

BRB No. 05-0890 BLA

JETTIE ASHER	)	
(Widow of ANDY ASHER)	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: 05/24/2006
	)	
v.	)	
	)	
EAS COAL COMPANY	)	
	)	
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-Denying Survivor Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PERCURIAM:

Claimant<sup>1</sup> appeals the Decision and Order-Denying Benefits (2003-BLA-5706) of Administrative Law Judge Joseph E. Kane 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). Adjudicating this survivor's claim pursuant to 20 C.F.R. Part 718, based on claimant's February 27, 2001 filing date, the administrative law judge accepted the parties' stipulation to thirty-one years of coal mine

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<sup>1</sup> Claimant is the widow of the miner, Andy Asher, who died on March 5, 1997. Director's Exhibit 8. The survivor's claim is the only claim herein at issue.

employment and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge however found the evidence insufficient to 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 denial of benefits, contending that the administrative law judge erred in finding the medical evidence insufficient to establish that pneumoconiosis contributed to the miner's death. In response, employer urges affirmance of the administrative law judge's denial of benefits 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 on the merits of this appeal.

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).

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); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For 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, 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 20 C.F.R. §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).

The Board is not permitted to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as a review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). As we have emphasized previously, the Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is

contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf, supra*; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). 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 Sarf, supra*; *Fish, supra*.

In this case, other than asserting that the death certificate indicates that the miner's death was due in part to pneumoconiosis and that the autopsy corroborates the findings of the death certificate, claimant has not challenged the rationale provided by the administrative law judge for finding the medical evidence of record insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).<sup>2</sup> Claimant has failed to identify any error made by the administrative law judge in the evaluation of the evidence pursuant to Section 718.205(c) and applicable law. Thus, the Board has no basis upon which to review this part of the decision of the administrative law judge. *See* 20 C.F.R. §802.211(b); *Cox, supra*; *Sarf, supra*; *Fish, supra*. Consequently, we must affirm the finding of the administrative law judge that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). We, therefore, affirm the denial of benefits as it is supported by substantial evidence and is in accordance with law.

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

SO ORDERED.

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<sup>2</sup>The administrative law judge noted that the evidence consisted of the miner's death certificate, the autopsy report, the reports of Drs. Jarboe and Naeye and the miner's treatment records. Decision and Order at 13. The administrative law judge correctly found that the death certificate listed the miner's immediate cause of death as respiratory failure due to both cancer of the lung and simple coal workers' pneumoconiosis; and chronic obstructive lung disease as other significant condition. *Id.*; Director's Exhibit 9. The administrative law judge further found that the treating physicians diagnosed COPD but none attributed it to coal mine exposure or stated that it contributed to the miner's death, Dr. Chan's autopsy report did not contain an opinion on the cause of death and Drs. Jarboe and Naeye unequivocally opined that the miner's pneumoconiosis did not contribute to his death. The administrative law judge therefore reasonably found that as no other physician of record opined that pneumoconiosis contributed to the miner's death, the death certificate "standing alone" is unreasoned and unreliable because there is no record indicating that the doctor signing the death certificate had personal knowledge from which to assess the cause of death. *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Decision and Order at 13.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge