

BRB No. 98-0607 BLA

MARY VAUGHN)
(Widow of KENNETH VAUGHN))
)
Claimant-Petitioner)

v.)

WILSON COAL COMPANY)
BILL WILLIAMS COAL COMPANY)
TALKINGTON MINING CORPORATION)

and)

LIBERTY MUTUAL INSURANCE)
COMPANY)
OLD REPUBLIC INSURANCE)
COMPANY)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Mary Vaughn, Crawford, Tennessee, *pro se*.

Debra L. Fulton and Robert L. Kahn (Frantz, McConnell & Seymour), Knoxville, Tennessee, for Wilson Coal Company and Liberty Mutual Insurance Company.

Mark E. Solomons (Arter & Hadden LLP), Washington, D.C., for Bill Williams Coal Company and Old Republic Insurance Company.

Before: BROWN and McGRANERY, Administrative Appeals Judges,
and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (95-BLA-2634) of Administrative Law Judge Mollie W. Neal denying benefits on claims 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 The miner's first application for benefits filed on May 10, 1973 was withdrawn by the miner when he returned to coal mine employment and the file was therefore closed on September 28, 1981. Director's Exhibit 28. The miner's second claim for benefits filed on January 10, 1986 was finally denied by the district director on May 22, 1986. Director's Exhibits 19, 29. On March 20, 1989, the miner filed the present application, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 2; see 20 C.F.R. §725.309(d).

The miner died on August 5, 1989 and claimant, the miner's widow, filed her application for survivor's benefits on September 11, 1989. Director's Exhibits 3, 11. Both claims were referred to the Office of Administrative Law Judges, but were remanded twice to the district director for further development of the evidence regarding the responsible operator. Director's Exhibits 31, 41, 67, 106. After those proceedings were completed, the administrative law judge held a hearing on both claims on April 30, 1997.

Regarding the miner's claim, the administrative law judge found that the medical evidence developed since the prior denial failed to establish any element of entitlement previously decided against the miner and therefore did not demonstrate a material change in conditions as required by 20 C.F.R. §725.309(d). See *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLA 2-10 (6th Cir. 1994). The administrative law judge also found that, assuming *arguendo* that a material change in conditions was established by the new evidence, the record as a whole failed to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Turning to the survivor's claim, the administrative law judge found that the record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and contained no evidence 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 both claims.

On appeal, claimant generally challenges the denial of benefits. Wilson Coal

Company and Williams Coal Company respond, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To be entitled to benefits under 20 C.F.R. Part 718, a miner must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment, and a survivor must prove by a preponderance of the evidence that the miner's death was due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether the miner has established at least one of the elements previously decided against him. *Ross, supra*. If so, the miner has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Ross, supra*.

The miner was previously denied benefits because he failed to establish any element of entitlement pursuant to Sections 718.202(a) and 718.204. Director's Exhibit 19. Accordingly, the administrative law judge considered the newly submitted evidence to determine whether it established a material change in conditions. Decision and Order at 3-13; see *Ross, supra*.

The administrative law judge found that the new x-ray readings and medical opinions did not demonstrate a material change in the miner's condition with respect

to the element of pneumoconiosis, but concluded that the new medical opinions tended to indicate that the miner had become totally disabled by a respiratory or pulmonary impairment since the previous denial of benefits. Decision and Order at 13. The administrative law judge found that the 1989 hospitalization records detailing the miner's struggle with metastatic lung cancer supported this view, but concluded:

Assuming *arguendo* that these opinions which establish total disability due to a pulmonary or respiratory condition are sufficient to establish one of the elements previously adjudicated against the miner, the claim would still be denied on the merits. Specifically, I find the weight of the evidence, both the evidence submitted in the prior denial and the newly submitted medical evidence, when considered as a whole, fails to establish . . . that the miner was totally disabled due to pneumoconiosis.

Decision and Order at 14. We conclude that substantial evidence supports the administrative law judge's denial of benefits on the miner's claim.

To establish disability causation pursuant to Section 718.204(b) claimant must prove by a preponderance of the evidence that the miner's total disability was due at least in part to pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52, 2-63 (6th Cir. 1989). Review of the record reveals no medical evidence supportive of claimant's burden. The 1973 report by Dr. Cravens and the 1979 report by Dr. Guthrie do not address disability causation, Director's Exhibit 28, and the 1981 and 1986 reports by Dr. Swann do not contain a cardiopulmonary diagnosis. Director's Exhibits 28, 29. The records from St. Thomas Hospital of Nashville, Tennessee, and the Cumberland Medical Center of Crossville, Tennessee, relate the diagnosis and treatment of the miner's lung cancer and do not address respiratory disability or its causation.¹ Dr. Cohen, the miner's treating physician at St. Thomas, did not address disability causation, reporting only that the miner "had advanced carcinoma of the lung making a radiographic evaluation for underlying black lung disease quite difficult." Director's Exhibit 53. After reviewing the medical evidence of record, Drs. Fino and Broudy opined that at the time of his death the miner was totally disabled due to smoking-related lung cancer. Director's Exhibits 40, 88, 103. Drs. Anderson and Branscomb opined that until he developed

¹ No physician at St. Thomas Hospital or Cumberland Medical Center opined that the miner's small-cell metastatic lung cancer was in any way related to coal dust exposure.

the lung cancer, the miner had the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 42, 102. Review of the record reveals no other evidence regarding disability causation.

Because the record contains no medical evidence that the miner's total disability was due at least in part to pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to prove that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(b). See *Adams, supra*. Therefore, we affirm the denial of benefits on the miner's claim. See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

We also affirm the administrative law judge's denial of the survivor's claim. Pursuant to Section 718.205(c)(1)-(3), the administrative law judge found that the record was devoid of any evidence that the miner's death was due to pneumoconiosis. Decision and Order at 15-16. For survivor's claims filed on or after January 1, 1982, 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. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

The death certificate, completed by Dr. Durham, lists cancer of the lung as the cause of death, but lists no other conditions. Director's Exhibit 11. The death certificate does not indicate whether an autopsy was performed, and the record does not contain an autopsy report. A discharge summary relating to the miner's final hospitalization at the Cumberland Medical Center reports that he died on August 5, 1989 and lists the final diagnoses of metastatic lung cancer, right lower lobe pneumonia, and urinary tract infection. Director's Exhibit 84. The discharge summary does not address whether pneumoconiosis caused or hastened the miner's death, nor does Dr. Cohen's final report address this issue. Director's Exhibit 53. After reviewing some or all of the medical evidence, Drs. Kraman, Wilson, Hutchins, Broudy, Branscomb, Caffrey, Anderson, Fino, and Lane opined that the miner's death was due solely to lung cancer caused by smoking. Director's Exhibits 12, 39, 40, 42, 85, 88, 99, 101-03. Review of the record reveals no other evidence regarding the cause of the miner's death, nor any evidence relevant to the Section 718.304 presumption of death due to pneumoconiosis. See 20 C.F.R. §718.205(c)(3).

Because claimant has the burden to establish that the miner's death was due to or hastened by pneumoconiosis and submitted no such evidence, we affirm the administrative law judge's finding that claimant failed to prove that the miner's death

was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because claimant has failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we affirm the denial of benefits on the survivor's claim. See *Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits in both the miner's and the survivor's claims is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge