrative Law Judge Jeffrey Tureck 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).¹ Based on claimant's filing date of July 6, 2004, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In addition, the administrative law judge accepted the parties' stipulation of twenty years of coal mine employment, Decision and Order at 2, and found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Id.* at 3. However, the administrative law judge found the medical evidence failed to establish that pneumoconiosis contributed, in any way, to the miner's death. *Id.* at 4. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence failed to establish that the miner's death was due to pneumoconiosis. In addition, claimant contends that the administrative law judge erred in finding that the entire record in the miner's claim was not reserved for review in this claim.² Claimant also contends that the administrative law judge erred in finding that the miner had a very significant smoking history. In response, employer urges affirmance of the administrative law judge's denial of benefits. However, employer agrees with claimant that consideration of the record from the miner's claim in the survivor's claim is consistent with the requirements of the Act, but that based on the administrative law judge's weighing of the evidence, this issue is moot. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he is not filing a brief in this appeal.³

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,

¹ Claimant is the widow of the miner, who died on September 29, 2003. Director's Exhibit 8. Claimant filed her survivor's claim on July 6, 2004. Director's Exhibit 2.

² The miner filed a claim for benefits on May 31, 1983, which was denied by Administrative Law Judge John S. Patton in a Decision and Order issued on May 10, 1988. Director's Exhibit 1. Judge Patton found that the miner failed to establish the existence of pneumoconiosis. *Id.* The Board affirmed the denial of benefits. [*J.D.*] *v. Tennessee Consolidated Coal Co.*, BRB No. 88-2008 BLA (Feb. 23, 1990)(unpub.); Director's Exhibit 1. No further action was taken on the miner's claim.

³ The parties do not challenge the administrative law judge's decision to credit claimant with twenty years of coal mine employment, or his finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in a survivor’s claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, 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. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (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)(2); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Initially, claimant contends that the administrative law judge erred in determining that the entire record from the miner’s claim was not reserved for review in the survivor’s claim. Claimant argues that at the formal hearing, she stated that she would be relying on the entire record, specifically, Director’s Exhibits 9, 10, and 11 and, therefore, the administrative law judge erred in not considering all the evidence from the miner’s claim. Claimant’s Brief at 1-2. This contention lacks merit.

When a living miner files a subsequent claim, all the evidence from the first miner’s claim is specifically made part of the record. *See* 20 C.F.R. §725.309(d)(1). Such an inclusion is not automatically available, however, in a survivor’s claim filed pursuant to the revised regulations. Consequently, the medical evidence from the prior living miner’s claims must be designated as evidence by one of the parties in order for it to be included in the record in the survivor’s claim. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007)(*en banc*). In this case, claimant did not designate any specific evidence from the miner’s claim, contained in Director’s Exhibit 1, to be included in support of her affirmative case in the survivor’s claim, other than the 1983 medical report of Dr. Soteres, that the miner suffered from pneumoconiosis, which claimant separately submitted and was admitted as Director’s Exhibit 10. 20 C.F.R. §725.414(a)(2)(i). Therefore, the administrative law judge did not err in not considering all of the medical evidence from the miner’s claim.⁴ *Keener*, 23 BLR at 1-241.

Pursuant to Section 718.205(c), the administrative law judge found that there was limited evidence in the record on the issue of whether pneumoconiosis contributed to the

⁴ The administrative law judge also stated that because there was no evidence that the miner’s pneumoconiosis contributed to his death, it is immaterial whether the records from the miner’s lifetime claim are admitted or not. Decision and Order at 2 n.2.

miner's death. Initially, the administrative law judge stated that the record contained the miner's death certificate, prepared by Dr. Melvin, which listed the cause of the miner's death as end stage chronic obstructive pulmonary disease, and congestive heart failure secondary to aortic stenosis. Decision and Order at 3; Director's Exhibit 8. However, he found that Dr. Melvin did not mention pneumoconiosis on the death certificate. *Id.* In addition, he found that the record contains the autopsy report of Dr. Harlan, that the miner died as a result of chronic obstructive pulmonary disease, with pulmonary emphysema and pulmonary anthracosis with simple pneumoconiosis, and the contrary opinion of Dr. Caffrey, that the miner's simple coal workers' pneumoconiosis did not cause or contribute to the miner's death. Decision and Order at 3-4; Director's Exhibits 9, 12; Employer's Exhibit 1. In weighing this evidence, the administrative law judge found that Dr. Harlan's opinion was not probative because the physician offered no explanation for his conclusions. Decision and Order at 4. Consequently, the administrative law judge found that "there is no probative evidence in the record that the miner's death was due in any way to pneumoconiosis." *Id.*

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in determining that Dr. Harlan's opinion held no probative value, arguing that the administrative law judge's finding is not rational. Claimant's Brief at 2. In addition, claimant contends that Dr. Harlan's autopsy report supports claimant's contention that the miner had suffered from pneumoconiosis since the miner's original filing for benefits in 1983 and, therefore, because the miner "suffered from the effects of CWP for 21 years, it is clear that this disease must have contributed to his death." Claimant's Brief at 3. These contentions lack merit.

Contrary to claimant's contention, in order to establish entitlement to benefits, claimant must affirmatively establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death, not merely that the miner was suffering from pneumoconiosis at the time of his death. 20 C.F.R. §718.205(c); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Trumbo*, 17 BLR at 1-87; *Neeley*, 11 BLR at 1-86. Herein, the administrative law judge weighed the evidence relevant to the cause of the miner's death and found that it was insufficient to establish that the miner's death was due in any way to pneumoconiosis. Decision and Order at 4. Specifically, the administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding that the opinion of Dr. Harlan, which included the conclusion that "this adult white male died as a result of chronic obstructive pulmonary disease, with pulmonary emphysema, and pulmonary anthracosis, with simple pneumoconiosis," was insufficient to support claimant's burden of proof because the physician failed to adequately explain the rationale for this conclusion. *Id.* at 3-4; Director's Exhibit 9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). In particular, the administrative law judge noted Dr. Harlan's findings of

moderate pulmonary anthracosis and simple pneumoconiosis on autopsy, but found that the physician did not offer an explanation for his conclusion that these findings were related to the cause of the miner's death. *Id.* Because the administrative law judge rationally declined to credit Dr. Harlan's opinion, the only medical opinion of record that arguably supports claimant's burden of proof at Section 718.205(c), we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis.⁵ 20 C.F.R. §718.205(c).

Based on the foregoing, we affirm the administrative law judge's finding that the evidence of record is insufficient to support claimant's burden of proof to establish death due to pneumoconiosis pursuant to Section 718.205(c), as it is supported by substantial evidence and is in accordance with law. We thus affirm the administrative law judge's denial of benefits in this survivor's claim.

⁵ Thus, in light of our affirmance of the administrative law judge's finding that the evidence supportive of claimant's burden is not sufficient to establish entitlement, we need not address claimant's argument regarding the administrative law judge's finding that the miner had a significant smoking history because error, if any, therein is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge