

BRB Nos. 07-0203 BLA
and 07-0203 BLA-A

J.M.)	
(Widow of C.M.))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
WEST VIRGINIA ELECTRIC)	
CORPORATION)	DATE ISSUED: 11/30/2007
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	
)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits and the Order Denying Motion for Reconsideration of Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

J.M., Clemont, Florida, *pro se*.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY and HALL, Administrative Appeals judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel,² and employer cross-appeals, the Decision and Order – Denial of Benefits (05-BLA-5006) and the Order Denying Motion for Reconsideration of Associate Chief Administrative Law Judge Thomas M. Burke rendered 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). Claimant filed her survivor’s claim on November 6, 2002. Director’s Exhibit 2. On August 24, 2006, the administrative law judge issued a Decision and Order – Denial of Benefits (Decision and Order), identifying claimant by her initials in the caption of the case. The administrative law judge found that the evidence was sufficient to show that the miner suffered from pneumoconiosis, but it failed to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On September 26, 2006, employer filed a Motion for Reconsideration requesting that the administrative law judge reissue his Decision and Order, identifying claimant by her full name, and not her initials, as required under 20 C.F.R. §725.477(b) (2006). Employer’s motion was denied by the administrative law judge on November 3, 2006.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer has filed a consolidated brief, responding to claimant’s appeal, and urging affirmance of the denial of benefits. In support of its cross-appeal, however, employer contends that the administrative law judge’s use of initials in his Decision and Order to identify claimant was in error. Employer also argues that the administrative law judge erred by not including all of the evidence contained in the miner’s claim as part of the record in the survivor’s claim. The Director, Office of Workers’ Compensation Programs (the Director), responds to employer’s cross-appeal, asserting that the administrative law judge “properly identified claimant solely by her initials in conformance with the policy adopted by the Department of Labor with regard to decisions that will be posted on the Department’s website.” Director’s Letter Brief at

¹ Claimant is the widow of the miner, who died on August 18, 2002. Decision and Order at 3; Director’s Exhibits 2, 7. The miner filed a claim for benefits on August 18, 2000, which was denied on February 6, 2001.

² Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge’s decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

1. The Director takes no position on the merits of claimant's appeal. Employer has also filed a reply brief in its cross-appeal.

We first address claimant's appeal. In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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 (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. 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be 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). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).³

In this case, substantial evidence supports the administrative law judge's denial of benefits as he properly determined that there was no evidence to support a finding that the miner's death was due to, substantially contributed to, or hastened by pneumoconiosis.⁴ Pursuant to Section 718.205(c), the administrative law judge correctly noted that medical treatment records indicate that the miner underwent a bronchoscopy in October 2000, at which time the miner was diagnosed with small cell lung carcinoma.

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. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

⁴ We affirm the administrative law judge's determination, based on his reliance on the autopsy evidence, that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), as that finding is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711-12 (1983); Decision and Order at 7.

Decision and Order at 4; Director's Exhibit 9. The miner died on August 18, 2002, and his death certificate listed the cause of death as metastatic lung cancer due to hypoxemia. Decision and Order at 5; Director's Exhibit 7. No other causes or contributing conditions were listed. Director's Exhibit 7. Dr. Estallia performed a limited autopsy examination of the miner's lungs, which showed the presence of pneumoconiosis. Dr. Estallia, however, did not offer an opinion as to cause of the miner's death or further address whether pneumoconiosis caused, contributed to, or hastened the miner's death. Decision and Order at 6; Director's Exhibit 8. In a letter dated May 26, 2005, Dr. Kessinger, indicated that he treated the miner in 1999 for pneumoconiosis and dyspnea. However, Dr. Kessinger has not rendered an opinion regarding the cause of the miner's death. Decision and Order at 6-7; Claimant Exhibit 1. Dr. Oesterling reviewed the autopsy findings and the miner's medical records, and he concluded that the miner died due to lung cancer. He specifically opined that pneumoconiosis did not cause, contribute to, or hasten the miner's death in any way. Decision and Order at 7; Employer's Exhibit 2.

Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes and Tucker Co.*, 11 BLR 1-147 (1988). Because there is no evidence of record from which to conclude that the miner's death was caused, contributed to, or hastened by pneumoconiosis, the administrative law judge properly found that claimant was unable to satisfy her burden of proof pursuant to Section 718.205(c). We therefore affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis. Because claimant failed to establish that the miner's death was due to pneumoconiosis under Section 718.205(c), a requisite element of entitlement in her survivor's claim, benefits are precluded. See 20 C.F.R. §718.205(a)(3); *Shuff*, 967 F.2d at 980, 16 BLR at 2-93; *Trumbo*, 17 BLR at 1-87-88. Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and in accordance with law.⁵ *McFall*, 12 BLR at 1-177.

We now turn to employer's cross-appeal. Although we have affirmed the denial of benefits, employer asks the Board to address whether the administrative law judge erred in using claimant's initials, rather than her full name, to identify her on the first

⁵ In light of our affirmance of the denial of benefits, it is not necessary that we address employer's arguments on cross-appeal that the administrative law judge erred by not admitting evidence contained in the record of the miner's claim on the ground that the evidence was not specifically proffered by the parties in accordance with 20 C.F.R. §725.414. See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

page of the Decision and Order. Employer asserts that the administrative law judge's actions are in violation of 20 C.F.R. §725.477(b) (2006).

When the administrative law judge issued his Decision and Order on August 24, 2006, Section 725.477(b) provided that a “decision and order shall contain...the names of the parties.” 20 C.F.R. §725.477(b) (2006). The Department of Labor, however, issued a revised version of Section 725.477(b) on January 30, 2007, in which the latter requirement was stricken. 20 C.F.R. §725.477(b) (2007); 72 Fed. Reg. 4205 (Jan. 30, 2007). As the Director asserts, the administrative law judge's Decision and Order is clearly in compliance with the regulation now in effect. Moreover, we agree with the Director that the administrative law judge's Decision and Order is in substantial compliance with the prior version of Section 725.477(b) (2006), as he included a cover sheet on which claimant was identified by name. Thus, we reject employer's argument on cross-appeal that the administrative law judge erred in identifying claimant by her initials in his Decision and Order.⁶

⁶ Employer expressed concern that the use of initials in the caption of the case is an impediment to tracking the subsequent history of a claim and performing legal research. Employer's concerns, however, are merely speculative and do not constitute evidence that employer has suffered prejudice in this case. See *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158 (1985).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits and the Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge