

BRB Nos. 08-0469 BLA  
and 08-0469 BLA-A

V.W.	)	
(Surviving Divorced Spouse of D.W.)	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CCCC COAL COMPANY,	)	
INCORPORATED	)	DATE ISSUED: 02/25/2009
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan PSC), South Williamson, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals and employer cross-appeals the Decision and Order (05-BLA-5414) of Administrative Law Judge Janice K. Bullard denying benefits on a survivor's

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<sup>1</sup> Claimant is the surviving divorced spouse of the miner, who died on July 29, 2000. Director's Exhibit 7.

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 credited the miner with seventeen years of coal mine employment<sup>2</sup> based on claimant's stipulation, which the administrative law judge found to be supported by the record. The administrative law judge determined that claimant is an eligible survivor of the miner pursuant to 20 C.F.R. §§725.212, 725.216 and 725.217. The administrative law judge found that the evidence established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), but found that the existence of complicated pneumoconiosis was not established pursuant to 20 C.F.R. §718.304. The administrative law judge also 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 asserts that the administrative law judge erred in finding that the existence of complicated pneumoconiosis was not established, and in finding that the evidence did not establish that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. In its cross-appeal, employer asserts that the administrative law judge erred in determining that claimant was dependent on the miner, and thus erred in finding that claimant is eligible to receive benefits. Claimant responds, urging affirmance of the administrative law judge's dependency determination. The Director, Office of Workers' Compensation Programs, has not submitted a brief in either appeal.<sup>3</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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

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<sup>2</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

<sup>3</sup> We affirm the administrative law judge's length of coal mine employment determination, as well as her finding that the evidence established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2),(4), 718.203(b), as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. Death will also be considered due to pneumoconiosis if the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable.<sup>4</sup> 20 C.F.R. §718.205(c)(1)-(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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003).

The administrative law judge considered the medical reports of Drs. Mellen, Crouch, and Tomashefski, and the miner's death certificate. Dr. Mellen performed the miner's autopsy and noted the presence of anthracosis and fibrosis in the lungs consistent with black lung, and chronic obstructive pulmonary disease. He opined that the miner "died from coronary atherosclerosis (heart attack)." Director's Exhibit 19. Dr. Mellen signed the miner's death certificate and identified the immediate cause of death as atherosclerotic coronary artery disease. Director's Exhibit 7. No contributing causes were noted. *Id.* In a subsequent deposition, Dr. Mellen opined that the fibrosis in the miner's lungs, coupled with black nodular masses measuring up to two centimeters in diameter, constituted progressive massive fibrosis and that therefore, the miner had complicated pneumoconiosis. Director's Exhibit 19 at 11-12, 19-20, 27. Additionally, Dr. Mellen stated that the primary cause of the miner's death was cardiac disease, but that based on the amount of fibrosis in the miner's lungs, he believed that pneumoconiosis contributed to the miner's death. Director's Exhibit 19 at 16. He explained that the extent of the fibrosis in the miner's lungs would have impaired the oxygenation of his blood, and that in a person with the "critical coronary atherosclerosis that [the miner] had,

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<sup>4</sup> Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304, provides in relevant part that there is an irrebuttable presumption that the miner died due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). In determining whether claimant has established invocation of the irrebuttable presumption, the administrative law judge must consider all relevant evidence. *Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

the inability to oxygenate the blood can precipitate a further heart attack or arrhythmia.”  
*Id.*

By contrast, Drs. Crouch and Tomashefski reviewed the miner’s autopsy report and lung tissue slides, and concluded that he had simple coal workers’ pneumoconiosis that was too mild to have caused any impairment or to have hastened his death from heart disease. Director’s Exhibit 41; Employer’s Exhibit 1.

In weighing the autopsy evidence pursuant to 20 C.F.R. §718.304(b), the administrative law judge found that Dr. Mellen’s opinion did not carry claimant’s burden of proof to establish complicated pneumoconiosis:

Without an opinion as to whether a nodule of 2 or 1.3 centimeters in diameter would produce an opacity greater than one centimeter if viewed by X-ray or that the Miner had a massive lesion, I find the evidence insufficient to demonstrate equivalency to complicated pneumoconiosis. Dr. Mellen’s opinion that the existence of fibrosis makes a case of pneumoconiosis complicated is inconsistent with the Act’s requirement that an autopsy reveal “massive lesions in the lung.” The weight of his conclusion is diminished accordingly. Furthermore, the well reasoned opinions of the two other pathologists, both of whom opined that the Miner’s pneumoconiosis was simple, cast doubt on Dr. Mellen’s conclusion.

Decision and Order at 16 (citation omitted). Thus, the administrative law judge determined that the autopsy evidence did not establish the existence of complicated pneumoconiosis. The administrative law judge also found that the record did not contain any x-ray evidence diagnosing complicated pneumoconiosis and that there was no other evidence of complicated pneumoconiosis.<sup>5</sup> Decision and Order at 15-16.

With respect to whether pneumoconiosis was a substantially contributing cause of the miner’s death pursuant to 20 C.F.R. §718.205(c), the administrative law judge found that Dr. Mellen’s testimony was not convincing or well-reasoned. Noting that Dr. Mellen had not indicated that pneumoconiosis contributed to the miner’s death until he was deposed, the administrative law judge stated that she accorded “greater weight” to the opinions Dr. Mellen had expressed at the time he prepared the autopsy report and the miner’s death certificate. Decision and Order at 18. Moreover, the administrative law

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<sup>5</sup> We affirm the administrative law judge’s finding that the evidence did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (c), as these findings are not challenged on appeal. *Skrack*, 6 BLR at 1-711.

judge found Dr. Mellen's explanation, that pneumoconiosis hastened the miner's death by causing an impairment in blood oxygenation that led to a cardiac arrhythmia, to be unconvincing because Dr. Mellen admitted that he could not determine the cause of the miner's pulmonary impairment, as the miner also had chronic obstructive pulmonary disease due to smoking, and hypertension. Additionally, the administrative law judge considered that Dr. Tomashefski "directly contradicted" Dr. Mellen's opinion, when he opined that the miner's coal workers' pneumoconiosis was too mild to have caused hypoxemia that might have precipitated a cardiac arrhythmia. Decision and Order at 19. According "substantial weight" to the opinions of Drs. Tomashefski and Crouch, the administrative law judge found that claimant did not establish that pneumoconiosis hastened the miner's death. *Id.*

In response to these findings by the administrative law judge, claimant quotes portions of Dr. Mellen's deposition testimony and states that, "Despite this clear and concise testimony the [administrative law judge] found Dr. Mellen to be unconvincing on the issue." Claimant's Brief at 5. However, claimant, who is represented by counsel, alleges no specific error in regard to the administrative law judge's analysis of Dr. Mellen's opinion on the existence of complicated pneumoconiosis and on whether pneumoconiosis hastened the miner's death. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. See 20 C.F.R. §§802.211, 802.301. Consequently, we affirm the administrative law judge's findings that Dr. Mellen's opinion did not carry claimant's burden of proof to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b) or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c).

Claimant asserts that the administrative law judge erred in redacting a portion of Dr. Mellen's deposition testimony in which he stated that he disagreed with Dr. Crouch. Claimant's Brief at 5-6. In view of the fact that claimant bears the burden of proof and has alleged no specific error in the administrative law judge's weighing of Dr. Mellen's opinion, we need not resolve this issue, as any error would not affect the disposition of this appeal. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Consequently, we affirm the administrative law judge's finding that the evidence did not establish the existence of complicated pneumoconiosis pursuant to Section 718.304, or that the miner's death was due to pneumoconiosis pursuant to Section 718.205. Therefore, we affirm the denial of benefits. In view of our affirmance of the denial of benefits, we need not address employer's cross-appeal challenging the finding that claimant was dependent on the miner.

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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BETTY JEAN HALL  
Administrative Appeals Judge