

BRB No. 00-0547 BLA

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| BEULAH BROCK |) | | |
| (Widow of ORVILLE BROCK) |) | | |
| |) | | |
| Claimant-Petitioner |) | | |
| |) | | |
| v. |) | | |
| |) | | |
| GREAT WESTERN RESOURCES |) | DATE | ISSUED: |
| |) | | |
| 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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford & Siemon), Harlan, Kentucky, for claimant.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

Sarah M. Hurley (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denial of Benefits (99-BLA-0657) of

¹ Claimant, Beulah Brock, is the widow of Orville Brock, the miner, who died on

Administrative Law Judge Robert L. Hillyard 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).² Initially, the administrative law judge credited the miner with thirty-six years and nine months of qualifying coal mine employment, and determined that claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the case should be held in abeyance for twelve years until the termination of claimant's receipt of the miner's state workers' compensation benefits. Additionally, claimant contends that the Director, Office of Worker's Compensation Programs (the Director), failed to assist claimant with the development of her survivor's claim. Employer responds, urging affirmance of the denial of benefits. The

August 10, 1994. Director's Exhibit 8. The miner filed his application for benefits on March 14, 1988 and was awarded benefits by the district director on May 9, 1989. Director's Exhibit 25. Employer did not appeal the district director's award of benefits on the miner's claim. After the miner's death on August 10, 1994, the widow filed her application for benefits on July 22, 1997. Director's Exhibit 1.

² 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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Director has filed a response letter, disagreeing with claimant's contentions with respect to holding the case in abeyance and the inadequate assistance she received from the Director's office. Consequently, claimant has filed a reply brief, reiterating her arguments.³

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits on a survivor's claim filed on or after January 1, 1982, a claimant must establish that the miner had pneumoconiosis, that the miner's 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). Death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). Pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Claimant initially argues that this case should be held in abeyance, pending the completion of the payment of state workers' compensation benefits scheduled to expire in the year 2012. Director's Exhibit 25; [1999] Hearing Transcript at 10. Claimant avers that, notwithstanding a finding of entitlement on her survivor's claim, she is ineligible to receive any federal benefits for twelve years. Claimant's arguments are without merit. It is well established that in the Black Lung Benefits Act, Congress intended federal benefits to serve only as a supplement to inadequate state awards. *Carbon Fuel Co. v. Director, OWCP [Kyle]*, 20 F.3d 120, 18 BLR 2-228 (4th Cir. 1994); see *Director, OWCP v. Hamm*, 113 F.3d 23, 21 BLR 2-131 (4th Cir. 1997). Section 422(g) of the Act, and its implementing regulation at 20 C.F.R. §725.101(a)(31), provides that Federal Black Lung Benefits shall be reduced by the amount of any compensation received under any federal or state workers'

³ We affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment as unchallenged. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 11-14.

compensation law because of death or disability due to pneumoconiosis. 30 U.S.C. §932(g); *see O’Brockta v. Eastern Associated Coal Co.*, 18 BLR 1-71, 1-78 (1994); *Burnette v. Director, OWCP*, 14 BLR 1-151 (1990). Therefore, contrary to claimant’s contention, her continuing receipt of state workers’ compensation benefits would not preclude a finding of entitlement in her survivor’s claim or preclude her eligibility to receive federal benefits.

Furthermore, claimant’s request to hold the case in abeyance is denied. In a case involving claimants who were required by Kentucky state law, as a condition for filing a state workers’ compensation claim, to pursue federal Black Lung claims diligently and in good faith, the Board held that an administrative law judge cannot enter Orders of Dismissal, which could be set aside at some indefinite future time, if it is ever determined by the Kentucky Workers’ Compensation Board that claimants did not diligently and in good faith pursue their federal Black Lung claims. *Slone v. Wolfe Creek Coal Collieries, Inc.*, 10 BLR 1-66 (1987), *appeal dismissed, sub nom. Canada Coal Co. v. Stiltner*, 866 F.2d 153, 12 BLR 2-115 (6th Cir. 1989). Accordingly, judicial finality requires either that claimants continue to pursue their federal claims, or that the claims be unconditionally withdrawn⁴ or dismissed. We, therefore, reject claimant’s arguments. *See Slone*, 10 BLR at 1-70.

Claimant requests that the case be reversed because she received inadequate assistance from the Director in the pursuit of her claim. Specifically, claimant argues that because employer appealed the district director’s finding that she was entitled to survivor’s benefits, the Director was thereafter required by law to represent claimant’s interests and defend her award of benefits before the administrative law judge. The Director responds that, contrary to claimant’s argument, he has no statutory duty to advocate a claimant’s position once a claim is referred to the Office of Administrative Law Judges or the Board in cases where the district director rendered a finding of entitlement and a responsible operator is liable for the award of benefits. We agree with the Director.

Section 725.405(c) provides, “In the case of a claim filed by or on behalf of a survivor of a miner, the district director shall obtain whatever medical evidence is necessary and available for the development and evaluation of the claim.” 20 C.F.R. §725.405(c). Similarly, it is well established that the Act, regulations, and case precedent all provide that the claimant, not the Department of Labor (the Director), bears the burden of establishing initial entitlement. The Board has explained that “although the Department of Labor, through

⁴ In her reply brief, claimant asserts that she was not advised of the right to withdraw her claim, “other than on penalty of never being able to file again.” Claimant’s Reply letter at 1. Contrary to claimant’s assertion, there is no penalty for the withdrawal of a claim. Section 725.306(b) provides, “When a claim has been withdrawn under paragraph (a) of this section, the claim will be considered not to have been filed.” 20 C.F.R. §725.306(b).

the [district director], has the duty to develop evidence pertinent to the claim when the claim is initially filed, 20 C.F.R. §725.404 *et seq.*, this requirement does not preclude the claimant from obtaining and submitting his own evidence. 20 C.F.R. §725.407(b).” *White v. Director, OWCP*, 6 BLR 1-368, 1-370 (1983); *see Barnes v. ICO Corp.*, 31 F.3d 678, 18 BLR 2-319 (8th Cir. 1994)(claimant and his attorney, not district director, had duty to obtain satisfactory evidence to support his claim). Accordingly, claimant and counsel had the duty to obtain satisfactory evidence to support her claim. We, therefore, reject claimant’s contention.

Inasmuch as claimant has not raised any other allegation of error with respect to the administrative law judge’s analysis of the medical evidence or his findings on the merits of entitlement, we affirm the administrative law judge’s determination that claimant failed to establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c)(5), a requisite element of entitlement in this Part 718 survivor’s claim. *See* 20 C.F.R. §§718.205(c)(2), (5); *Brown, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); Decision and Order at 14-15.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge