

BRB No. 98-1363 BLA

CAROL S. GENTRY)
(Widow of DANNY R. GENTRY))
)
Claimant-Petitioner)
)
v.)
)
SILVER EAGLE MINING COMPANY,) DATE ISSUED: 7/16/99
INCORPORATED)
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr.,
Administrative Law Judge, United States Department of Labor.

Carol S. Gentry, Norton, Virginia, *pro se*.¹

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for
employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals
Judges.

PER CURIAM:

¹Ron Carson, 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. In a letter dated July 20, 1998, the Board stated that claimant would be considered to be representing herself on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant,² without the assistance of counsel, appeals the Decision and Order (97-BLA-1267) of Administrative Law Judge Edward J. Murty, Jr. denying benefits 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 administrative law judge credited the miner with over ten years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718.³ The administrative law judge found the evidence

²Claimant is the widow of the miner, Danny Gentry, who died on December 7, 1992. Director's Exhibits 1, 4, 18.

³Claimant filed her initial survivor's claim on January 26, 1993. Director's Exhibit 18. This survivor's claim was denied by the Department of Labor (DOL) on June 25, 1993. *Id.* Although claimant requested a formal hearing before the Office of Administrative Law Judges (OALJ) on July 6, 1993, the district director considered the claim and issued a Memorandum of Informal Conference dated October 20, 1993, which denied benefits. *Id.* Claimant filed her most recent application for survivor's benefits on December 2, 1996. Director's Exhibit 1. Employer filed a Motion for Summary Judgment dated December 20, 1996 and a Renewed Motion for Summary Judgment dated July 14, 1997, requesting dismissal of claimant's most recent survivor's claim because more than one year had elapsed since claimant's

insufficient to 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 challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, 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 on appeal to be whether the Decision and Order below is supported by substantial evidence. See *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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

prior application for survivor's benefits was denied. On July 14, 1997, Administrative Law Judge Thomas M. Burke issued an Order which denied employer's Renewed Motion for Summary Judgment. Judge Burke held that since claimant's July 6, 1993 request for a formal hearing was not referred to the OALJ in accordance with 20 C.F.R. §725.421(a), claimant's initial survivor's claim remained open, pending referral for a formal hearing to the OALJ as requested. Employer does not contest the denial of its request for dismissal of claimant's claim for survivor's benefits.

Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish, in pertinent part, 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 pursuant to 20 C.F.R. §718.205(c).⁴ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

⁴Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (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).

The administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).⁵ The administrative law judge stated that “[t]here is simply no medical evidence to establish that the death of [the miner] was in any way related to his pneumoconiosis or his coal dust exposure.” Decision and Order at 2. Drs. Hansbarger, Kleinerman and Naeye opined that pneumoconiosis did not hasten the miner's death. Director's Exhibit 6; Employer's Exhibits 1, 3. The death certificate, signed by Dr. Oxley, lists the cause of the miner's death as flame and hot gas inhalation due to an explosion in a coal mine. Director's Exhibit 4. Similarly, in an autopsy report, Dr. Oxley opined that the cause of the miner's death was flame and hot gas inhalation and carbon monoxide poisoning. Director's Exhibit 18. Thus, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). See *Shuff*, *supra*.

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

⁵Citing 20 C.F.R. §718.205(c)(4), the administrative law judge stated that “the regulations also specifically provide that survivors are not eligible for benefits where the miner's death was caused by a traumatic injury unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.” Decision and Order at 2.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge