

BRB No. 00-1113 BLA

JEANETTE M. BROWNING)
(Widow of ROBERT H. BROWNING))
)
 Claimant-Petitioner)
)
 v.)
)
 ELKAY MINING COMPANY) DATE ISSUED:
)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Jeanette Browning, Bruno, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (99-BLA-195) of Administrative Law Judge Richard A. Morgan 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).¹ The administrative law judge

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969 as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted,

found, and the parties stipulated to, at least twenty-five years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant generally contends that the evidence is sufficient to establish entitlement. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on May 21, 2001, to which employer and the Director have responded.² Based on those briefs and our review, we hold that the disposition of the instant case is not impacted by the challenged regulations. Contrary to employer's contention, because the progressivity of pneumoconiosis has already been recognized by the Fourth Circuit, the circuit in which the instant case arises, *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-379-380 (4th Cir. 1996), *citing Plesh v. Director, OWCP*, 71 F.3d 103, 108, 20 BLR 2-30, 2-40 (3d Cir. 1995), the definition of pneumoconiosis which has been revised to reflect the progressivity of pneumoconiosis, 20 C.F.R. §718.201(c), will not alter the outcome of this case. Moreover, contrary to employer's argument, the change in 20 C.F.R. §718.204(a) will not alter the outcome of this case, as the cause of disability is not at issue in this survivor's claim. Therefore, we will proceed to adjudicate the merits of this appeal.

refer to the amended regulations.

² Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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 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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 969 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Dr. Dy, the autopsy prosecutor, diagnosed mild micro macular anthracotic pneumoconiosis, but did not opine whether pneumoconiosis substantially contributed to the miner's death. Director's Exhibit 26. The death certificate lists the immediate cause of death as cardio-respiratory failure and lung cancer, with chronic obstructive pulmonary disease and coronary artery disease listed as other significant conditions. Director's Exhibit 26. Drs. Hansbarger, Naeye, Castle, Jarboe, Fino and Kleinerman found that death was due to lung cancer, caused by smoking with metastasis to the brain combined with pneumonia. Employer's Exhibits 2-4; 7-9, 11. Drs. Naeye, Hansbarger and Zaldivar also opined that pneumoconiosis did not contribute to the miner's death. Employer's Exhibit 6. Although Drs. Oesterling and Fino diagnosed pneumoconiosis, they also found that pneumoconiosis did not contribute to death. Employer's Exhibits 7, 11. The administrative law judge permissibly found the evidence insufficient to establish death due to pneumoconiosis based on the majority of the medical opinions by the physicians with superior qualifications who found that pneumoconiosis did not cause or contribute to the miner's death. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77

(1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, the administrative law judge permissibly accorded little weight to Dr. Dy, the autopsy prosecutor, as he failed to state whether pneumoconiosis contributed to the miner's death. See *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); see *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, BLR (4th Cir. 2000). Consequently, we affirm the administrative law judge's denial in this survivor's claim as it is supported by substantial evidence and is in accordance with law. Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, entitlement to benefits in this survivor's claim is precluded. 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge