

BRB Nos. 09-0509 BLA
and 09-0509 BLA-A

VIRGINIA A. ALLEN)	
(Widow of ARTHUR ALLEN))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
ROYAL COAL COMPANY)	DATE ISSUED: 03/18/2010
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Anthony J. Cicconi (Shaffer & Shaffer PLLC), Charleston, West Virginia, for claimant.

Douglas A. Smoot, Kathy L. Snyder and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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 CURIAM:

Claimant¹ appeals and employer/carrier (employer) cross-appeals the Decision and Order (04-BLA-6860) of Administrative Law Judge Thomas M. Burke (the administrative law judge) denying 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). The administrative law judge credited the miner with 23 years of coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge also found that claimant established the existence of simple pneumoconiosis arising out of coal mine employment, based on the doctrine of collateral estoppel.² 20 C.F.R. §§718.202(a), 718.203. The administrative law judge further found

¹ Claimant is the widow of the miner. The miner filed a claim on January 7, 2000. Director's Exhibit 1. In a letter dated February 9, 2000, employer contested all issues in the miner's claim. *Id.* In a Notice of Initial Finding dated June 14, 2000, a claims examiner found that the miner was entitled to benefits. *Id.* By letter dated June 22, 2000, employer contested its liability. *Id.* On September 21, 2000, the district director found that the miner was entitled to benefits. *Id.* In response to employer's request for a hearing, the case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Daniel L. Leland. *Id.* Judge Leland held a hearing on August 1, 2001. *Id.* In a letter dated November 8, 2001, however, employer withdrew its controversion of liability and requested that Judge Leland remand the claim to the district director for further administrative processing. *Id.* By Order dated November 14, 2001, Judge Leland remanded the claim to the district director for appropriate action, on the ground that employer decided to withdraw its controversion of liability. *Id.* On January 11, 2002, a claims examiner ordered employer to reimburse the Black Lung Disability Trust Fund (Trust Fund) and to pay benefits to the miner. *Id.* The miner died on September 20, 2002. Director's Exhibit 10. Claimant filed her survivor's claim on December 18, 2003. Director's Exhibit 3.

² Administrative Law Judge Thomas M. Burke (the administrative law judge) found that employer was not collaterally estopped from contesting the presence of complicated pneumoconiosis in the survivor's claim, given that there never was an actual finding of complicated pneumoconiosis in the miner's claim, and since employer did not

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, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a), based on the doctrine of collateral estoppel. Specifically, employer argues that the administrative law judge erred in finding that it was estopped from litigating the issue of simple pneumoconiosis in the survivor's claim because: 1) an actual determination of simple coal workers' pneumoconiosis was not made in the miner's claim; 2) the existence of simple coal workers' pneumoconiosis was not "actually litigated" in the miner's claim; and 3) employer did not stipulate to a finding of simple coal workers' pneumoconiosis. Employer further asserts that liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund) because the district director failed to properly preserve and produce the complete record developed in the miner's claim, as the district director did not issue a Proposed Decision and Order before the case was forwarded to the Office of Administrative Law Judges for a hearing. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, arguing that the Board should reject employer's contention that liability for the payment of benefits must transfer to the Trust Fund. The Director maintains that employer's allegation is baseless because the prior regulations did not require the district director to issue a Proposed Decision and Order.³

concede the presence of complicated pneumoconiosis when it withdrew its controversion of liability in the miner's claim. However, the administrative law judge found that employer was collaterally estopped from contesting the existence of simple pneumoconiosis in the survivor's claim. In so finding, the administrative law judge stated, "[h]aving withdrawn its controversion of liability to all the issues in the living miner's claim, [e]mployer is bound by its stipulation to the conditions of entitlement, one of which is the presence of pneumoconiosis." Decision and Order at 4.

³ Employer filed a brief in reply to the brief by the Director, Office of Workers' Compensation Programs, in response to employer's cross-appeal, reiterating its prior contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act 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 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁵ *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R.

⁴ The record indicates that the miner was employed in the coal mining industry in West Virginia. Director's Exhibit 4. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁵ Section 718.205(c) provides 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.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (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).

§718.205(c)(2). 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); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner’s death was due to pneumoconiosis at Section 718.205(c)(2). The record consists of the death certificate signed by Dr. Gray, and the reports of Drs. Rasmussen, Zaldivar, and Crisalli. In the death certificate, Dr. Gray listed pneumonia (aspergillus) as an immediate cause of the miner’s death. Director’s Exhibit 10. Dr. Gray also listed hemoptysis, coal workers’ pneumoconiosis, and coronary artery disease as underlying causes of the miner’s death. *Id.* Further, Dr. Gray listed rheumatoid arthritis as a significant condition contributing to the miner’s death. *Id.* In his report, Dr. Rasmussen opined that the miner’s coal workers’ pneumoconiosis led to his respiratory death and represented a material contributing factor to his death. Claimant’s Exhibit 1. By contrast, Dr. Zaldivar opined that coal workers’ pneumoconiosis did not cause or play any role in the miner’s death. Employer’s Exhibit 2. Similarly, Dr. Crisalli opined that neither coal workers’ pneumoconiosis nor coal dust exposure hastened, or played any role in, the miner’s death. Employer’s Exhibits 3.

The administrative law judge gave little weight to the opinions of Drs. Zaldivar and Crisalli because he found that they are based on the inaccurate premise that the miner did not have pneumoconiosis.⁶ Decision and Order at 8. Next, the administrative law judge discredited Dr. Rasmussen’s opinion because it was not documented or reasoned. *Id.* The administrative law judge then determined that “the record does not contain probative evidence that pneumoconiosis substantially contributed to the miner’s death.” *Id.* Consequently, the administrative law judge found that claimant did not establish that the miner’s death was due to pneumoconiosis at Section 718.205(c)(2).

Claimant argues that the administrative law judge erred in discrediting Dr. Rasmussen’s opinion because Dr. Rasmussen relied on x-ray reports that were not part of the record. Specifically, claimant asserts that “[t]he xray (sic) reports are all contained at Directors (sic) Exhibit One, which [the administrative law judge], himself, moved and admitted into evidence, without objection by anyone.” Claimant’s Brief at 4. Claimant maintains that the administrative law judge misapplied the Board’s decision in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*).

In his report, Dr. Rasmussen opined that “[the miner] suffered from coalworkers’ (sic) pneumoconiosis, possibly complicated by rheumatoid lung disease and Caplan’s

⁶ No party challenges the administrative law judge’s findings with regard to the death causation opinions of Drs. Zaldivar and Crisalli.

syndrome, which ultimately led to his respiratory death and represents a material contributing factor to his death.” Claimant’s Exhibit 1. In considering Dr. Rasmussen’s opinion at Section 718.205(c), the administrative law judge stated:

Dr. Rasmussen’s finding that the miner’s respiratory death resulted from coal workers’ pneumoconiosis was based in large part on readings of chest x-rays, which he described as evidence of widespread small opacities and Category A or even Category B complicated pneumoconiosis. Unfortunately, the chest x-rays referred to by Dr. Rasmussen’s report are not in the record.

Decision and Order at 7. The administrative law judge additionally stated:

Moreover, Dr. Wiot’s chest x-ray readings, which are in the record, are inconsistent with a finding of complicated pneumoconiosis as they are interpreted by Dr. Wiot as negative for pneumoconiosis. In addition, the reports of Dr. Zaldivar and Dr. Crisalli rule out complicated pneumoconiosis. Thus, the record does not support Dr. Rasmussen’s finding of complicated pneumoconiosis.

Id. The administrative law judge further found that “Dr. Rasmussen’s opinion on the cause of death is not documented in light of the referenced x-rays not being in the record.” *Id.* at 8.

In *Keener*, the Board held that medical evidence from a miner’s claim is not automatically available in a survivor’s claim filed pursuant to the amended regulations. *Keener*, 23 BLA at 1-241. Rather, the Board held that medical evidence from the miner’s claim must be designated by one of the parties in order for it to be included in the record as evidence relevant to the survivor’s claim. *Id.* In this case, the administrative law judge admitted the miner’s claim into the record of the survivor’s claim as Director’s Exhibit 1.⁷ However, neither claimant nor employer designated any specific medical evidence from the miner’s claim, contained in Director’s Exhibit 1, as evidence pursuant

⁷ At the March 12, 2008 hearing, the administrative law judge admitted Director’s Exhibits 1 through 27 into the record. Hearing Tr. at 5, 9. Regarding Director’s Exhibit 1, employer’s counsel stated: “There are other numerous medical records in Director’s Exhibit 1 which would be over the limitations and have not been designated by the parties. So, I just wanted to be sure that I mentioned that here today.” Hearing Tr. at 9. The administrative law judge responded to employer’s comment by stating, “Very good.” *Id.*

to 20 C.F.R. §725.414 for consideration in the survivor's claim. The evidentiary limitations are mandatory and may not be waived. *Smith v. Martin County Coal Co.*, 23 BLR 1-69, 1-74 (2004). Thus, the administrative law judge properly found Dr. Rasmussen referred to x-rays that are not in the record as evidence relevant to the survivor's claim. Consequently, we reject claimant's assertion that the administrative law judge misapplied the Board's decision in *Keener*.

Furthermore, we hold that any error by the administrative law judge in failing to explain how Dr. Rasmussen's reference to x-ray evidence that is not in the survivor's claim affected the doctor's death causation opinion is harmless,⁸ *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), since the administrative law judge properly discredited Dr. Rasmussen's opinion because "it is not reasoned[,] as it is equivocal and otherwise provides no explanation." Decision and Order at 8; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

As claimant raises no other challenge to the administrative law judge's weighing of the evidence regarding the issue of death causation, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), because it is supported by substantial evidence.

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.⁹ *Trumbo*, 17 BLR at 1-88.

⁸ The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

⁹ In view of our disposition of the case at 20 C.F.R. §718.205(c), we decline to address employer's contentions, on cross-appeal, that the administrative law judge erred in finding that claimant established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a), based on the doctrine of collateral estoppel, and that liability for the payment of benefits should transfer to the Trust Fund. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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