

BRB Nos. 08-0254 BLA  
and 08-0254 BLA-A

D.L.D. )  
(Divorced Spouse of W.B.D.) )  
 )  
Claimant-Petitioner )  
Cross-Respondent )  
 )  
v. )  
 )  
HARVEY ENERGY CORPORATION )  
 )  
and ) DATE ISSUED: 11/26/2008  
 )  
WEST VIRGINIA CWP FUND )  
 )  
Employer/Carrier- Respondents )  
Cross-Petitioners )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

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

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Kathy L. Snyder and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Emily Goldberg-Kraft (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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals and employer cross-appeals the Decision and Order – Denial of Survivor Benefits (05-BLA-5908) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) denying benefits on a survivor's claim<sup>2</sup> 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 initially determined that employer had been incorrectly designated as the responsible operator, because the record established that employer lacked the capability to assume liability for the payment of benefits. Noting, however, that an administrative law judge may not dismiss the designated responsible operator without the consent of the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge determined that employer remained a party to the case and that consideration of its medical evidence was therefore appropriate. Decision and Order at 3, 9.

On the merits of entitlement, the administrative law judge determined that the evidence did not establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further determined that, even if claimant had established that the miner had pneumoconiosis, the evidence did not establish that his death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that, because the administrative law judge found that employer was not properly designated as the responsible operator, he should have excluded employer's evidence. Claimant asserts that the exclusion of employer's

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<sup>1</sup> Claimant is the surviving divorced spouse of the miner, who died on February 16, 2003. Director's Exhibits 3, 8, 19.

<sup>2</sup> The miner was awarded benefits on October 19, 1990. Director's Exhibit 1. On May 19, 2003, after the miner's death, claimant filed the instant claim for survivor's benefits. Director's Exhibit 3. The district director denied the claim on May 12, 2004. Director's Exhibit 16. Claimant requested modification on January 24, 2005. Director's Exhibit 18. In a Proposed Decision and Order issued on April 14, 2005, the district director awarded benefits. Director's Exhibit 21. Pursuant to employer's request, the claim was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 26.

evidence leaves no basis for the administrative law judge's denial of benefits, and the district director's award should be reinstated. In a consolidated response and cross-appeal, employer agrees with claimant's contention, and asserts that it should be dismissed as a party. In response to employer's cross-appeal, the Director asserts that the administrative law judge properly found that employer remained a party to the claim, but indicates that he has no objection to the Board now dismissing employer as a party to this appeal. In response to claimant's appeal, the Director effectively adopts employer's evidence, and argues that substantial evidence supports the administrative law judge's denial of benefits. Claimant has filed a reply brief reiterating her contentions.

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 (1965).

Because the Director does not challenge the administrative law judge's finding that employer was not the responsible operator, and he indicates that he has no objection to the dismissal of employer, employer is hereby dismissed as a party to this case. The Board will address the arguments of claimant and the Director.

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.3, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(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). 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).

Claimant's sole argument on appeal is that the administrative law judge erred in admitting and considering the evidence submitted by employer on the elements of entitlement. Contrary to this contention, however, the administrative law judge correctly noted that he could not dismiss employer as the designated responsible operator "except upon the motion or written agreement of the Director." 20 C.F.R. §725.465(b). Thus, because the Director did not consent to employer's dismissal while the case was pending before the Office of Administrative Law Judges, employer remained a party to the claim proceedings before the administrative law judge. Further, as the Director accurately

points out, employer had contested the entitlement issues and the administrative law judge was obligated to address those issues. *See* 20 C.F.R. §725.463(a). Additionally, because employer's evidence was in compliance with the evidentiary limitations and was properly admitted into the record at the hearing, the administrative law judge permissibly considered the evidence that was submitted by employer. *See* 20 C.F.R. §725.414(a)(3).

Claimant mistakenly relies on *Henley v. Cowin & Co.*, BRB No. 05-0778 BLA (May 30, 2007)(unpub.), to support her argument that employer's evidence had to be excluded. As the administrative law judge correctly stated, *Henley* involved evidence submitted by a potentially liable operator that had been dismissed by the district director after he designated a different employer as the responsible operator. Since the regulations restrict the operator evidence to be placed in the hearing record to that submitted by the single responsible operator finally designated by the district director, and none of the parties in *Henley* had adopted the dismissed operator's evidence, the administrative law judge could not consider the evidence that had been submitted by the dismissed operator. *See* 20 C.F.R. §§725.414(a)(3)(i); 725.421(b)(4); *Henley*, slip op. at 3-4. Here, by contrast, the administrative law judge correctly observed that employer was the finally designated responsible operator, and thus, its evidence was properly part of the hearing record. *See* 20 C.F.R. §§725.414(a)(3)(i); 725.421(b)(4).

Moreover, claimant does not acknowledge that where the responsible operator has been dismissed, the regulations authorize the Director to exercise the evidentiary rights of a responsible operator. *See* 20 C.F.R. §725.414(a)(3)(iii). As discussed *supra*, the Director indicates that he has no objection to the dismissal of employer, and, citing 20 C.F.R. §725.414(a)(3)(iii), he effectively adopts employer's evidence and argues that substantial evidence supports the denial of benefits.<sup>3</sup> Director's June 18, 2008 Brief at 2 n.4; Director's April 3, 2008 Brief at 2. Based on the foregoing, we reject claimant's argument that the administrative law judge erred in considering the evidence that was submitted by employer.

Claimant does not otherwise challenge the administrative law judge's findings that the evidence did not establish that the miner had pneumoconiosis or that his death was due to pneumoconiosis. Moreover, we agree with the Director that substantial evidence supports the administrative law judge's permissible finding that, even had claimant established the existence of pneumoconiosis, the well-reasoned, conflicting medical opinions of Drs. Doyle and Rosenberg were in equipoise as to whether pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to 20 C.F.R. §718.205(c).

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<sup>3</sup> The Director has standing to defend a claim on behalf of the Black Lung Disability Trust Fund, and he may use evidence submitted by employer in his defense of the claim. *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733-34 (1985).

*See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). Therefore, we affirm the administrative law judge's finding that claimant did not carry her burden of proof to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

Because we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge