

BRB No. 95-1898 BLA

HELEN JACKSON)	
(Widow of CLARENCE JACKSON))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
PATSY TRUCKING COMPANY,)	
INCORPORATED)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Helen Jackson, Cedar Bluff, Virginia, *pro se*.

Leah Q. Griffin (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the

¹ Claimant is Helen Jackson, widow of Clarence Jackson, the miner, who died on April 16, 1993. Director's Exhibit 4. At the time of his death, Mr. Jackson was receiving benefits on a claim filed on March 26, 1985. Director's Exhibit 18 at 20. Because her husband's claim was filed after January 1, 1982, Mrs. Jackson was required to establish entitlement to benefits in her own right, 30 U.S.C. §901(a); 20 C.F.R. §718.1; see *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990), and filed a survivor's claim on July 29, 1994. Director's Exhibit 1. Although she is *pro se* before the Board, Mrs. Jackson was represented by counsel below. Director's Exhibit 11; Claimant's Exhibit 1.

Decision and Order (95-BLA-0130) of Administrative Law Judge Clement J. Kichuk denying benefits 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). The administrative law judge accepted the parties' request to make a determination on the record.² He found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(2), but concluded that the evidence failed to establish death due to pneumoconiosis pursuant to Section 718.205(c) and, accordingly, denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² In that request, the parties also jointly stipulated to twenty-four years of coal mine employment. Claimant's Exhibit 1.

To be entitled to benefits pursuant to 20 C.F.R. §718.205(c),³ claimant must demonstrate 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, 718.205. 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).

Pursuant to Section 718.202(a)(2), the administrative law judge permissibly credited the autopsy prosector's diagnosis of anthracosis over the reviewing pathologist's opinion that the miner did not have pneumoconiosis. Director's Exhibit 5; Employer's Exhibit 1; see Section 718.201; *Gruller v. BethEnergy Mines Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). We therefore affirm his threshold finding of the existence of pneumoconiosis. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Pursuant to Section 718.205(c)(1), the administrative law judge correctly noted that all the medical evidence indicated that the miner died from a gunshot wound to the head. Director's Exhibits 4, 5; Employer's Exhibit 1. Therefore, we affirm his finding that the evidence failed to establish death due to pneumoconiosis pursuant to Section 718.205(c)(1).

Pursuant to Section 718.205(c)(2), the administrative law judge found that "all the physicians agreed that . . . the pneumoconiosis present did not contribute to nor hasten" the miner's death. Decision and Order at 4. The death certificate, signed by Dr. Stefanini, the medical examiner, indicates that death occurred within minutes of the injury; no contributing causes are listed. Director's Exhibit 4. The prosector

³ 20 C.F.R. §718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis:

- (1) Where competent medical evidence established that the miner's death 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)(1)-(3).

concluded that pneumoconiosis "did not cause or contribute to [the miner's] death. [He] sustained a gunshot wound and died rapidly as a result thereof." Director's Exhibit 5. The medical examiner's report does not address whether pneumoconiosis hastened death. Director's Exhibit 5. The reviewing pathologist opined that "[the miner's] death was not hastened in any way . . . by his history of coal mine employment." Employer's Exhibit 1. Inasmuch as the record contains no evidence that the miner's pneumoconiosis hastened his death from a gunshot wound, we affirm the administrative law judge's finding that the evidence failed to establish that pneumoconiosis was a substantially contributing cause or factor leading to death.⁴ See 20 C.F.R. §718.205(c)(4); see also *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

⁴ Claimant does not allege that pneumoconiosis caused the miner to commit suicide. See *Johnson v. Peabody Coal Co.*, 26 F.3d 618, 18 BLR 2-444 (6th Cir. 1993); *Haduck*, n.1, *supra*.

Pursuant to Section 718.205(c)(3), the administrative law judge correctly noted that the record contained no evidence of complicated pneumoconiosis and concluded that the presumption at Section 718.304 is inapplicable to this case. We therefore affirm his finding pursuant to Section 718.205(c)(3). Because claimant has failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c),⁵ a necessary element of entitlement in a survivor's claim under Part 718, we affirm the denial of benefits. See *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

_____ JAMES F.
BROWN
Administrative Appeals Judge

⁵ The record contains no evidence of any pending claim filed by the miner prior to January 1, 1982 which could provide a basis for derivative entitlement. See *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989).