

BRB No. 08-0355 BLA

G.C.)	
(Survivor of D.C.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
NATIONAL MINES CORPORATION)	DATE ISSUED: 11/25/2008
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

BEFORE: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order - Award of Benefits (06-BLA-5754) of Administrative Law Judge Larry S. Merck 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). The administrative law judge found, as

stipulated by the parties, that the miner had thirty-two years of coal mine employment. The administrative law judge further found that employer did not contest that the miner had simple pneumoconiosis that arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Considering the sole issue before him, the administrative law judge found that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4), based on employer's stipulation that the miner had clinical pneumoconiosis. Employer also argues that, even if legal pneumoconiosis were established, the administrative law judge erred in finding that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), (5). In response, claimant¹ urges affirmance of the administrative law judge's award of benefits, asserting that employer stipulated to the existence of both clinical and legal pneumoconiosis, and that Dr. Potter's opinion is sufficient to establish that the miner's death was hastened by his pneumoconiosis. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

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.² 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).

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* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where the death was caused by complications of pneumoconiosis, or where the

¹ Claimant, G.C., is the widow of the miner, D.C., who died on March 25, 1996. Director's Exhibit 11. Claimant filed her survivor's claim for benefits on June 23, 2005. Director's Exhibit 2.

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, because the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

irrebuttable presumption of death due to pneumoconiosis is applicable. 20 C.F.R. §718.205(c)(1), (2), and (3). 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, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

At the outset, we hold that the administrative law judge erred in finding that there was sufficient evidence to establish that the miner's death was hastened by pneumoconiosis in this case. Accordingly, we reverse the administrative law judge's award of benefits. Further, because we hold that the evidence is insufficient as a matter of law to establish that pneumoconiosis hastened the miner's death, an essential element of entitlement in a survivor's claim, *see Trumbo*, 17 BLR at 1-87, we need not address employer's argument concerning legal pneumoconiosis at Section 718.202(a).

We agree with employer that the administrative law judge erred, as a matter of law, in finding that Dr. Potter's opinion was sufficient to establish that the miner's pneumoconiosis hastened his death, pursuant to the holding of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).³ In that case, the Sixth Circuit held that "pneumoconiosis only 'hastens' a death if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Williams*, 338 F.3d at 518, 22 BLR at 2-655.

In crediting Dr. Potter's opinion, the administrative law judge acknowledged that Dr. Potter found that lung cancer was the ultimate cause of the miner's death. The administrative law judge, however, also noted that Dr. Potter found that the pre-existing damage to the miner's lungs from coal dust and smoking made life-prolonging cancer treatment more difficult and, thus, hastened the miner's death by cancer. The administrative law judge further noted that while Dr. Potter stated that he could not estimate how much longer the miner would have survived if he had not had pneumoconiosis, he believed that people with interstitial fibrosis or chronic lung disease

³ Because Dr. Potter's opinion is insufficient, as a matter of law, to establish that pneumoconiosis hastened the miner's death, we need not address employer's arguments concerning whether the administrative law judge properly accorded greater weight to Dr. Potter's opinion based on his treating physician status or employer's argument that the administrative law judge gave impermissible reasons for discrediting the opinions of Drs. Fino and Broudy, that the miner's death was not hastened by pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

have less respiratory reserve and, thus, less capacity to fight off serious problems like cancer or tolerate the associated treatment. Decision and Order at 10.

As employer contends, however, pursuant to *Williams*, Dr. Potter's statement, that he could not say how much longer the miner would have lived if he had not had pneumoconiosis, is not sufficient to establish that pneumoconiosis hastened the miner's death. Deposition at 12. Further, as employer alleges, Dr. Potter's statement that the miner's pneumoconiosis hastened his death because it decreased his respiratory reserve, "[i]n other words, the healthier we are, the better we're able to deal with serious problems[,]” *id.*, is insufficient to establish that pneumoconiosis hastened the miner's death pursuant to *Williams*. Thus, as Dr. Potter failed to make any additional statements that could establish that the miner's pneumoconiosis hastened his death, and there is no other evidence sufficient to meet the standard set forth in *Williams*,⁴ we reverse the administrative law judge's award of benefits.

⁴ The record also contains the miner's death certificate that lists cardiorespiratory failure due to or as a consequence of pulmonary malignancy with metastasis. A history of cigarette smoking and coal mining are listed as other significant conditions contributing to death but not resulting in the underlying causes. Director's Exhibit 11. The administrative law judge found that while the death certificate alone could not establish the cause of death in this case, it was probative because it was supported by Dr. Potter's opinion. However, in light of the fact that Dr. Potter's opinion has been found insufficient to establish that pneumoconiosis hastened the miner's death, we conclude that the death certificate, signed by Dr. Potter, standing alone, cannot establish that the miners death was due to pneumoconiosis at 20 C.F.R. §718.205(c). See *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

I concur in the result only.

REGINA C. McGRANERY
Administrative Appeals Judge