

BRB No. 07-0978 BLA

J.B.)	
(Widow of B.B.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PERFORMANCE COAL COMPANY)	DATE ISSUED: 08/29/2008
)	
Employer-Respondent)	
)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet Walker Rundle & Associates), Pineville, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2006-BLA-5595) of Administrative Law Judge Richard A. Morgan (the administrative law judge) 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 found that the record supported a finding of at least twenty-five years of qualifying coal mine employment. On the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and that claimant was entitled to the presumption that the miner's pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the medical evidence did not support a finding of death due to pneumoconiosis pursuant to Section 718.205(c)(1) and (2). Claimant also contends that the administrative law judge erred in not finding that claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis at 20 C.F.R. §§718.304, 718.205(c)(3), 30 U.S.C. §921(c)(3)(A), based on a finding of complicated pneumoconiosis.² Employer responds, contending that the Decision and Order Denying Benefits should be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response brief, contending that employer's evidence did not comply with the evidentiary limitations at 20 C.F.R. §725.414, and that the case must, therefore, be remanded to allow for the compilation of a record that complies with the evidentiary limitations at Section 725.414. The Director does not, however, take a position on the ultimate merit of claimant's case. In response to the Director's brief, employer contends that the Director failed to raise the evidentiary arguments before the administrative law judge and, therefore, consideration of the Director's arguments for the first time on appeal would result in a violation of employer's due process rights. Additionally, employer contends that irrespective of whether all of its evidence should have been admitted pursuant to Section 725.414, because claimant has failed to present evidence sufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), the denial of benefits must be affirmed.

¹ Claimant is the widow of the miner, who died on June 10, 2005. Director's Exhibit 131. Claimant filed her survivor's claim on July 1, 2005. Director's Exhibit 3.

² The administrative law judge's finding that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 718.205(a). In claims filed on or after January 1, 1982, death is considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis or, if the presumption at 20 C.F.R. §718.304 is available based on a finding of complicated pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After consideration of the arguments on appeal, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge properly found that, while there was x-ray, autopsy, and medical opinion evidence sufficient to establish pneumoconiosis at Section 718.202(a), there was no medical opinion evidence in the record that established that pneumoconiosis was either the cause of the miner's death or a substantially contributing cause. Although the administrative law judge noted that the death certificate listed end stage chronic obstructive pulmonary disease and emphysema, due to smoking and coal mining, as contributing causes of death.⁴ Director's Exhibit 13. He properly found, however, that it could not establish death due to pneumoconiosis as it was without explanation or underlying documentation. Director's Exhibit 13; *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989); *Addison v. Director*,

³ The law of the United States Court of Appeals for the Fourth Circuit applies because the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3-4, 8.

⁴ The miner's death certificate lists "cardiac arrest, right heart failure" as immediate causes of death. Director's Exhibit 13.

OWCP, 11 BLR 1-68 (1988). Accordingly, the administrative law judge properly found that claimant did not meet her burden of establishing that the miner's death was due to pneumoconiosis at Section 718.205(c)(1) or was a substantially contributing cause of death at Section 718.205(c)(2), (5). Decision and Order at 9; *Mays*, 176 F.3d at 755, 21 BLR at 2-592; *Shuff*, 967 F.2d at 979, 16 BLR at 2-92. The administrative law judge's findings thereunder are, therefore, affirmed.

Further, the administrative law judge properly found that because the evidence failed to establish complicated pneumoconiosis, claimant was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis at Sections 718.205(c)(3), 718.304. Claimant contends that Dr. Patel's interpretation of a July 28, 2004 x-ray as showing a large lesion was sufficient to establish the presence of complicated pneumoconiosis and, therefore, sufficient to entitle claimant to the presumption that the miner's death was due to pneumoconiosis at Sections 718.205(c)(3), 718.304. However, the administrative law judge properly discounted Dr. Patel's x-ray interpretation as equivocal because he found that the physician also noted that the large lesion could be a neoplasm.⁵ Decision and Order at 9; Director's Exhibit 14; *Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236 (2003) (Gabauer, J. concurring); *Cranor v. Peabody Coal Co.*, 21 BLR 1-201 (1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Accordingly, we affirm the administrative law judge's finding that the miner's death was not due to pneumoconiosis pursuant to Sections 718.205(c)(3), 718.304.

Because we affirm the administrative law judge's finding that claimant failed to present evidence sufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), an essential element of entitlement, we need not consider the arguments of employer and the Director at Section 725.414. See *Anderson*, 12 BLR at 1-114; *Trent*, 11 BLR at 1-27.

⁵ Dr. Patel noted s and t shaped opacities, 2/1, size A, but he did not check the box designating abnormalities consistent with pneumoconiosis. Dr. Patel further described his findings as "ill defined density DDX neoplasm, large opacity..." and checked the boxes indicating other abnormalities including bullae, distortion of intrathoracic organs, emphysema, eggshell calcification, enlarged hilar mediastinal lymph nodes, honeycombing, ill defined diaphragm and ill defined heart. Director's Exhibit 14.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge