

BRB No. 07-0632 BLA

G.W. )  
(Widow of R.W.) )  
 )  
Claimant-Petitioner )  
 )  
v. ) DATE ISSUED: 03/28/2008  
 )  
ADDINGTON, INCORPORATED )  
c/o PITTSTON COAL )  
 )  
and )  
 )  
ACORDIA EMPLOYERS SERVICE )  
 )  
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 – Denial of Benefits of Larry S. Merck,  
Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville,  
Kentucky, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2005-BLA-05513)  
of Administrative Law Judge Larry S. Merck rendered 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).<sup>1</sup> The administrative law judge adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718, based on claimant's December 2, 2003 filing date, and accepted the parties' stipulation of twenty years of coal mine employment. Addressing the merits of the survivor's claim, the administrative law judge found the medical evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, the administrative law judge found the medical evidence 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 contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant also generally contends that the administrative law judge erred in finding that pneumoconiosis was not an underlying cause in the miner's death. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has stated that he will not respond on the merits of claimant's appeal.<sup>2</sup>

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

---

<sup>1</sup> Claimant is the widow of the miner who died on September 1, 2003. Director's Exhibit 6. The record contains the miner's application for benefits, which was filed on August 7, 2003 and denied by the district director on June 16, 2004. Director's Exhibits 1, 26. The miner's claim was administratively closed on July 29, 2004. Director's Exhibit 29. Claimant filed her survivor's claim on December 2, 2003. Director's Exhibit 2.

<sup>2</sup> The parties do not challenge the administrative law judge's decision to credit the miner with twenty years of coal mine employment, or his finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(2). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). While the administrative law judge did not render a specific finding under 20 C.F.R. §718.202(a)(3), remand is not necessary as the presumptions set forth thereunder, 20 C.F.R. §§718.304, 718.305 and 718.306, are not available to claimant because there is no evidence of complicated pneumoconiosis in the record and this survivor's claim was filed after June 30, 1982. 20 C.F.R. §§718.304, 718.305, 718.306; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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 pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *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 caused the miner’s death, or 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)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner’s death if it hastens the miner’s death.<sup>3</sup> 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). 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).

In challenging the administrative law judge’s weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), claimant generally contends that the administrative law judge erred in finding that the medical opinion evidence fails to establish the existence of pneumoconiosis. Claimant’s Brief at 3. Claimant states that it is error for the administrative law judge to substitute his own interpretations of the medical evidence for those of the physician. Claimant’s Brief at 5. This contention lacks merit.

The administrative law judge properly found that none of the medical opinions of record diagnosed the existence of pneumoconiosis. Specifically, he correctly found that Drs. Rosenberg and Repsher opined that the miner did not suffer from pneumoconiosis.<sup>4</sup>

---

<sup>3</sup> The record indicates that the miner’s coal mine employment occurred in Kentucky. Director’s Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup> Dr. Rosenberg opined that the miner did not have clinical or legal pneumoconiosis. Employer’s Exhibit 1. In addition, Dr. Rosenberg opined that while the miner had a degree of impairment prior to his pneumonectomy, it was related to his tumor mass and changes due to radiation therapy, and that the miner was not disabled from a pulmonary perspective, at that time, related to his coal dust exposure. *Id.* Dr. Rosenberg further stated, however, that the miner clearly had a “whole person

Decision and Order at 8-10; Employer's Exhibits 1-4; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). In addition, the administrative law judge found that the treatment notes and hospital records, including the reports of Drs. Halpin, Pierce and Tzouanakis, who treated the miner for his lung cancer, were insufficient to establish the existence of pneumoconiosis because "none of the notes from Central Baptist [Hospital] or from these physicians reveal any evidence of pneumoconiosis." Decision and Order at 8; Director's Exhibits 7-10. The administrative law judge also permissibly found that the death certificate was of little probative value because it does not identify the person who completed the section referencing the cause of death.<sup>5</sup> Decision and Order at 8; Director's Exhibit 6; *see Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

As the administrative law judge correctly found that the record contains no affirmative evidence of pneumoconiosis, claimant's contention that the administrative law judge erred in substituting his interpretation of the medical evidence for that of a physician lacks merit. Consequently, since claimant does not otherwise allege any specific errors with the administrative law judge's weighing of the evidence in this case, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, entitlement to benefits is precluded. *Trumbo*, 17 BLR at 1-87-88. We, therefore, need not address claimant's allegations of error with respect to the administrative law judge's Section 718.205(c) findings.

---

impairment" as a consequence of his lung cancer. *Id.* Dr. Repsher, in a report dated May 9, 2005, opined that the miner did not suffer from coal workers' pneumoconiosis or any pulmonary disease or condition that could be related to work in a coal mine. Employer's Exhibit 3. In a supplemental report dated May 25, 2006, Dr. Repsher stated that the additional information that the miner had twenty years of coal mine employment did not change his original opinion that there was no objective evidence of coal workers' pneumoconiosis or any other condition clearly related to his work in the coal mines. Employer's Exhibit 4.

<sup>5</sup> The death certificate lists the cause of the miner's death as "recurrent non-small cell lung cancer." Director's Exhibit 6.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge

---

JUDITH S. BOGGS  
Administrative Appeals Judge