

BRB No. 97-1403 BLA

DOROTHY GANN)	
(Widow of CHARLES GANN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KERR-McGEE COAL CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
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.

Dorothy Gann, Thompsonville, Illinois, *pro se*.

Gary B. Nelson (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order - Denying Benefits (95-BLA-2558) 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 administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but determined 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, he denied benefits.

¹ Claimant is Dorothy Gann, the widow of Charles Gann, the miner, who died on June 10, 1994. Director's Exhibit 3. The record contains the miner's application for benefits, which was denied on December 23, 1992. Director's Exhibit 18.

Employer responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a brief in this appeal.²

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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'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, 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).

In order to establish entitlement to benefits in a survivor's claim, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment. Claimant must also establish that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that the miner had complicated pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c), 718.304. The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that a miner's death is considered to be due to pneumoconiosis where pneumoconiosis hastens, even briefly, the miner's death. See *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

In finding the evidence insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge reviewed the medical evidence relevant to the cause of the miner's death. The administrative law judge found that "Claimant did not prove that pneumoconiosis caused, contributed to, or hastened the miner's death." Decision and Order - Denying Benefits at 3. The administrative law judge also considered claimant's assertion that the miner's chronic obstructive pulmonary disease was a manifestation of his pneumoconiosis, and that this establishes that the miner's death was due to pneumoconiosis. The administrative law judge found, however, that the medical evidence "does not affirmatively establish that the chronic obstructive pulmonary disease that contributed to the miner's death had any causal nexus to his coal mine dust exposure." Decision and Order - Denying Benefits at 3.

² Inasmuch as the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(1) is not challenged on appeal, and is not adverse to claimant, it is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

As the administrative law judge found, the record is devoid of any evidence affirmatively establishing that the miner's death was due to pneumoconiosis.³ The administrative law judge also correctly found that the evidence of record does not establish that the chronic obstructive pulmonary disease, which Dr. Tuteur noted, see Director's Exhibit 14; Employer's Exhibit 1, and which Dr. Lewis listed as contributing to the miner's death, see Director's Exhibits 3, 4, was due to dust exposure in the miner's coal mine employment, a finding which would constitute pneumoconiosis under the regulations, see 20 C.F.R. § 718.201. Therefore, we affirm the administrative law judge's finding that claimant failed to satisfy her burden of establishing that the miner's death was due to

³ The evidence relevant to a finding of death due to pneumoconiosis at 20 C.F.R. §718.205(c) is as follows. The death certificate signed by Dr. Lewis lists the immediate cause of death as heart failure due to myocardial infarction, and identifies pneumonia, "COPD" and hypertension as other significant conditions contributing to death but not resulting in the underlying cause of death. Director's Exhibit 3. In a medical opinion dated June 14, 1994, Dr. Lewis stated that the cause of death was heart failure secondary to myocardial infarction, and as his final diagnosis he identified chronic obstructive pulmonary disease, pneumonia, hypertension and heart failure- secondary to myocardial infarction. Director's Exhibit 4. Dr. Tuteur reviewed the evidence of record and opined that the miner suffered from cigarette smoke induced chronic obstructive pulmonary disease, unrelated to his coal mine dust exposure, and organic heart disease. Dr. Tuteur opined "Had this man never worked in the coal mines, his clinical course would have been no different than reported in this dataset." Director's Exhibit 14. In a later deposition, Dr. Tuteur repeated his opinion that the miner's death was due to acute myocardial infarction due to arteriosclerotic heart disease and that coal dust exposure and pneumoconiosis did not contribute to that disease or his death. Employer's Exhibit 1 at 14-15.

pneumoconiosis. See 20 C.F.R. §718.205(c); *Railey, supra*. Consequently, 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge