

BRB No. 98-1534 BLA

RITA A. OUSLEY)
(Widow of HERMAL OUSLEY))
)
Claimant-)
Petitioner)
)
v.) DATE ISSUED:
)
DIRECTOR, OFFICE OF)
WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR) DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Rita S. Fuchsman, Chillicothe, Ohio, for claimant.

Rita A. Roppolo (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denial of Benefits (98-BLA-

¹ Claimant is the widow of the miner, Hermal Ousley, who died on December 11, 1996. Director's Exhibit 2. Claimant filed a survivor's claim on December 27, 1996. Director's Exhibit 1. The survivor's claim is the only case

0470) of Administrative Law Judge Joseph E. Kane 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 noted initially the procedural history of this claim, specifically, that the miner had been awarded federal Black Lung benefits pursuant to an application for benefits filed on February 5, 1991.² The administrative law judge credited the miner with six years of coal mine employment and adjudicated this case pursuant to 20 C.F.R. Part 718, based on claimant's December 27, 1996 filing date. Addressing the merits of the survivor's claim, the administrative law judge accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), regarding the existence of pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(c). However, the administrative law judge found the medical evidence of record insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(1)-(3). Accordingly, the administrative law judge denied benefits.

In challenging the administrative law judge's denial of survivor's benefits, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a contributing cause of the miner's death. In a Motion to Remand,³ the Director requests that the Board vacate the administrative law judge's denial of benefits and remand the case to the administrative law judge for further consideration of the medical opinion evidence

currently before the Board.

² In a Decision and Order issued August 25, 1993, Administrative Law Judge Rudolf L. Jansen awarded benefits in the miner's claim, crediting the miner with six years of coal mine employment and finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(c). Additionally, Judge Jansen found the evidence sufficient to establish a totally disabling respiratory impairment which was due, at least in part, to the miner's pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Director's Exhibit 18. No appeal was taken of Judge Jansen's Decision and Order.

³ We accept the Motion to Remand from the Director, Office of Workers' Compensation Programs, as his response brief in this appeal.

pursuant to Section 718.205(c).⁴

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

⁴ The parties do not challenge the administrative law judge's decision to credit the miner with six years of coal mine employment, his acceptance of the Director's concession of the existence of pneumoconiosis arising out of coal mine employment, or his findings pursuant to 20 C.F.R. §718.205(c)(1) and (c)(3). These findings are, therefore, affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when claimant meets her burden of establishing that the miner's death was due to pneumoconiosis arising out of coal mine employment, where pneumoconiosis was a substantially contributing cause of the miner's death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established. 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Moreover, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,⁵ has held that, pursuant to Section 718.205(c)(2), pneumoconiosis is considered to have substantially contributed to death if it hastened the miner's death. *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); see also *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding the medical evidence insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death. In particular, claimant contends that the administrative law judge erred in finding that the medical opinion of Dr. Lance, that pneumoconiosis was a substantially contributing cause of the miner's death, was not documented or supported by underlying documentation inasmuch as the record contains previous medical opinions from Dr. Lance which support his conclusions. In a Motion to Remand, the Director concurs with claimant that the administrative law judge erred in finding the opinion of Dr. Lance not documented, arguing that medical reports of Dr. Gutterman, which outlined the miner's treatment for lung cancer during the last six months of his life, were sent to Dr. Lance and, therefore, may provide documentation for the physician's opinion. We disagree.

⁵ Inasmuch as the miner's last coal mine employment took place within the State of Ohio, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Decision and Order at 4; Director's Exhibit 18; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Contrary to the contention of claimant and the Director, the administrative law judge did not find that the medical opinion of Dr. Lance was entitled to little weight solely because it lacked underlying documentation. Rather, the administrative law judge reasonably exercised his discretion as trier-of-fact in finding that the opinion of Dr. Lance was not well reasoned inasmuch as the physician did not explain how his underlying documentation supported his conclusion the pneumoconiosis was a substantially contributing cause of the miner's death. Decision and Order at 7; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Moreover, contrary to claimant's contention, inasmuch as the administrative law judge reasonably found the opinion of Dr. Lance not well reasoned, the administrative law judge was not required to accord greater weight to the opinion of Dr. Lance based on his status as treating physician. See *Griffith, supra*; see also *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Inasmuch as the administrative law judge reasonably accorded no weight to the opinion of Dr. Lance, the only opinion supportive of claimant's burden, we affirm his finding that the evidence of record is insufficient to establish that pneumoconiosis was a contributing cause of the miner's death pursuant to Section 718.205(c).⁶ *Brown, supra*; *Griffith, supra*.

⁶ In light of our affirmance of the administrative law judge's weighing of the opinion of Dr. Lance, the only opinion supportive of claimant's burden, we need not address claimant's contention regarding the administrative law judge's weighing of the contrary opinions of Drs. Long and Gutterman inasmuch as claimant bears the burden of proof under Section 718.205(c) and, therefore, error, if any, in the administrative law judge's weighing of these contrary opinions is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); see also *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Since claimant has failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), a requisite element of entitlement for a survivor's claim under Part 718, an award of benefits is precluded. *Brown, supra; Griffith, supra; Trumbo, supra; Neeley, supra.*

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge