

BRB No. 02-0684 BLA

KATHERINE COUCH)
(Widow of WALLACE GENE COUCH))

Claimant-Petitioner)

v.)

GREAT AMERICAN MINING COMPANY)

and)

OLD REPUBLIC INSURANCE)
COMPANY, INC.)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denial of Benefits (2000-BLA-1083) of Administrative Law Judge Robert L. Hillyard on a miner’s claim and 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 Initially, the administrative law judge determined that this case involves the consolidation of a duplicate miner’s claim filed on March 8, 1999 and a survivor’s claim filed on May 19, 1999.³ Director's Exhibits 1, 29. The administrative law judge credited the miner with thirty-two years of coal mine employment and adjudicated both the miner’s claim and the survivor’s claim pursuant to 20 C.F.R. Part 718. Addressing the miner’s claim, the administrative law judge determined that the newly submitted evidence was insufficient to establish that the miner was suffering from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Therefore, the administrative law judge found the newly submitted evidence insufficient to establish a material change in conditions under 20 C.F.R. §725.309(d) (2000).⁴ Addressing the merits of the survivor’s claim, the administrative law judge found the evidence of record, old and new, insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In addition, the administrative law judge found the relevant medical evidence insufficient to establish that the miner’s death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner’s death

¹ Claimant is the widow of the miner, Wallace Gene Couch, who died on April 8, 1999. Director's Exhibit 8.

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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ The miner filed his original application for benefits on August 5, 1993. Director's Exhibit 35-274. This claim was denied by the district director by Order dated January 31, 1996, based on the finding that the miner failed to establish any element of entitlement pursuant to 20 C.F.R. Part 718. Director's Exhibits 35-35, 35-2. No further action was taken on this claim.

⁴ The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claims, which were pending on January 19, 2001. See 20 C.F.R. §725.2.

pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, found that claimant failed to establish entitlement in her survivor's claim. Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). In addition, claimant contends that the administrative law judge erred in finding the medical evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). In response, employer urges affirmance of the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.⁵

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. 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).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in order to determine whether a material change in conditions is established under Section 725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. 20 C.F.R. §725.309(d) (2000); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994); see also *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). In this case, the miner's 1993 claim was denied by the district director based on the determination that the evidence failed to establish any of the requisite elements of entitlement under Part 718. Director's Exhibits 35-35, 35-2.

⁵ The parties do not challenge the administrative law judge's decision to credit the miner with thirty-two years of coal mine employment. This finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Herein, the administrative law judge found the newly submitted evidence of record insufficient to establish a material change in conditions pursuant to Section 725.309(d) (2000) inasmuch as it was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Decision and Order at 14. In challenging the findings within the administrative law judge's Decision and Order, claimant does not cite a specific error made by the administrative law judge or challenge the administrative law judge's finding that claimant failed to establish a material change in conditions in the miner's claim pursuant to Section 725.309(d) (2000). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g Cox v. Director, OWCP*, 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d) (2000) and, thus, his denial of benefits in the miner's claim, as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); see also *Cox, supra*; *Sarf, supra*; *Fish, supra*.

With respect to the survivor's claim, substantial evidence supports the administrative law judge's findings that the miner's death was not due to pneumoconiosis pursuant to Section 718.205(c) and it therefore must be affirmed.⁶ The administrative law judge considered all of the medical evidence of record regarding the cause of the miner's death, including the death certificate and the medical opinions of Drs. Broudy and Fino, which were based on a review of the medical evidence of record. Decision and Order at 16; Director's Exhibits 8, 20, 28; Employer's Exhibits 1, 2. In reviewing the relevant evidence, the administrative law judge found that the death certificate lists the immediate cause of the miner's death as colon and liver cancer, and does not list any additional conditions, which contributed to the miner's death. Director's Exhibit 8. In addition, the administrative law judge properly found that none of the medical reports stated that pneumoconiosis was the cause of the miner's death. Rather, Drs. Broudy and Fino attributed the miner's death to colon and liver cancer. Decision and Order at 16; Director's Exhibits 20, 28; Employer's Exhibits 1, 2. The record also supports the administrative law judge's determination that these physicians opined that the miner's death was neither hastened nor caused in part by pneumoconiosis or coal dust exposure. Decision and Order at 16; Director's Exhibits 20, 28; Employer's Exhibits 1, 2; 20 C.F.R. §718.205(c)(2), (5); see *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). Contrary to claimant's contention, the mere presence of pneumoconiosis is insufficient to establish entitlement to benefits in a survivor's claim. Rather, claimant has the burden of establishing that the miner's death was due to, or hastened by, pneumoconiosis. Inasmuch as the administrative law judge reasonably found that claimant submitted no such evidence, we affirm his finding that claimant failed to prove that the miner's death was due to pneumoconiosis pursuant to

⁶ To establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director*, OWCP, 14 BLR 1-29 (1990); *Neeley v. Director*, OWCP, 11 BLR 1-85 (1988). In survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if it was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if 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 death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); see *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).

Section 718.205(c).⁷ 20 C.F.R. §718.205(c); see *Griffith, supra*; *Brown, supra*; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); see also *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

⁷ In addition, the irrebuttable presumption of death due to pneumoconiosis is inapplicable because the record contains no evidence of complicated pneumoconiosis. 20 C.F.R. §§718.205(c)(3), 718.304.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge