

BRB Nos. 07-0900 BLA
and 07-0900 BLA-A

A.D.)
(Widow of G.D.))
)
Claimant-Petitioner)
Cross-Respondent)
)
v.) DATE ISSUED: 07/23/2008
)
STRAIGHT CREEK MINING COMPANY)
)
and)
)
UNITED STATES FIDELITY &)
GUARANTY)
)
Employer/Carrier-)
Respondents)
Cross-Petitioners)
)
)
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 Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

A.D., Pineville, Kentucky, *pro se*.

H. Brett Stonecipher (Ferreri & Fogle, PLLC), Lexington, Kentucky, for
employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of legal counsel,² appeals and employer cross-appeals the Decision and Order Denying Benefits (2006-BLA-05672) of Administrative Law Judge Robert D. Kaplan 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). Claimant filed her survivor's claim on June 10, 2005. The administrative law judge credited the miner with fifteen years of qualifying coal mine employment, based on a stipulation of the parties, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), as the sole x-ray of record was read as positive by Dr. Broudy. The administrative law judge further determined that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the medical evidence was insufficient to establish that the miner's death was due pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer has filed a consolidated brief, urging affirmance of the denial of benefits and challenging the administrative law judge's finding that claimant established the existence of pneumoconiosis. In support of its cross-appeal, employer contends that if the Board vacates the denial of benefits and remands the case to the administrative law judge, then the administrative law judge must re-evaluate the evidence, particularly Dr. Broudy's opinion regarding the significance of his positive x-ray interpretation. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a substantive response in either

¹ Claimant is the widow of the miner, G.D., who died on January 25, 2005. Director's Exhibits 9, 11. The miner filed a claim for benefits on December 9, 1992, which was denied by Administrative Law Judge Bernard J. Gilday, Jr., who found that the miner failed to establish that his pneumoconiosis arose out of his coal mine employment or that his total disability was due to pneumoconiosis. The Board affirmed Judge Gilday's denial of benefits. [*G.D.*] *v. Straight Creek Mining Co.*, BRB Nos. 95-1032 BLA and 95-1032 BLA-A (Aug. 31, 1995)(unpub.).

² Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1985) (Order).

claimant's appeal or employer's cross-appeal, unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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, 1-177 (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 rational, supported by substantial evidence, and in accordance with applicable law.³ 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the denial of benefits is supported by substantial evidence, consistent with applicable law, and must be affirmed. Pursuant to Section 718.205(c), the administrative law judge considered the miner's death certificate, the medical opinions of Drs. Morgan, Broudy and Dahhan, as well as hospital records and treatment notes. The miner's death certificate attributed the miner's death to pulmonary fibrosis, and Dr. Morgan, the miner's treating physician, stated that "pulmonary

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

fibrosis[,] i.e.[,] black lung was the primary issue in regard to [the miner's] death.”⁴ Director's Exhibits 9, 11. In their consulting opinions, Drs. Broudy and Dahhan opined that pneumoconiosis played no role in the miner's death and that the miner's extensive pulmonary fibrosis was due to the effects of ankylosing spondylitis and cigarette smoking. Employer's Exhibits 1, 2.

The administrative law judge assessed the credibility of Dr. Morgan's opinion, the only medical opinion supportive of claimant's burden, and found it to be unreasoned and undocumented because the physician failed to explain how the evidence supports his conclusion and also failed to provide the basis for his opinion. Decision and Order at 13. The administrative law judge's conclusions regarding Dr. Morgan's opinion are supported by substantial evidence, as Dr. Morgan acknowledged that he could not ascertain the precise cause of the miner's pulmonary fibrosis and did not identify any medical evidence supporting his opinion. Director's Exhibit 11; *see* Decision and Order at 10. Consequently, the administrative law judge rationally found that Dr. Morgan's opinion regarding the cause of the miner's death was entitled to no weight under Section 718.205(c). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49 (6th Cir. 2003) (the opinions of treating physicians get the deference they deserve based on their power to persuade); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (the administrative law judge as fact-finder should decide whether a physician's report is sufficiently reasoned and documented); *Griffith*, 49 F.3d at 186, 19 BLR at 2-117; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88-89; Decision and Order at 13.

In addition, substantial evidence supports the administrative law judge's finding that the death certificate is insufficient, standing alone, to establish that the miner's death

⁴ Dr. Morgan, in a letter dated June 16, 2005, stated:

The patient had extensive pulmonary fibrosis. The only way to know the exact cause for his pulmonary fibrosis would be tissue exam, which I do not have knowledge of. Nevertheless[,] given his coal mine history, it is my impression that his pulmonary fibrosis was related to black lung, which is based on medical (sic) relevant material. The pulmonary fibrosis[,] i.e.[,] black lung was the primary issue in regard to his death. I had treated this man for five or greater years. If he had not suffered from black lung, he would have lived a long duration.

Director's Exhibit 11.

was due to pneumoconiosis, as the document contains no explanation of the cause of the “pulmonary fibrosis,” listed as the cause of the miner’s death. *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order at 13; Director’s Exhibits 9, 11. Additionally, the administrative law judge’s finding that the medical records and treatment notes are insufficient to support a finding that the miner’s death was related to pneumoconiosis is supported by substantial evidence because these records do not include a diagnosis of pneumoconiosis or any other conditions related to his coal mine employment. Decision and Order at 13; Director’s Exhibit 11. Because the administrative law judge permissibly discounted the only medical evidence of record supportive of claimant’s burden, we affirm the administrative law judge’s finding that claimant failed to establish that the miner’s death was due to pneumoconiosis at Section 718.205(c).⁵ *Griffith*, 49 F.3d at 186, 19 BLR at 2-117; *Brown*, 996 F.2d at 817, 17 BLR at 2-140.

Since claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c), an essential element of entitlement to benefits in a survivor’s claim under Part 718, an award of benefits is precluded. *Id.*; *Trumbo*, 17 BLR at 1-87-88. In light of our affirmance of the denial of benefits, we need not address employer’s cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁵ Because we have affirmed the administrative law judge’s finding that the evidence supportive of claimant’s burden is insufficient to establish entitlement, error, if any, in the administrative law judge’s consideration of the medical opinions in which Drs. Broudy and Dahhan stated that the miner’s death was unrelated to pneumoconiosis is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge