

BRB No. 05-1006 BLA

LEONA M. HERCULES)	
(Widow of WILLIAM D. HERCULES))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 06/23/2006
)	
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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Rita S. Fuchsman, Chillicothe, Ohio, for claimant.

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

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor, Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIUM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5261) of Administrative Law Judge Gerald M. Tierney 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 May 28, 2002. The

miner filed a claim for black lung benefits during his life, which was pending at the time of his death and remains pending. Claimant filed her application for survivor's benefits on September 10, 2002. Director's Exhibits 1, 3. The district director awarded benefits and employer requested a hearing, but subsequently agreed to claimant's request for a decision on the record. Director's Exhibits 29, 30, 36.

In the ensuing Decision and Order – Denying Benefits, the administrative law judge credited the miner with twenty-five years of coal mine employment and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and therefore, 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 contends that the administrative law judge erred in declining to consider, pursuant to her survivor's claim, medical evidence which had been submitted in support of the living miner's claim. Claimant further asserts that, even assuming the administrative law judge properly limited his consideration to the evidence submitted in support of the survivor's claim, the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Finally, claimant contends that the medical evidence of record supports a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits.¹ The Director, Office of Workers' Compensation Programs, has filed a limited response to claimant's appeal, contending that the administrative law judge properly declined to consider the evidence submitted in support of the miner's lifetime claim.²

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Employer preserves an objection to the administrative law judge's exclusion from the record, pursuant to 20 C.F.R. §725.414(a)(3)(i), of portions of Dr. Tomaszewski's opinion, and all of Dr. Fino's opinion. Employer's Brief at 10-13.

² The administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis 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)(2), (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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). 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).

Claimant initially asserts that the administrative erred in finding, pursuant to 20 C.F.R. §725.414, that because none of the parties designated the medical evidence from the miner's lifetime claim as evidence in the survivor's claim, this evidence is not part of the record in the survivor's claim and would not be considered. Claimant's argument is without merit.

When a living miner files a subsequent claim, all the evidence from the first miner's claim is specifically made part of the record. *See* 20 C.F.R. §725.309(d)(1); *see also Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-61 (2004). Such an inclusion is not automatically available in a survivor's claim filed pursuant to the revised regulations. *See* 20 C.F.R. §§725.309(d)(1), 725.414. As this case involves a survivor's claim, the medical evidence from the prior living miner's claim must have been designated as evidence by one of the parties in order for it to have been included in the record relevant to the survivor's claim. *See* 20 C.F.R. §§725.309, 725.414. Contrary to claimant's argument, the *pro forma* inclusion of the prior living miner's claim in the Director's exhibits does not automatically make it part of the evidentiary record, but, rather, simply makes that evidence available for consideration in the survivor's claim provided it is identified and admitted in accordance with the express numerical limitations on evidence set forth in the revised regulations at Section 725.414.

In this case, as the administrative law judge properly found, none of the evidence in the miner's claim was specifically designated as evidence in the survivor's claim. Thus, under the facts of this case, the administrative law judge properly declined to consider this evidence. 20 C.F.R. §725.414(a); Decision and Order at 2.

Claimant further asserts that in evaluating the medical opinion evidence as to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative

law judge erred in failing to credit the opinion of Dr. Chokkavelu, claimant's treating physician, as expressed on the death certificate and in his medical reports, and further failed to credit additional records from Wheeling Hospital. We disagree.

Reviewing the medical opinion evidence supportive of the survivor's claim, the administrative law judge properly noted that in hospital records dating from October 2001 through May 2002, Dr. Chokkavelu, claimant's treating physician, as well as other attending and consulting physicians, listed cancer of the right lung, chronic obstructive pulmonary disease (COPD), respiratory failure, congestive heart failure, cor pulmonale, and a "history of pneumoconiosis" among the miner's numerous health conditions. Claimant's Exhibits 1-2; Director's Exhibits 7, 15, 20; Decision and Order at 3-4. The administrative law judge also noted that the death certificate, also completed by Dr. Chokkavelu, listed the immediate cause of death as COPD, due to "coal miner's pneumoconiosis." Director's Exhibit 7; Decision and Order at 4. Finally, the record contains a short letter from Dr. Chokkavelu, in which the physician stated that the miner "had coal miners pneumoconiosis, COPD, cor pulmonale and lung cancer" and had "died because of the above problems." Claimant's Exhibit 1; Decision and Order at 4.

Contrary to claimant's arguments, the administrative law judge permissibly concluded that because the hospital records, the death certificate and the note from Dr. Chokkavelu are unaccompanied by any supporting documentation, do not contain any discussion as to the basis for the diagnoses of coal workers' pneumoconiosis contained therein, and further do not indicate that the miner's COPD or other respiratory conditions were causally related to coal dust inhalation, these reports do not constitute credible medical evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Sparks*, 213 F.3d 186, 22 BLR 2-251; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-282 (1983); Claimant's Exhibits 1-2; Director's Exhibits 7, 15, 20; Decision and Order at 4.

It is within the purview of the administrative law judge to make credibility determinations and resolve inconsistencies in the evidence, *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993), and the Board will not substitute its inferences for those of the administrative law judge, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n. 10, 21 BLR 2-587, 2-603 n. 10 (4th Cir 1999). As the administrative law judge properly considered all of the relevant medical evidence, and permissibly discredited the only evidence supportive of a finding of pneumoconiosis, we affirm the administrative law judge's finding that the miner did not have pneumoconiosis and that, therefore, pneumoconiosis was not a substantially contributing cause of the miner's death. *Mays*, 176 F.3d at 753, 21 BLR at 2-587; *see Trumbo*, 17 BLR at 1-87-88. Accordingly, we 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, supra; 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

BETTY JEAN HALL
Administrative Appeals Judge