

BRB Nos. 03-0371 BLA  
and 03-0371 BLA-A

KAREN COX )  
(Widow of GEORGE COX, III) )  
 )  
Claimant-Petitioner )  
Cross-Respondent )  
 )  
v. )  
 ) DATE ISSUED: 12/12/2003  
POND CREEK MINING COMPANY )  
 )  
and )  
 )  
A.T. MASSEY/UNDERWRITER SAFETY )  
AND CLAIMS )  
 )  
Employer/Carrier-Respondents )  
Cross-Petitioners )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative  
Law Judge, United States Department of Labor.

Karen Cox, Phelps, Kentucky, *pro se*.<sup>1</sup>

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<sup>1</sup> Susie Davis, with the Kentucky Black Lung Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Martin E. Hall (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing herself, appeals and employer cross-appeals the Decision and Order (01-BLA-0938) of Administrative Law Judge Thomas F. Phalen, Jr. 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).<sup>2</sup> The instant case involves a survivor's claim filed on December 7, 2000.<sup>3</sup> After crediting the miner with not less than 9.86 years of coal mine employment, the administrative law

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<sup>2</sup> 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> The miner filed a claim on July 19, 1995. Director's Exhibit 25-642. The district director denied the claim on June 23, 1995. Director's Exhibit 25-578. The miner subsequently filed a duplicate claim on February 7, 1997. Director's Exhibit 25-796. In a Decision and Order dated April 20, 1999, Administrative Law Judge Robert L. Hillyard found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 25-90. Accordingly, Judge Hillyard denied benefits. *Id.* By Decision and Order dated May 16, 2000, the Board affirmed Judge Hillyard's denial of benefits. *Cox v. Pond Creek Mining Co.*, BRB Nos. 99-0799 BLA and 99-0799 BLA-A (May 16, 2000) (unpublished). The miner filed an appeal with the United States Court of Appeals for the Sixth Circuit and subsequently died. Director's Exhibit 7. On December 8, 2000, the Sixth Circuit affirmed Judge Hillyard's denial of benefits. *Cox v. Pond Creek Mining Co.*, No. 00-3710 (6th Cir. Dec. 8, 2000) (Order) (unpublished). There is no indication that any further action was taken in pursuit of the miner's 1997 duplicate claim.

judge found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge further found that claimant was entitled to a presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge found, however, that the evidence was insufficient 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 benefits. Employer responds in support of the administrative law judge's denial of benefits. Employer has filed a cross-appeal, contending that the administrative law judge erred in designating it as the responsible operator. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, contending that the administrative law judge properly designated employer as the responsible operator.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>4</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

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<sup>4</sup> Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

*OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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, 17 BLR 2-135 (6th Cir. 1993).

The administrative law judge initially noted that the miner's death certificate lists the cause of death as cardiogenic shock due to congestive heart failure. Decision and Order at 18; Director's Exhibit 7. Consequently, the miner's death certificate cannot support a finding that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge also properly found that the Dr. Carpenter, the autopsy prosector, did not address the cause of the miner's death. Decision and Order at 18; Director's Exhibit 8.

The administrative law judge next noted that three Board-certified pathologists, Drs. Caffrey,<sup>5</sup> Naeye<sup>6</sup> and Tomashefski,<sup>7</sup> after reviewing the autopsy slides and medical evidence, opined that the miner's mild, simple pneumoconiosis did not cause, contribute to, or hasten his death. Decision and Order at 18; Employer's Exhibits 1-3, 11. The administrative law judge properly found that the opinions of Drs. Caffrey, Naeye and Tomashefski were well reasoned and well documented. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 18. The administrative

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20 C.F.R. §718.205(c).

<sup>5</sup> Dr. Caffrey attributed the miner's death to severe cardiac disease, noting that the miner had developed cardiomyopathy with congestive heart failure. Employer's Exhibit 1. Dr. Caffrey opined that none of these conditions was caused by, or in any way related to, the miner's coal mine employment. *Id.* Dr. Caffrey opined that the miner's coal workers' pneumoconiosis was of such a mild degree that it did not contribute to, or hasten, his death. *Id.*; *see also* Employer's Exhibit 11 at 20.

<sup>6</sup> Dr. Naeye attributed the miner's death entirely to "progressive cardiac failure which in turn was the apparent consequence of coronary artery disease and damage to the microcirculation of his heart by cigarette smoking." Employer's Exhibit 2. Dr. Naeye opined that the miner's mild coal worker's pneumoconiosis disease did not contribute to his death in any way. *Id.*

<sup>7</sup> Dr. Tomashefski attributed the miner's death to congestive left ventricular failure. Employer's Exhibit 3. Dr. Tomashefski opined that the miner's mild coal workers' pneumoconiosis did not cause, or contribute to, the miner's death. *Id.*

law judge further found that the opinions of Drs. Caffrey, Naeye and Tomashefski were supported by the opinions of five Board-certified pulmonologists, Drs. Dahhan,<sup>8</sup> Jarboe,<sup>9</sup> Castle,<sup>10</sup> Fino<sup>11</sup> and Repsher,<sup>12</sup> who reviewed the medical evidence of record. Decision and Order at 18; Employer's Exhibits 4, 6-9, 12. The administrative law judge further accurately found that the "record is completely devoid of any evidence that [the miner's] death was hastened by pneumoconiosis." Decision and Order at 18.

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<sup>8</sup> Dr. Dahhan opined that the miner died due to cardiac disease that terminated in a cardiac arrest. Employer's Exhibit 4. Dr. Dahhan opined that the miner's coal workers' pneumoconiosis "did not cause, aggravate, worsen, hasten, bring on or contribute to his demise." *Id.*

<sup>9</sup> Dr. Jarboe opined that the miner died due to end stage ischemic cardiomyopathy which resulted in shock and renal failure. Employer's Exhibit 6. Dr. Jarboe opined that the degree of involvement of the miner's coal workers' pneumoconiosis would not have contributed to, or hastened, the miner's death. *Id.* Dr. Jarboe opined that the miner "would have died at the same time and of the same causes he did whether or not he had ever worked as a coal miner." *Id.*; *see also* Employer's Exhibit 10.

<sup>10</sup> Dr. Castle opined that:

[The miner's] death had no relationship whatsoever to [his] underlying coal workers' pneumoconiosis that was present pathologically. He died as a result of congestive heart failure due to end-stage ischemic cardiomyopathy. This man died as and when he would have died regardless of his occupational history and occupational exposure.

Employer's Exhibit 7.

<sup>11</sup> Dr. Fino opined that the miner's death was due to cardiomyopathy. Employer's Exhibit 8. Dr. Fino also opined that the miner's lung disease did not cause, contribute to, or hasten his death. *Id.* Dr. Fino stated that the miner "would have died as and when he did had he never stepped foot in the mines." *Id.*

<sup>12</sup> Dr. Repsher opined that the miner's "mild degree of simple coal workers' pneumoconiosis noted at autopsy did not have any significant effect on his pulmonary function and, therefore, did not cause, contribute to, or even hasten his death." Employer's Exhibit 9; *see also* Employer's Exhibit 12 at 16-17.

Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>13</sup> In light of our affirmance of the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. Consequently, we need not address employer's contentions raised in its cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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PETER A. GABAUER, JR.  
Administrative Appeals Judge

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<sup>13</sup> Because there is no evidence of complicated pneumoconiosis, the administrative law judge properly found that claimant is not entitled to the presumption set out at 20 C.F.R. §718.304. Decision and Order at 17.