

BRB No. 07-0897 BLA

L.E.S.)
(Widow of G.A.S.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 05/28/2008
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denial of Survivor Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

L. E. S., Kenna, West Virginia, *pro se*.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Survivor Benefits (2005-BLA-5486) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a 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).¹ The administrative law judge adjudicated the claim pursuant to 20 C.F.R.

¹ The miner filed a claim on June 24, 1970, with the Social Security Administration. This claim was ultimately denied by the Department of Labor (DOL) on April 25, 1980, because the miner failed to establish any element of entitlement. The

Part 718, credited the miner with four and one-half years of coal mine employment, and found that the miner suffered from simple coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b).² The administrative law judge also found, however, that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, he denied benefits.

On appeal, claimant generally contends that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis. In response, the Director, Office of Workers' Compensation Programs, urges affirmance of the administrative law judge's denial of benefits.

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, 1-177 (1989). 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.³ 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).

Because the survivor's claim in this case was filed after January 1, 1982, claimant was required to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be due to pneumoconiosis if the evidence

miner filed a second claim on July 24, 1986, that was denied by the DOL on January 13, 1987, because the miner failed to establish any element of entitlement. The miner did not appeal or further pursue this claim. The miner died on October 15, 2002. Director's Exhibit 12. Claimant, the miner's widow, filed an application for survivor's benefits on March 7, 2003. Director's Exhibit 2.

² We affirm the administrative law judge's findings that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant 20 C.F.R. §§718.202(a)(2) and 718.203(b), because they are not adverse to claimant and have not been challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 4, 5.

establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

The administrative law judge considered all of the relevant evidence under Section 718.205(c), consisting of x-rays, hospital and treatment records, the death certificate, and autopsy reports by Dr. Jelic and Dr. Perper. Decision and Order at 11-12; Director's Exhibits 9, 11-15. The death certificate attributed the miner's death to pneumonia as a consequence of chronic obstructive pulmonary disease (COPD). Director's Exhibit 9. Dr. Jelic, who conducted a chest-only autopsy, diagnosed simple pneumoconiosis, but did not identify the cause of the miner's death. Director's Exhibits 11, 13, 15. Dr. Perper reviewed the miner's medical records and Dr. Jelic's autopsy report, and microscopically examined the lung tissue. Director's Exhibit 12. Dr. Perper opined that the miner's simple pneumoconiosis was "too mild and sparse" to have hastened, or contributed to, the miner's death and that the cause of death was acute bronchopneumonia due to cigarette smoking-related COPD. *Id.* The attending physicians at the Charleston Area Medical Center and Jackson General Hospital did not attribute the miner's COPD to his coal dust exposure or otherwise indicate that pneumoconiosis or coal dust exposure played a role in the miner's death. Director's Exhibits 13-15.

The administrative law judge found that there is no evidence of complicated pneumoconiosis or progressive massive fibrosis to establish death due pneumoconiosis pursuant to 20 C.F.R. §§718.205(c)(3), 718.304. Decision and Order at 11. The administrative law judge noted that Dr. Jelic did not identify the cause of the miner's death and that Dr. Perper concluded that bronchopneumonia, due to cigarette smoking related COPD, caused the miner's death. *Id.* The administrative law judge therefore correctly found that none of the physicians concluded that pneumoconiosis or its complications caused the miner's death. *See* 20 C.F.R. §718.205(c)(1); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); Decision and Order at 11-12. Additionally, pursuant to 20 C.F.R. §718.205(c)(2), (5), the administrative law judge determined that Dr. Perper, the only physician who considered the effect of pneumoconiosis, concluded that the "sparse distribution of the coal mine dust macules in [the miner's] lung tissue" did not contribute to, or hasten, the miner's death. Decision and Order at 12. Because the administrative law judge's findings are supported by substantial evidence, we affirm the administrative law judge's weighing of the medical evidence, and his finding that the miner's death was not caused, contributed to, or hastened by, coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge