

BRB No. 07-0913 BLA

C.C.)
(Widow of J.C.))
)
Claimant-Petitioner)
)
v.)
)
ARCH ON THE NORTH FORK)
)
and)
) DATE ISSUED: 07/28/2008
UNDERWRITERS SAFETY & CLAIMS)
)
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 – Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

C.C., Hazard, Kentucky, *pro se*.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIUM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (05-BLA-6032) of Administrative Law Judge Donald W. Mosser rendered 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 miner died on December 17, 2003, and claimant filed her application for survivor’s

benefits on May 27, 2004. Director's Exhibit 2. In a decision dated July 20, 2007, the administrative law judge credited the miner with at least thirty-two years of coal mine employment¹ and found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a), as stipulated by the parties. The administrative law judge further found, however, that the evidence did not 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 contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.²

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). The Board 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'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 survivors' claims 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); *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-17 (6th Cir. 2003); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-

¹ The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 1, 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² The administrative law judge's finding of at least thirty-two years of coal mine employment is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

140 (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).

In considering whether claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge reviewed the relevant evidence of record, consisting of medical reports from Drs. Reddy and Jarboe, the miner's death certificate, and numerous treatment notes and hospital records.

The medical records indicate that the miner was hospitalized several times between 1996 and 2003, for complaints of shortness of breath, coughing, and wheezing, and the treatment notes include diagnoses of acute bronchitis, sinusitis, bronchiectasis, chronic obstructive pulmonary disease (COPD), congestive heart failure, chronic atrial fibrillation, coronary artery disease, hypertension, gastroesophageal reflux disease, hiatal hernia, status post stent placement, and a history of black lung. Decision and Order at 4-5; Director's Exhibits 12, 14; Claimant's Exhibits 1, 3, 4. The miner's final hospitalization began on December 5, 2003. After the miner's condition failed to improve, all but palliative care was discontinued. The miner was released to his home on December 16, 2003, and he died the next morning. The final discharge summary, signed by Dr. May, who attended the miner during his last hospitalization, listed the miner's diagnoses as COPD exacerbation, pneumonia, hemoptysis, chronic atrial fibrillation, and ischemic heart disease. Decision and Order at 5; Claimant's Exhibit 4. The miner's death certificate, also signed by Dr. May, listed the immediate cause of death as COPD, due to, or as a consequence of, respiratory failure. No other causes or conditions were noted, and no autopsy was conducted. Decision and Order at 4; Director's Exhibit 10. In a report dated June 11, 2004, Dr. Reddy, the miner's treating physician, diagnosed clinical and legal pneumoconiosis, but further opined that pneumoconiosis did not contribute to or cause the miner's death. Decision and Order at 3, 6; Director's Exhibit 15. Dr. Jarboe, in reports dated September 16, November 22, and December 7, 2006, and in a deposition conducted on September 21, 2006, opined that pneumoconiosis did not cause or contribute to the miner's death. Decision and Order at 3-4; Employer's Exhibits 1, 2.

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered all of the relevant medical evidence and initially found, as was within his discretion, that the miner's death certificate was not sufficient to establish that the miner's death was due to pneumoconiosis, because it was conclusory. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 6. The administrative law judge further found, correctly, that all of the physicians who offered

opinions on the cause of the miner's death opined that pneumoconiosis did not cause, substantially contribute to, or hasten the miner's death. Decision and Order at 6. Finally, the administrative law judge found that while the treatment notes clearly indicated that the miner suffered from disabling lung disease, including COPD, the treatment notes did not indicate that pneumoconiosis hastened the miner's death. Decision and Order at 6-7. Thus, the administrative law judge rationally concluded that claimant failed to meet her burden to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c).

Because claimant has failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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

JUDITH S. BOGGS
Administrative Appeals Judge