

BRB No. 00-0880 BLA

ETHEL KYNARD)
(Surviving Divorced Spouse of)
ROBERT KYNARD))

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS')

DATE ISSUED:

COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Ethel Kynard, Toledo, Ohio, *pro se*.

Edward Waldman (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order (99-

¹ Claimant filed her application for survivor's benefits on January 14, 1999, which the district director denied on March 22, 1999. *See* Director's Exhibits 1, 7. Claimant and the miner were married in 1948 and divorced in 1966. *See* Director's Exhibits 5, 6. The miner died on December 18, 1987. *See* Director's Exhibit 4. Claimant has requested benefits as the miner's surviving divorced spouse. 20 C.F.R. §§725.212, 715.216, 725.217.

BLA-907) of Administrative Law Judge Daniel J. Roketenetz 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).² Based on the filing date of January 14, 1999 the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited the miner with seven years of coal mine employment. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis and insufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits by the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), has filed a response letter, urging the Board to affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis or death due to pneumoconiosis. The Director further contends that the claim must be denied inasmuch as claimant has failed to provide any evidence of her dependency and has failed therefore, to establish that she is an eligible survivor.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief and stayed for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the brief submitted by the Director and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

² The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

In order to establish entitlement to survivor's benefits, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a). In a survivor's claim filed after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death; if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death; death was caused by complications of pneumoconiosis; or the presumption set forth at Section 718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5).

After consideration of the Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence, contains no reversible error, and is, therefore, affirmed.³ The administrative law judge properly found that claimant did not establish the existence of pneumoconiosis as there was no medical evidence in the record which discusses whether the miner had pneumoconiosis or a respiratory impairment related to his coal mine employment. 20 C.F.R. §718.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). We, therefore, affirm the finding of the administrative law judge that claimant did not establish the existence of pneumoconiosis as it is supported by substantial evidence. In finding that claimant failed to establish that the miner's death was due to pneumoconiosis, the administrative law judge correctly concluded that the death certificate listing hypertensive and arteriosclerotic cardiovascular disease as the cause of death, was the only evidence of record which addressed the cause of the miner's death, *see* Director's Exhibit 4, and that it was insufficient to establish that the miner's death was caused by pneumoconiosis. *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997). We, therefore, affirm the finding of the administrative law judge that claimant failed to meet her burden of proving that pneumoconiosis caused, contributed to or hastened the miner's death. 20 C.F.R.

³ We affirm the finding of seven years of coal mine employment by the administrative law judge as it is supported by substantial evidence. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

§718.205(c)(1)-(5).⁴

⁴ Inasmuch as we affirm the administrative law judge's denial of benefits because claimant failed to establish the existence of pneumoconiosis and death due to pneumoconiosis, we need not address the Director's contention that claimant has failed to establish that she is an eligible survivor. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge