

BRB No. 01-0676 BLA

JUANITA NECESSARY	)	
(Widow of GEORGE C. NECESSARY, Jr.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
WESTMORELAND COAL COMPANY)	)	
	)	
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 Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Juanita Necessary, Wise, Virginia, *pro se*.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel,<sup>2</sup> appeals the Decision and Order Denying Benefits (00-BLA-0920) of Administrative Law Judge Alice M. Craft 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>3</sup> This case involves a survivor's claim filed on August 10, 1999.<sup>4</sup> After stating that the parties stipulated that the miner worked in

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<sup>1</sup>Claimant is the surviving spouse of the miner, who died on March 6, 1999. Director's Exhibit 11.

<sup>2</sup>Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, acting on behalf of claimant, filed an appeal of the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

<sup>3</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 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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued a decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

<sup>4</sup>The miner filed an initial living miner's claim on February 23, 1979. Director's Exhibit 33. In a Decision and Order dated February 24, 1988, Administrative Law Judge Clement J. Kichuk considered the claim pursuant to the applicable regulations at 20 C.F.R. Part 727 (2000). After crediting the miner with nineteen years of coal mine employment, Judge Kichuk found the evidence insufficient to establish invocation of the interim presumption under 20 C.F.R. §727.203(a) (2000). Judge Kichuk also determined that the miner failed to establish the existence of pneumoconiosis under 20 C.F.R. Part 410, Subpart

coal mine employment for sixteen and fifty-five one-hundredths to nineteen years, the administrative law judge considered the instant claim under the applicable regulations at 20 C.F.R. Part 718. The administrative law judge stated that the x-ray evidence of record was conflicting as to whether the miner suffered from pneumoconiosis. The administrative law judge further stated that, even if she were to credit the evidence showing that the miner suffered from pneumoconiosis, the record was devoid of any evidence supportive of a finding 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 decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, noting his belief that the instant case is not affected by any of the revisions to the regulations.

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.

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D (2000). Accordingly, Judge Kichuk denied benefits. Claimant appealed. The Board affirmed Judge Kichuk's decision in a Decision and Order dated July 29, 1992. *Necessary v. Westmoreland Coal Co.*, BRB No. 88-0778 BLA (July 29, 1992)(unpublished). The miner filed an appeal with the United States Court of Appeals for the Fourth Circuit, but subsequently filed a motion for voluntary withdrawal of his appeal. The United States Court of Appeals for the Fourth Circuit issued an order dismissing the miner's appeal on January 11, 1993. *Necessary v. Westmoreland Coal Co.*, No. 92-2202 (4th Cir. Jan. 11, 1993)(unpublished Order). The miner filed a duplicate claim on March 22, 1996. Director's Exhibit 34. This claim was finally denied on June 20, 1996 by the district director, who determined that the miner failed to establish any of the requisite elements of entitlement under 20 C.F.R. Part 718 (2000). *Id.* The miner did not take any further action in pursuit of benefits.

*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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Inasmuch as 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>5</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §718.203; *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

In considering the evidence of record, the administrative law judge correctly found that the record does not include any evidence supportive of a finding that the miner's death was due to pneumoconiosis. Decision and Order at 13-14. The administrative law judge correctly stated that all of the physicians' opinions addressing the cause of the miner's death attribute the miner's death to the miner's heart condition, and indicate that pneumoconiosis played no role in the miner's death. *Id.*; Director's Exhibits 29-32; Employer's Exhibits 1, 2. Specifically, Drs. Zaldivar, Jarboe, Castle, Fino and Spagnolo all opined that the miner's sudden death on March 6, 1999 was related to his cardiac condition and was in no way attributable to pneumoconiosis. Director's Exhibits 29-32; Employer's Exhibits 1, 2. In addition, the miner's death certificate did not mention pneumoconiosis, indicating only cardiopulmonary arrest as the cause of the miner's death. Director's Exhibit 11. Moreover, the record contains no evidence of complicated pneumoconiosis and therefore, claimant

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<sup>5</sup>Section 718.205(c) provides, in pertinent part, 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.
- ...
- (5) Pneumoconiosis is a "substantial contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

cannot establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3) by establishing invocation of the irrebuttable presumption of death due to pneumoconiosis under 20 C.F.R. §718.304. *See* 20 C.F.R. §§718.205(c)(3) and 718.304. Accordingly, we affirm 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). *See* 20 C.F.R. §718.205(c). Consequently, claimant's entitlement to survivor's benefits is precluded.<sup>6</sup>

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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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>6</sup>Any error the administrative law judge may have made in failing to articulate specific findings as to whether claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(1)-(4) and 718.203 is harmless, inasmuch as survivor's benefits are precluded. *See Larioni v. Director, OWCP*, 6 BLR 1-710 (1983).