

BRB No. 07-1013 BLA

O.C.)	
(Widow of A.C.))	
)	
Claimant-Petitioner)	DATE ISSUED: 08/21/2008
)	
v.)	
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

O.C., Manchester, Kentucky, *pro se*.

Emily Goldberg-Kraft (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2006-BLA-05845) of Chief Administrative Law Judge John M. Vittone 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). Claimant is the widow of the miner, who died on August 19, 2005.¹ Director's Exhibits

¹ Prior to his death, the miner filed a claim for benefits on June 22, 1970, which was denied by the Social Security Administration on July 2, 1976. Living Miner's Claim Director's Exhibit (LMDX) 1. The miner filed a second claim for benefits on December 20, 1976, which was also denied. LMDX 2 On February 28, 2001, the miner filed his

8. Claimant filed her survivor's claim on September 10, 2005. Director's Exhibit 2. The administrative law judge credited the miner with at least ten years of coal mine employment, and adjudicated this survivor's claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that there was insufficient evidence to establish that the miner had pneumoconiosis prior to his death and thus, the administrative law judge found that claimant was unable to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying her claim. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

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 Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and are consistent with applicable law.² 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, 363 (1965).

After reviewing the administrative law judge's Decision and Order and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits. Specifically, we affirm the administrative law judge's finding that claimant has failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), as claimant has not established the existence of pneumoconiosis.

In order to prove her entitlement to survivor's benefits, claimant was required to establish that the miner suffered from pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R.

third claim and the case was assigned to Administrative Law Judge Thomas F. Phalen, Jr., who denied benefits on December 20, 2005, on the grounds that the evidence was insufficient to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. LMDX 3. Pursuant to the miner's appeal, the Board affirmed the denial of benefits. *[A.C.] v. Director, OWCP*, BRB No. 06-0894 BLA (Nov. 30, 2006) (unpub.). No further action was taken with regard to the denial of the miner's claim.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

§§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993). For survivor's claims, like this one, filed on or after January 1, 1982, death will be considered 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 relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). 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)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 815, 17 BLR 2-135, 2-138 (6th Cir. 1993).

As noted by the administrative law judge, the evidence submitted with respect to the survivor's claim consists of treatment records from Dr. Mahboob, the miner's treating physician, records from Central Baptist Hospital, and the miner's death certificate. Dr. Mahboob treated the miner from February 1, 2001 through August 19, 2005 for several conditions, including chronic lung infection, hypertension, chronic obstructive pulmonary disease (COPD), and a heart condition. Director's Exhibits 11, 12. Included in Dr. Mahboob's treatment notes are narrative chest x-ray reports, which describe COPD, left pleural effusion, granulomas, and atelectatic changes in the miner's lungs. Director's Exhibit 11. The records from Central Baptist Hospital, indicated that the miner was under the care of Dr. Saha in February 2002 for coronary artery bypass surgery. Director's Exhibit 10. Dr. Saha diagnosed COPD, coronary artery disease and heart failure. *Id.* There were six chest x-rays taken during the miner's hospitalization, which report possible granuloma scarring, bibasilar pleural scarring, and left base pleural effusion. *Id.* Following the miner's death on August 19, 2005, Dr. Mahboob signed the death certificate, listing the immediate cause of the miner's death as myocardial infarction and coronary artery disease. Director's Exhibit 8. Dr. Mahboob further identified COPD, renal failure and Alzheimer's disease as significant contributing conditions to the miner's death. *Id.*

Pursuant to Section 718.205(c), the administrative law judge correctly found that there was no evidence to support a finding that the miner's death was due to pneumoconiosis.³ In fact, the administrative law judge properly found that the record

³ The regulation at 20 C.F.R. §718.202(a) provides four methods by which claimant may establish the existence of pneumoconiosis: 1) chest x-ray evidence; 2) biopsy or autopsy evidence; 3) application of the presumptions contained in 20 C.F.R. §§718.304, 718.305 or 718.306; and 4) medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4). We note that there is no biopsy or autopsy evidence of record, and that claimant is not eligible for any of the presumptions contained at Sections 718.304, 718.305 or 718.306. Thus, claimant is unable to establish that the miner had pneumoconiosis pursuant to Section 718.202(a)(2), (3).

failed to establish that the miner suffered from either clinical or legal pneumoconiosis.⁴ In considering the x-ray evidence, the administrative law judge correctly noted that there were no findings of clinical pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1). The administrative law judge also properly determined that while the x-rays, medical treatment notes, and the death certificate indicate that the miner suffered from COPD, which contributed to his death, there is not “a scintilla of evidence” in the record from which to conclude that the miner’s COPD was due to coal dust exposure.⁵ 20 C.F.R. §718.202(a)(4). Decision and Order at 5; *see Trumbo*, 17 BLR at 1-88. Since neither Dr. Mahboob nor Dr. Saha diagnosed clinical pneumoconiosis, and they did not attribute the miner’s COPD to coal dust exposure, we affirm the administrative law judge’s finding that the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a) and, therefore, claimant was unable to establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c).⁶ *See Brown*, 996 F.2d at 815, 17 BLR at 2-138.

Claimant bears the burden of proof and thus, the risk of non-persuasion if her evidence is found insufficient to establish an element of entitlement. *See Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because claimant has failed to establish that the miner had pneumoconiosis, an essential element of entitlement, she is unable to establish that pneumoconiosis caused, substantially contributed to, or hastened the miner’s death as required by Section 718.205(c). Thus, benefits are precluded. *Trent v.*

⁴ Legal pneumoconiosis is defined as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

⁵ The administrative law judge noted that “[a]t the hearing, [claimant] mentioned several physician[s]’ names and x-ray reports dating as far back as 1970 [in support of her assertion that the miner was diagnosed with black lung disease] but [she] did not offer them as evidence for [the survivor’s] claim pursuant to 20 C.F.R. [§]725.414.” Decision and Order at 5 n. 2. We note that in order to have evidence from the prior miner’s claim considered in her survivor’s claim, claimant was required to designate that evidence in accordance with the evidentiary limitations at Section 725.414. *See* 20 C.F.R. §725.414. Nonetheless, after reviewing all of the evidence submitted in connection with the survivor’s claim, the administrative law judge indicated that he had also considered the evidence contained in the prior miner’s claims. The administrative law judge stated, “I agree with Judge Phalen’s denial, and the Benefits Review Board’s affirmation, on the grounds that the miner had not established the presence of coal workers’ pneumoconiosis.” Decision and Order at 5.

⁶ The administrative law judge properly found that because there was no evidence of complicated pneumoconiosis, claimant was unable to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3). *Id.*

Director, OWCP, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge