

BRB No. 06-0788 BLA

FRONA BLACKBURN	)	
(Widow of BILLY RAY BLACKBURN)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	DATE ISSUED: 05/24/2007
	)	
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 Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Billy J. Mosley (Webster Law Offices), Pikeville, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5105) of Administrative Law Judge Alice M. Craft with respect to 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 administrative law judge credited claimant with twenty-seven years of coal mine employment and adjudicated the

claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> After determining that the evidence of record was insufficient to establish either the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to 20 C.F.R. §718.205(c), the administrative law judge denied the survivor's claim for benefits.

On appeal, claimant argues that the administrative law judge erred both in failing to find that the evidence of record established the existence of pneumoconiosis and in failing to determine that pneumoconiosis hastened the miner's death. In response, employer urges affirmance of the administrative law judge's Decision and Order.<sup>2</sup> The Director, Office of Workers' Compensation Programs, has declined to respond unless specifically requested to do so.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

To establish entitlement to survivor's benefits in a claim filed after January 1, 1982, 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. §§718.202, 718.203, 718.205(a), (c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). 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. 20 C.F.R. §718.205(c)(2), (4).

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<sup>1</sup> Claimant is the spouse of the deceased miner. The miner filed a claim for benefits on March 16, 1981. Living Miner's Claim at 327. On August 11, 1986, the miner and the responsible operator submitted a Joint Motion for Remand, requesting that the claim be remanded to the district director for dismissal; the claim was dismissed on August 18, 1986. Living Miner's Claim at 2, 27-29. The miner died on October 7, 1994. Director's Exhibit 11. Claimant filed a claim for survivor benefits on September 8, 2003. Director's Exhibit 2.

<sup>2</sup> The parties do not challenge the administrative law judge's findings that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3). Decision and Order at 10. These findings are, therefore, affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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); *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).<sup>3</sup>

We will first address claimant's arguments concerning the administrative law judge's finding that the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c). The evidence regarding the cause of the miner's death consists of the medical opinions of Drs. Frederick, Kohari, and Rosenberg, and the death certificate prepared by Dr. Kohari. Director's Exhibits 11, 13; Claimant's Exhibit 1; Employer's Exhibit 2. In a letter dated September 20, 1982, Dr. Frederick described the miner as a fifty-two year old man that he first saw on February 2, 1982 "for pneumoconiosis with marked wheezing." Director's Exhibit 13 at 3. Dr. Frederick found that the miner had angina pectoris, coronary atherosclerosis, diabetes, hypertension, and chronic obstructive pulmonary disease. *Id.* Based on the severity of the miner's chest pain, shortness of breath, and related dizziness, Dr. Frederick opined that the miner was totally disabled. *Id.* In a letter dated May 14, 2004, Dr. Frederick explained that he had treated the miner from February 2, 1982 through October 25, 1993. Director's Exhibit 13 at 2. Dr. Frederick stated that the miner "was known to have pneumoconiosis," which Dr. Frederick felt "contributed to [the miner's] ill health and hastened his demise." *Id.*

Dr. Kohari signed the miner's death certificate, listing acute renal failure, cardiogenic shock, and acute myocardial infarction as the immediate causes of the miner's death. Director's Exhibit 11. In a letter dated June 10, 2004, Dr. Kohari stated that "[u]pon further review of the record, it is my professional opinion that coal workers' pneumoconiosis was a direct contributing factor to this patient's respiratory failure and ultimate demise." Claimant's Exhibit 1.

Dr. Rosenberg reviewed Dr. Frederick's reports dated September 20, 1982 and May 4, 2004, the death certificate, Dr. Kohari's letter dated June 10, 2004, and the deposition of Dr. Broudy dated November 21, 1985.<sup>4</sup> Director's Exhibits 1, 11, 12, 13;

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 202 (1989)(*en banc*); Decision and Order at 4; Director's Exhibit 3.

<sup>4</sup> Dr. Broudy examined the miner on behalf of the employer on May 4, 1981, in connection with the miner's claim. Dr. Broudy concluded that the miner was not suffering from pneumoconiosis and that his chronic bronchitis and possible small airways disease were due to smoking. Living Miner's Claim at 65. In a deposition taken on

Claimant's Exhibit 1. After reviewing these records, Dr. Rosenberg provided a report dated January 30, 2006, in which he opined that the miner died from acute myocardial infarction, resulting in cardiogenic shock and renal failure. Employer's Exhibit 2. Dr. Rosenberg noted that such conditions were not caused or aggravated by coal dust exposure, and concluded that the miner's death was not hastened by his previous coal mine employment. *Id.* Acknowledging Dr. Kohari's opinion to the contrary, Dr. Rosenberg indicated that there was no objective basis upon which to state that pneumoconiosis contributed to the miner's death. *Id.* Dr. Rosenberg concluded that the miner was not totally disabled, that he did not have clinical or legal pneumoconiosis, and that his death was unrelated to coal dust exposure or his history of coal mine employment. *Id.*

The administrative law judge determined that claimant failed to establish that pneumoconiosis contributed to the miner's death within the meaning of the Act and regulations as interpreted by the United States Court of Appeals for the Sixth Circuit. Decision and Order at 12. Noting that while Drs. Frederick and Kohari had both stated that pneumoconiosis contributed to the miner's death, the administrative law judge observed that neither physician explained in what way pneumoconiosis played any contributing role or hastened the miner's death. *Id.* Conversely, the administrative law judge found that Dr. Rosenberg's conclusion that the miner's death resulted from coronary artery disease, unrelated to pneumoconiosis, was consistent with the death certificate completed by Dr. Kohari. *Id.* Finding that Dr. Rosenberg's opinion was better documented and reasoned than those of Drs. Frederick and Kohari, the administrative law judge accorded Dr. Rosenberg's opinion greater weight and found that the evidence did not establish that the miner's death was due to pneumoconiosis. *Id.*

On appeal, claimant alleges that the administrative law judge erred in failing to find that the opinion of Dr. Frederick, the miner's treating physician, as corroborated by Dr. Kohari, was sufficient to establish that pneumoconiosis hastened the miner's death. Claimant's argument has no merit. A review of the record indicates that the administrative law judge permissibly determined that Dr. Rosenberg's opinion, that the miner's death was unrelated to pneumoconiosis, was better documented and reasoned than the contrary opinions offered by Drs. Frederick and Kohari. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126, 1-128 (1985).

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November 21, 1985, Dr. Broudy indicated that he could not completely rule out the possibility that coal dust exposure was a contributing cause of the miner's chronic bronchitis and possible small airways disease. Employer's Exhibit 1. The administrative law judge addressed the opinion of Dr. Broudy at 20 C.F.R. §718.202(a)(4). Decision and Order at 11-12.

In addition, the administrative law judge rationally accorded little weight to Dr. Frederick's opinion, despite his status as the miner's treating physician, because he did not explain how pneumoconiosis played a contributing role in, or hastened, the miner's death. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003)(opinions of treating physicians get the deference they deserve based on their power to persuade); *Tedesco v. Director, OWCP*, 18 BLR 1-103, 1-105 (1994); Decision and Order at 12; Director's Exhibit 11, 13 at 3. Similarly, the administrative law judge acted within her discretion as fact-finder in according little weight to Dr. Kohari's opinion because she found that Dr. Kohari did not adequately explain how pneumoconiosis contributed to, or hastened, the miner's death. Decision and Order at 12; *Clark*, 12 BLR at 1-155; *Peskie*, 8 BLR at 1-128.

Because the administrative law judge's determination that claimant has failed to establish that the miner's death was due to pneumoconiosis was rational and supported by substantial evidence, it is affirmed. 20 C.F.R. §718.205(c); see *Griffith*, 49 F.3d at 186, 19 BLR 2-116; *Trumbo*, 17 BLR at 1-87-88. Consequently, we also affirm the denial of benefits in the survivor's claim.<sup>5</sup>

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<sup>5</sup> Because claimant has failed to establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in her survivor's claim under Part 718, we need not reach claimant's other assertions of error regarding the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (4).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge