

BRB No. 00-0917 BLA

ERMA MILLER BOTKINS)
(Widow of WILLIAM BOTKINS))
)
Claimant-Petitioner)
)
v.)
)
K A S COAL, INCORPORATED) DATE ISSUED:
)
and)
)
KENTUCKY COAL PRODUCERS -)
S-I FUND)
)
Primary Employer/Carrier-)
Respondent)
)
and)
)
GATLIFF COAL COMPANY)
)
Secondary 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 - Denial of Benefits of Robert L. Hillyard,
Administrative Law Judge, United States Department of Labor.

Erma Miller Botkins, Middlesboro Kentucky, *pro se*.

David H. Neeley (Neeley & Reynolds, P.S.C.), Prestonsburg, Kentucky, for
Kas Coal, Incorporated and Kentucky Producers' S-I Fund.

William M. Cox, Williamsburg, Kentucky, for Gatliff Coal Company.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (99-BLA-0886) of Administrative Law Judge Robert L. Hillyard 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 Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found thirty-one years of coal mine employment established and that Kas Coal, Incorporated was the responsible operator liable for the payment benefits. The administrative law judge concluded, however, that the evidence of record was insufficient to establish the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied. On appeal, claimant generally contends that the evidence is sufficient to establish entitlement. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he would not participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States 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 claim, 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. Employers respond that any application of the amended regulations "which limits employer's evidence, changes the burden of proof or to any degree obviates a defense to the claim constitutes an unconstitutional denial of procedural and [substantive] due process," and "unreasonably

¹ The miner filed a claim for benefits on November 12, 1985, which was denied May 6, 1986. Director's Exhibit 38. The miner died September 27, 1997. Director's Exhibit 9. Claimant filed her survivor's claim for benefits on January 13, 1998.

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, 722,725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

impairs and interferes with the contractual rights existing between employer and the carrier as established when they entered into the contract[.]” Brief at 2. The Director asserts that application of the amended regulations will not alter the outcome of this case inasmuch as the new regulations merely codify prior existing law concerning the definition of pneumoconiosis under the Act and methods of establishing death due to pneumoconiosis. *See Crace v. Kentland & Elkhorn Coal Co.*, 109 F.3d 1163 (6th Cir. 1997); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987). Based on the briefs of the employers and the Director and our review, we hold that the disposition of the instant case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

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. *McFall v. Jewell Ridge Coal Corp.*, 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); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In a survivor’s claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of death, pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Corp.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

After consideration of the administrative law judge’s Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge’s Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge rationally determined that the evidence addressing the cause of death was insufficient to establish that the miner’s death was due to pneumoconiosis inasmuch as Dr. Burki found that the miner died from severe left heart

failure not associated with pneumoconiosis, Director's Exhibit 34; Dr. Morgan, who admitted the miner to the hospital three weeks prior to his death, did not list pneumoconiosis as a condition suffered by claimant on the initial assessment of the miner's condition, any examination reports, or on the hospital discharge summary; and the death certificate signed by Dr. Morgan, listed the immediate cause of death as CHF (cardiovascular heart failure) with no contributing causes listed. Director's Exhibit 9. Regarding Dr. Morgan's letter of December 9, 1998, where Dr. Morgan stated that black lung disease was substantiated "by x-ray and examination parameters" and opined that black lung was a contributing cause to the miner's cardiac disease and ultimate death, Director's Exhibit 33, the administrative law judge rationally concluded that this report was insufficient to establish that the miner's death was due to pneumoconiosis since Dr. Morgan's finding was inconsistent with his earlier findings, Director's Exhibit 32, and he failed to explain the basis for his most recent opinion. Decision and Order at 15, 18; *Fagg v. Amax Coal Co.*, 12BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Consequently, we affirm the administrative law judge's denial in this survivor's claim as it is supported by substantial evidence and is in accordance with law. *Griffith, supra*; *Brown, supra*. Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, entitlement to benefits in this survivor's claim is precluded, *Griffith, supra*; *Brown, supra*, and we will not consider the administrative law judge's findings on the existence of pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order - Denial of 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