

BRB No. 97-0748 BLA

JEANETTE CARR)		
(Widow of GEORGE F. CARR))		
)		
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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

C. Ellen Webb, Middlesboro, Kentucky, for claimant.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (95-BLA-2281) of Administrative Law Judge Robert L. Hillyard denying benefits 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 instant case involves a survivor's claim filed on June 6, 1994.² The administrative law judge found the evidence insufficient to establish that the

¹Claimant is the surviving spouse of the deceased miner who died on December 5, 1986. Director's Exhibit 11.

²Claimant filed an earlier survivor's claim on December 16, 1986. Director's Exhibit 26. The district director denied the claim on August 10, 1988. *Id.* By letter dated August 22, 1988, the district director acknowledged claimant's appeal filed on August 15, 1988 and advised claimant that further action on the appeal would be deferred pending development of evidence in connection with a state workers' compensation claim. *Id.* The district director further advised claimant that her claim would be reconsidered and/or conferenced

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 contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board 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'Keeffe 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).³ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

prior to referral for a formal hearing. *Id.*

In the instant case, the administrative law judge noted that no final disposition of the 1986 survivor's claim appears in the record. Decision and Order at 5. In "fairness to [claimant]," the administrative law judge considered the 1994 survivor's claim as "an original claim." *Id.*

³Section 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 established that the miner's death

OWCP, 11 BLR 1-85 (1988). The United States Court of Appeals for the Sixth Circuit, wherein appellate jurisdiction in the instant case arises, has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

was due to pneumoconiosis, 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.

20 C.F.R. §718.205(c).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits under 20 C.F.R. Part 718. The administrative law judge properly found that the death certificate⁴ and the medical opinions rendered by Drs. Peagler, Kraman and Moore⁵ are insufficient to support a finding of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 8-10. Claimant

⁴Dr. Swann completed the miner's death certificate. Dr. Swann attributed the miner's death to lung cancer. Director's Exhibit 11. Dr. Swann listed pneumonia and respiratory failure as other significant conditions. *Id.*

⁵Dr. Peagler prepared a death summary on December 5, 1986. Although Dr. Peagler diagnosed lung cancer, dysrhythmia, malignant pleural effusion, hematuria and atelectasis of the right lung, he did not address the cause of the miner's death. Director's Exhibit 26.

Dr. Kraman reviewed the medical evidence. In a report dated January 26, 1995, he opined that the miner died of lung cancer caused by his many years of tobacco abuse. Director's Exhibit 14.

Dr. Moore, claimant's treating physician since May 31, 1986, prepared a March 23, 1987 report. Dr. Moore opined that the miner died "due to pulmonary complications and lung carcinoma." Director's Exhibit 17.

argues that the miner's lungs were weakened by pneumoconiosis, thereby hastening his death. Claimant, however, fails to cite to any medical evidence of record that supports such a finding. We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁶

⁶Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that claimant was precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. See 20 C.F.R. §718.205(c)(3).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge