

BRB No. 01-0969 BLA

ROSE MARIE DRUMHELLER)	
(Widow of ARCHIE DRUMHELLER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JEDDO-HIGHLAND COAL COMPANY)	DATE ISSUED:
)	
and)	
)	
LACKAWANNA CASUALTY COMPANY)	
)	
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 on Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Michelle A. Jones (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

William E. Wyatt, Jr. and John J. Notarianni (Fine, Wyatt & Carey, P.C.), Scranton, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (99-BLA-0894) of Administrative Law Judge Ainsworth H. Brown awarding 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).¹ This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited the miner with thirty-six years of coal mine employment and adjudicated the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) (2000) and 718.203(b) (2000). The administrative law judge also found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding. The Board also affirmed the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) (2000). However, the Board remanded the case to the administrative law judge to consider all evidence at 20 C.F.R. §718.202(a)(1)-(4) to determine whether claimant has established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Further, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.205(c) (2000), and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge to reconsider the relevant medical opinion evidence at 20 C.F.R. §718.205(c) and fully explain his findings and conclusions and the bases therefor. In this regard, the Board instructed the administrative law judge to cite to the specific medical evidence which establishes that the miner's pneumoconiosis caused or substantially contributed to his death. Finally, the Board instructed the administrative law judge that it was within his discretion to re-open the record for additional evidence on remand. *Drumheller v. Jeddo-Highland Coal Co.*, BRB No. 00-0534 BLA (Mar. 30, 2001)(unpub.).

On remand, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). However, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Based upon his weighing together of all of the evidence at 20 C.F.R. §718.202(a)(1)-(4), the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). The administrative law judge also found the evidence sufficient to establish that the miner's death

¹The 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 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant² responds, contending that, contrary to the administrative law judge's finding, the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant further urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

²Claimant is the widow of the miner, Archie Drumheller, who died on June 5, 1997. Director's Exhibits 1, 5. Claimant filed a survivor's claim on August 12, 1998. Director's Exhibit 1.

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.³ See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §718.203; *Boyd, supra*.

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer's argument has merit. The relevant evidence of record consists of a death certificate signed by Albert R. Breznik, Jr., a deputy coroner, and the medical reports of Drs. Bognatto, Cable, Dittman, Mazuz, Pandit and Saraceni. The death certificate lists the causes of the miner's death as aschemic cardiac disease, anthrocosilicosis, aschemic cardiomyopathy and severe chronic obstructive pulmonary disease.⁴ Director's Exhibit 5.

³Section 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 establishes that pneumoconiosis was the cause of the miner's death, 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.
- ...
- (5) 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).

⁴In the original Decision and Order, the administrative law judge implicitly rejected the death certificate because it was authored by a lay deputy coroner. In the instant case, the administrative law judge did not discuss the death certificate signed by Albert R. Breznik, Jr., a deputy coroner. The record does not indicate that Mr. Breznik is a physician qualified to render a medical opinion with regard to the cause of the miner's death. See Director's Exhibit 5; 20 C.F.R. §718.205(c); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Thus, we hold that any error by the administrative law judge in failing to address the death certificate is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-710 (1983).

Dr. Dittman opined that pneumoconiosis did not cause, contribute to, or hasten the miner's death. Employer's Exhibits 1, 4. Drs. Bognatto, Mazuz, Pandit and Saraceni opined that the miner's pulmonary condition prevented him from having coronary bypass surgery. Director's Exhibit 6-8. The administrative law judge stated, "I therefore find on this record that the need to withhold surgery was a factor that made it more difficult to forestall the [m]iner's death from heart disease, and that the lack of this surgery hastened the [m]iner's death." Decision and Order at 8. The administrative law judge also stated, "[g]iven diagnoses of coal workers' pneumoconiosis by Dr. Cable, which I have credited, I therefore find that the record supports the inference that pneumoconiosis was one of the factors which contraindicated surgical intervention that would have extended the [m]iner's life." *Id.* However, the record does not support the administrative law judge's inference that pneumoconiosis was a factor which prevented the miner from having coronary bypass surgery and thus contributed to his death. While Dr. Cable diagnosed pneumoconiosis in his reports, Dr. Cable also diagnosed chronic obstructive pulmonary disease and acute bronchitis. Director's Exhibits 6, 7, 10. Moreover, Dr. Cable did not opine that pneumoconiosis was a factor which prevented the miner from having coronary bypass surgery or that pneumoconiosis contributed to the miner's death. Thus, since the record does not contain any evidence in support of a finding that pneumoconiosis caused, contributed to, or hastened the miner's death, we reverse the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In view of our reversal of the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 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, supra; Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we reverse the administrative law judge's award of benefits.⁵

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is reversed.

SO ORDERED.

⁵In light of the foregoing, we need not address employer's contentions at 20 C.F.R. §718.202(a). *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*).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge