

BRB Nos. 06-0522 BLA
and 06-0522 BLA-A

ETHEL MARCUM)	
(Widow of FRELIN MARCUM))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	DATE ISSUED: 01/26/2007
)	
ISLAND CREEK COAL COMPANY)	
)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Ethel Marcum, Oakhill, Ohio, *pro se*.

Natalee A. Gilmore (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (04-BLA-5853) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) 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 administrative law judge credited the miner with eleven years and three months of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.203. The administrative law judge also found the evidence insufficient to 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 generally challenges the administrative law judge's denial of benefits.² Employer responds, urging affirmance of the administrative law judge's denial

¹Claimant is the widow of the miner. The miner filed his first claim on March 13, 1978. Director's Exhibit 1. On October 6, 1986, Administrative Law Judge Charles W. Campbell issued a Decision and Order denying benefits. *Id.* Because the miner did not pursue this claim any further, the denial became final. The miner filed his second claim on June 26, 1991. *Id.* After several administrative denials, the district director finally denied this claim on March 30, 1992. *Id.* The denial became final because the miner did not pursue this claim any further. The miner died on May 24, 2000. Director's Exhibit 10. Claimant filed a survivor's claim on September 28, 2001. Director's Exhibit 3.

²Claimant argues that she was treated unfairly at the January 25, 2006 hearing. Claimant's March 28, 2006 Letter at 1. Claimant specifically contends that "no one was allowed to speak on her behalf" and that she was not allowed to "show or talk about her claimant's exhibits." *Id.* Claimant appeared before the administrative law judge without the assistance of counsel. During the hearing, the administrative law judge informed claimant that she was entitled to have counsel. Transcript at 5-6. Claimant, however, elected to proceed without an attorney. *Id.* at 6. At the hearing, the administrative law judge informed claimant that he had reviewed documents that she had previously submitted. *Id.* at 8. The administrative law judge informed claimant that these documents did not need to be admitted since they were already a part of the record, having been admitted as part of the Director's Exhibits. *Id.* at 8-9. There is no indication that claimant sought to submit any additional evidence. Finally, claimant was provided an opportunity to provide testimony. *Id.* at 14-26. Consequently, we hold that the hearing before the administrative law judge was properly conducted. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

of benefits. On cross-appeal, however, employer challenges the administrative law judge's decision to exclude medical evidence in Employer's Exhibits 7-9, on the bases that the evidentiary limitations set forth in 20 C.F.R. §725.414 are invalid and, assuming that the limitations are valid, that the administrative law judge incorrectly applied the evidentiary limitations. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response in a letter brief, urging the Board to reject employer's contentions that the administrative law judge erred in excluding the medical evidence in Employer's Exhibits 7-9.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.³ See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a

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 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 "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

“substantially contributing cause” of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

The administrative law judge properly found that there is no evidence in the record supportive of a finding that the miner’s death was due to pneumoconiosis. The miner’s death certificate does not support a finding of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁴ Moreover, none of the reports indicate that pneumoconiosis caused or hastened the miner’s death in any way. *Id.* The administrative law judge correctly found that Drs. Fino and Repsher opined that the miner’s death was unrelated to his coal mine employment.⁵ Decision and Order at 11; Employer’s Exhibits 3-6. Consequently, we 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

In light of our affirmance of 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), we need not address the administrative law judge’s findings pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We similarly decline to address employer’s contentions of error raised in its cross-appeal. *Id.*

⁴Dr. Greever completed the miner’s death certificate. Dr. Greever attributed the miner’s death to arteriosclerotic heart disease. Director’s Exhibit 10. Dr. Greever listed carcinoma of the lung as an other significant condition that contributed to the miner’s death. *Id.*

⁵In a March 18, 2005 report, Dr. Fino opined that coal mine dust inhalation did not cause, contribute to or hasten the miner’s death. Employer’s Exhibit 4. Similarly, during an April 18, 2005 deposition, Dr. Fino opined that coal dust exposure did not cause or hasten the miner’s death. Employer’s Exhibit 5.

In a March 14, 2005 report, Dr. Repsher opined that coal workers’ pneumoconiosis did not cause, contribute to, or in any way hasten the miner’s death. Employer’s Exhibit 3. Further, during an April 29, 2005 deposition, Dr. Repsher opined that the miner’s death was not caused by, related to, or hastened by either medical pneumoconiosis or legal pneumoconiosis. Employer’s Exhibit 6.

⁶Because there is no evidence of complicated pneumoconiosis, the administrative law judge properly found that claimant is not entitled to the presumption set out at 20 C.F.R. §718.304. Decision and Order at 8.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge