

BRB No. 00-0916 BLA

JACQUELINE S. GREGORY)
(o/b/o and Widow of JOHN S. GREGORY))
)
Claimant-Petitioner)
)
v.)
)
BETHENERGY MINES, INCORPORATED) DATE ISSUED:
)
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 - Denying Benefits - Miner's Claim [and] Decision and Order - Denying Benefits - Survivor's Claim of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick, Morgantown, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order - Denying Benefits - Miner's Claim [and] Decision and Order - Denying Benefits - Survivor's Claim (99-BLA-502) and (99-BLA-503) of Administrative Law Judge Michael P. Lesniak on claims 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 miner filed a claim for benefits on

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

November 21, 1980, which was denied by Administrative Law Judge David A. Clarke, Jr., Director's Exhibit 36. Claimant appealed, and in *Gregory v. Beth Energy Mines, Inc.*, BRB No. 89-2273 BLA (Nov. 13, 1991)(unpub.), the Board affirmed the denial of benefits. The miner filed a duplicate claim on March 21, 1997, which was pending before the Office of Administrative Law Judges at the time of his death. Director's Exhibit 1. The miner died on December 12, 1997. Claimant filed a survivor's claim on January 6, 1998 and informed the Department by letter dated May 22, 1998, that she also wished to pursue the miner's claim. Because claimant established the existence of pneumoconiosis, the element of entitlement previously adjudicated against him, the administrative law judge found that claimant had established a material change in conditions. Director's Exhibits 1, 11. Adjudicating both the miner's and survivor's claims, the administrative law judge found that as employer conceded the existence of pneumoconiosis based on autopsy findings, that pneumoconiosis arose out of coal mine employment, and total disability, these elements were established. The administrative law judge found, however, that the evidence failed to establish that the miner was totally disabled due to pneumoconiosis and therefore denied benefits on the miner's claim.² Turning to the survivor's claim, the administrative law judge concluded that although he found the existence of pneumoconiosis established, claimant failed to establish that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied on the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in failing to find the medical evidence sufficient to establish death due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Appeals, has not filed a brief in this appeal.

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, refer to the amended regulations.

² We affirm the administrative law judge's denial of benefits on the miner's claim as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 March 16, 2001. Both the employer and the Director have responded. The Director contends that the regulations at issue in the lawsuit will not affect the outcome of this case. Employer, however, contends that the new regulations at 20 C.F.R. §§718.104(d), 718.201(a)(2), (c), 718.204(a) and 718.205(c) could affect the outcome of both the miner's and the survivor's claims. Claimant has not filed a response brief.³

Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Revised 20 C.F.R. §718.104(d) is inapplicable because the treating physician evidence in this record was developed prior to January 19, 2001. *See* 20 C.F.R. §718.101(a). Additionally, 20 C.F.R. §718.204(a) is not implicated in the record inasmuch as the credited evidence establishes that claimant is totally disabled as the result of a respiratory impairment. *See* 20 C.F.R. 718.204(a). Further, the principle that pneumoconiosis is progressive is the same under both the existing law recognizing the progressive nature of pneumoconiosis, *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-379 (4th Cir. 1996), and 20 C.F.R. §718.201(c), which codifies existing law. 65 Fed. Reg. 79937, 79971-72. Similarly, 20 C.F.R. §§718.201(a)(2) and 718.205(c)(5) merely codify existing law recognizing "legal pneumoconiosis", *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, BLR (4th Cir. 2000), and setting forth the "hasten death" standard. *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); 65 Fed. Reg. 79937-38, 79949-50. Additionally, based on our review, we conclude that none of the other challenged regulations affect the outcome of this case. Therefore, we will proceed with the adjudication of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, rational and consistent with applicable law, they are binding upon this Board and may not be

³ 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 March 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

disturbed. 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, 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); *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 survivors’ 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 the miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); see *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 20 BLR 2- (4th Cir. 2000); *Kirk v. Director, OWCP*, 86 F.3d 1151, 20 BLR 2-276 (4th Cir. 1996); *Mays v. Piney Mountain Coal Co.*, F.3d , 21 BLR 2-587 (4th Cir. 1999); *Shuff, supra*.

Claimant contends that the administrative law judge erred in failing to credit the medical opinion of Dr. Rizkalla over the opinions of the other physicians on the issue of death due to pneumoconiosis. We disagree. The evidence of record contains the opinions of six physicians, in addition to the death certificate. Dr. Rizkalla found simple coal workers’ pneumoconiosis and stated that the immediate cause of death was the pulmonary impairment, and that the miner’s simple coal workers’ pneumoconiosis “is considered a substantial contributing factor in his death.” Director’s Exhibit 39. The death certificate listed the immediate cause of death as non small cell carcinoma lung with severe chronic obstructive pulmonary disease as an underlying cause. Director’s Exhibit 11. Drs. Kleinerman, Renn, Naeye, Bellote and Crouch all stated that pneumoconiosis did not cause or hasten the miner’s death. Director’s Exhibits 13, 20, 32, 34; Employer’s Exhibits 1, 4, 5.⁴

The administrative law judge correctly accorded less weight to Dr. Rizkalla’s opinion because it failed to provide an explanation for the finding that pneumoconiosis caused, contributed to or hastened the miner’s death, and was not therefore well-reasoned. Decision and Order at 21; *Sparks, supra*; *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). The administrative law judge also permissibly found Dr. Rizkalla’s opinion

⁴ In addition, the record contains the opinion of Dr. Quintana who performed the autopsy. He found evidence of coal workers’ pneumoconiosis, but issued no opinion on whether the pneumoconiosis contributed to the miner’s death. Director’s Exhibits 12, 13.

outweighed by the opinions of Drs. Bellote, Kleinerman, Crouch, Naeye and Renn. *See Underwood v. Elkay Mining, Inc.*, 94 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). We reject claimant's contention that true doubt should be resolved in claimant's favor. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We therefore affirm the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis. 20 C.F.R. §718.205(c); *Sparks, supra*; *Kirk, supra*; *Mays, supra*; *Shuff, supra*.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits - Miner's Claim [and] Decision and Order - Denying Benefits - Survivor's Claim are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge