

BRB No. 06-0612 BLA

JULIA MARTIN)
(Widow of MICHAEL MARTIN))
)
 Claimant-Petitioner)
) DATE ISSUED: 12/27/2006
 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Daniel L. Chunko (Chunko, Pangburn & Francis), Washington, Pennsylvania, for claimant.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5229) of Administrative Law Judge Michael P. Lesniak rendered 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 accepted the parties' stipulation that the existence of pneumoconiosis arising out of coal mine employment was established. 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, the administrative law judge denied benefits.

On appeal, claimant alleges that the administrative judge erred in finding that claimant failed to establish the presence of pneumoconiosis. Claimant argues further that the administrative law judge erred in finding that claimant failed to prove that the miner's death was due to pneumoconiosis. The Director, Office of Workers' Compensation Programs responds, urging affirmance of the administrative law judge's denial of benefits, because there is no evidence that pneumoconiosis contributed to the miner's death.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. 20 C.F.R. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2),(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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006 (3d Cir. 1989). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant alleges that the administrative law judge erred in finding that the claimant failed to establish the presence of pneumoconiosis. Claimant's Brief at 2. The record reflects that the parties stipulated to the existence of pneumoconiosis arising out of coal mine employment, and the administrative law judge found the stipulated fact to be well supported by the evidence. Hearing Transcript at 8, 13-20; Decision and Order at 5. Because the existence of pneumoconiosis was found established by the administrative law judge, claimant's allegation of error lacks merit.

Claimant next argues that the administrative law judge erred in finding that claimant failed to meet her burden of establishing that the miner's death was due to pneumoconiosis. Claimant's Brief at 2-3. Claimant's argument again lacks merit.

Evidence submitted in the survivor's claim consisted of records from West Virginia University Hospital and Uniontown Hospital documenting the miner's medical treatment from 1995 until his death in 1999; a death certificate; an autopsy report; and a

medical opinion based on a review of the autopsy report and slides and the miner's medical records, as requested by the Department of Labor from its medical expert, Dr. Perper. Director's Exhibits 12-16. Claimant also submitted an affidavit of the deceased miner's condition. Director's Exhibit 17.

In reviewing the evidence, the administrative law judge found that although the medical experts disagreed as to the cause of the miner's death, there was no evidence that his death was due to or hastened by pneumoconiosis.¹ Decision and Order at 5; *see* 20 C.F.R. § 718.205(c). Specifically, the administrative law judge found that Dr. Perper's uncontradicted opinion, based on a review of the medical records and autopsy slides, was that pneumoconiosis did not contribute to or hasten the miner's death. Decision and Order at 5; Director's Exhibit 14. Thus, the administrative law judge correctly found that there was no evidence that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).²

Claimant argues that the administrative law judge erred in not crediting Dr. Rizkalla's autopsy report to find that pneumoconiosis contributed to the miner's death. Claimant's Brief at 4. However, in reviewing the evidence of record, the administrative law judge correctly found that the autopsy report merely confirmed the existence of pneumoconiosis, and that it contained no statement that the disease contributed to the miner's death. Decision and Order at 4; Director's Exhibit 13 at 1. We therefore reject claimant's argument.

Substantial evidence supports the administrative law judge's finding that there was no evidence that the miner's death was due to pneumoconiosis. We therefore affirm the

¹ As summarized by the administrative law judge, the miner's death certificate listed the cause of death as aspiration pneumonia; no other causes or conditions were listed. Director's Exhibit 12. The autopsy disclosed the presence of pneumoconiosis and other medical conditions, but the prosectors, Drs. Rizkalla and Hanna, concluded that the miner's death was due to arteriosclerotic heart disease. Director's Exhibit 13. They stated only that simple coal workers' pneumoconiosis was "present." Director's Exhibit 13 at 1. Dr. Perper examined the lung slides and other medical records and concluded that the miner's death was unrelated to his mild coal workers' pneumoconiosis, and was due to complicating aspiration pneumonia and a myocardial infarction. Director's Exhibit 14 at 12.

² The administrative law judge also found that there was no evidence of complicated pneumoconiosis in the record and that therefore, claimant could not establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3).

finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Because claimant failed to establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits. 20 C.F.R. §718.205(a)(1)-(3); *see Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge