

BRB No. 04-0754 BLA

CATHERINE M. LIEBEL)	
(Widow of PAUL J. LIEBEL))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DUNAMIS RESOURCES,)	DATE ISSUED: 05/27/2005
INCORPORATED)	
)	
and)	
)	
AMERICAN MINING INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (Law Care), Greensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

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

PER CURIUM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5728) of Administrative Law Judge Daniel L. Leland 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 miner died on November 13, 2000, and claimant filed her application for survivor's benefits on May 23, 2001. Director's Exhibit 2. The district director denied benefits on December 11, 2002. Director's Exhibit 26. On December 26, 2002, claimant requested a hearing. Director's Exhibit 27. The claim was referred to the Office of Administrative Law judges and a hearing was scheduled for September 24, 2003. On August 27, 2003, claimant's counsel requested an extension of time to file evidence, and on September 22, 2003 claimant requested that the hearing be continued, asserting that he had not yet received employer's response to his request for production of documents. By Order of Continuance dated September 24, 2003, the hearing was rescheduled for March 18, 2004. On February 25, 2004, claimant again requested that the scheduled hearing be continued on the ground that material was missing from the documentary evidence provided by employer. By Order dated February 27, 2004, the administrative law judge denied claimant's request for a continuance. At the hearing, held on March 18, 2004, claimant requested an extension of time to submit a report from Dr. Wald. Hearing Transcript at 6. Employer objected on the grounds that the submission of Dr. Wald's report would be untimely pursuant to 20 C.F.R. §725.456. The administrative law judge considered claimant's arguments and employer's objections and found that claimant's counsel failed to show good cause for an extension of time to submit additional medical evidence. Consequently, claimant's request was denied. After considering the merits of the claim, in the ensuing Decision and Order – Denying Benefits, the administrative law judge credited claimant with twenty-four years and three months of coal mine employment,¹ as stipulated by the parties, and found that claimant failed to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge abused his discretion in denying claimant's request for an extension of time to submit the report of Dr. Wald. Claimant further asserts that the report of Dr. Fino supports a finding that the miner died due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.²

¹ The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² The administrative law judge's finding of twenty-four years and three months of coal mine employment and his findings at 20 C.F.R. §§718.202(a)(1)-(3) are affirmed as

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 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. §718.205(c), 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. §718.205(a)(1)-(3); *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 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)(2), (4). 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); *Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989). 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).

Initially, we hold that the administrative law judge acted within his discretion in denying claimant's request for an extension of time to submit additional medical evidence. The applicable regulations specifically provide that documentary evidence which was not submitted to the district director may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2); *North American Coal Co. v. Miller*, 870 F.2d 948, 949, 12 BLR 2-222 (3d Cir. 1989). Section 725.456(b)(3) allows the administrative law judge discretion to admit documentary evidence not submitted to the district director and not exchanged by the parties within twenty days before a hearing if the parties waive the requirement or if a showing of good cause is made as to why such evidence was not exchanged. 20 C.F.R. §725.456(b)(3); *Miller*, 870 F.2d at 949, 12 BLR at 2-222; *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984).

In this case, at the hearing, held on March 18, 2004, claimant requested an extension of time to submit a report from Dr. Wald, who was in the process of reviewing the medical records. Hearing Transcript at 6. Claimant asserted that the delay in

unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

obtaining Dr. Wald's report stemmed from the fact that there had been a question as to whether employer had provided claimant with all of the relevant documentary evidence concerning the miner, necessary for Dr. Wald's review. The administrative law judge found that as claimant's counsel had been retained for more than a year and could have obtained a report from Dr. Wald earlier, based on the evidence employer had provided, and as one continuance had already been granted to claimant, claimant failed to show good cause for an extension of time to submit additional medical evidence. Hearing Transcript at 8. We find no abuse of discretion in the administrative law judge's decision to deny claimant's request for an extension of time to submit a report from Dr. Wald. *Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984); *Newland*, 6 BLR at 1-1286.

Turning to the merits of this claim, the medical evidence of record consists largely of hospital records and medical reports documenting the treatment of the miner's coronary artery disease, abdominal aortic aneurysm, and small cell carcinoma of the left lung, which was diagnosed by biopsy on January 21, 2000. Director's Exhibits 8-13. These records do not contain any diagnoses of pneumoconiosis or describe any coal mine dust related disease. The miner's death certificate listed the immediate cause of death as "metastatic small cell lung carcinoma." Director's Exhibit 8. No other causes or conditions were listed. *Id.* No autopsy was conducted. In addition, the record contains a report dated October 23, 2002, from Dr. Fino, who reviewed the medical evidence of record at employer's request. Dr. Fino opined that simple coal workers' pneumoconiosis was not present and that the miner did not suffer from an occupationally acquired pulmonary condition, but rather suffered from lung cancer due to cigarette smoking, severe vascular disease, an aneurysm and coronary artery disease. Dr. Fino explained that the miner's disabling respiratory impairment and subsequent death were due to his lung cancer and vascular disease, and that neither of these conditions was related to the inhalation of coal mine dust. Employer's Exhibit 2. In his April 30, 2003 deposition, Dr. Fino stated that while the miner had the necessary exposure to put him at risk for the development of coal mine dust-related illness, he had not in fact developed any such conditions. Dr. Fino also opined that the pulmonary function study evidence was non-conforming, due to inadequate information regarding the miner's effort, but assuming its validity, the results showed an obstructive impairment. Dr. Fino explained that while he could not absolutely exclude some portion of the obstruction, assuming there was one, as being due to coal mine dust, the results were due to the miner's smoking habit and any contribution from coal mine dust would have been insignificant. Dr. Fino reiterated his conclusion that the miner did not have pneumoconiosis and that his death was due to lung cancer and was unrelated to coal dust exposure. Dr. Fino concluded that even assuming the existence of pneumoconiosis, it played no role in the miner's death. Dr. Fino explained that he understood the definition of pneumoconiosis to be any lung disease, obstructive or restrictive, caused or aggravated by the inhalation of coal mine dust, and that the contribution of coal mine dust had to be materially significant. Employer's Exhibit 2 at p. 42.

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered all of the relevant medical evidence and found that, in addition to the radiographic and biopsy evidence being negative for the existence of pneumoconiosis, “[t]he extensive record does not include any medical report diagnosing or even mentioning pneumoconiosis. In short, there is absolutely no evidence that the miner suffered from either clinical or legal pneumoconiosis.” Decision and Order at 3-4. Therefore, the administrative law judge concluded that claimant failed to meet her burden to establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c).

Claimant specifically asserts that “it is undisputed” that the miner’s pulmonary condition was caused in part both by cigarette smoking and coal dust exposure, that this pulmonary condition compromised the miner’s lung function, and that the miner’s death was the result of complications due to pneumoconiosis. Claimant’s Brief at 4. Claimant asserts that this is supported by the opinion of Dr. Fino, who stated that he could not rule out at least a de minimis effect upon the miner’s breathing due to coal dust exposure, which, claimant contends, is all that is necessary to establish the existence of pneumoconiosis. Claimant’s Brief at 3. Claimant further contends, citing 20 C.F.R. §718.203(b), that as the miner had more than ten years of coal mine employment, she is entitled to the presumption that the miner’s “totally disabling respiratory disease arose from his coal mine employment,” and that employer has failed to rebut this presumption. Claimant’s Brief at 5. Claimant’s arguments are without merit.

Contrary to claimant’s arguments, claimant bears the burden of proving that the miner had pneumoconiosis and that the miner’s death was due to pneumoconiosis. 20 C.F.R. §718.205(a). In addition, while section 718.203(b) provides a presumption to miners with ten or more years of coal mine employment, that their *pneumoconiosis*, not their disability, arose out of their coal mine employment, in order to be entitled to this presumption, claimant must first establish that the miner in fact had pneumoconiosis, which she has failed to do in this case. As the administrative law judge found, the record contains no evidence that the miner had pneumoconiosis or any respiratory or pulmonary disease arising out of coal mine employment. Director’s Exhibits 8-11, 13, 24; Employer’s Exhibits 1, 2. Contrary to claimant’s arguments, 20 C.F.R. §718.201(c) provides that a disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment *significantly related to, or substantially aggravated by, dust exposure in coal mine employment*. 20 C.F.R. §718.201(c); *Mancia v. Director, OWCP*, 130 F.3d 579, 581 n.3, 21 BLR 2-215, 2-219 n.3 (3d Cir. 1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 312, 20 BLR 2-76, 2-84 (3d Cir. 1995). Therefore, Dr. Fino’s opinion, that he could not absolutely exclude some portion of the miner’s obstructive impairment, assuming there was one, as being due to coal mine dust, is insufficient to establish the existence of pneumoconiosis as Dr. Fino specifically opined that any contribution from coal mine dust would have been insignificant. Employer’s Exhibit 2 at p. 21. Substantial evidence supports the

administrative law judge's finding that the miner did not have pneumoconiosis and that, therefore, pneumoconiosis was not a substantially contributing cause of the miner's death. Accordingly, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c).

Because claimant has failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits. *See Anderson, supra; Perry v. Director, OWCP, 9 BLR 1-1, 1-2 (1986)(en banc).*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge