

BRB Nos. 08-0246 BLA

K.L.)	
(Surviving son of D.L.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
V.M. MINING, INCORPORATED)	
)	
and)	
BIRMINGHAM FIRE INSURANCE)	DATE ISSUED: 10/31/2008
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Miner's Benefits and Denying Survivor's Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

K.L., Jamboree, Kentucky, *pro se*.

Timothy J. Walker (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order Denying Miner's Benefits and Denying Survivor's Benefits (2006-BLA-05722) of Administrative Law Judge Adele Higgins Odegard rendered on a miner's claim and two survivors' claims, which were 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).³ The administrative law judge credited the miner with fifteen years of coal mine employment, based on a stipulation by the parties, and adjudicated both the miner's claim and the survivors' claims pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found that while the

¹ Claimant is K.L., the miner's surviving dependent disabled son. Director's Exhibits 2, 72.

² Claimant was not represented by legal counsel before the administrative law judge, but was represented by L.C., a lay representative, at the hearing. After specifically addressing claimant's appearance at the hearing without an attorney, the administrative law judge identified the issues in this case and gave claimant, through his lay representative, the opportunity to object to, and admit evidence, and to testify at the hearing. Hearing Transcript at 7-23. Therefore, we hold that the hearing was properly conducted. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

³ In her Decision and Order, the administrative law judge adjudicated the merits of three separate claims designated as: L.C. o/b/o K.L. (2006-BLA-05722); R.L. o/b/o A.L. (2006-BLA-05723); and R.L. o/b/o Estate of D.L. (2006-BLA-05724). The miner, D.L., filed his claim for benefits on December 10, 2001. Director's Exhibit 2. While his claim was pending, he died on May 4, 2005. Director's Exhibits 37, 50. Subsequently, claimants K.L and A.L. each filed a survivor's claim for benefits, as disabled adult children of the miner, on May 16, 2005 and May 23, 2005, respectively. Director's Exhibits 39, 72. After findings by the district director on the claims and requests for a formal hearing, the miner's claim and the survivors' claims were forwarded to the Office of Administrative Law Judges. The administrative law judge rendered a decision, in a single document, on the merits in all three claims. R.L. was the lay representative of claimant, A.L., in his survivor's claim and L.C. was the lay representative of claimant, K.L., in his survivor's claim. Director's Exhibits 49, 82. Only L.C. appealed the denial of K.L.'s survivor's claim to the Board and requested, on behalf of K.L., that the Board review the administrative law judge's decision. L.C. is not representing K.L. on appeal, and K.L.'s is the only appeal pending herein.

evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) in the miner's claim, and insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) in the survivors' claims. In addition, the administrative law judge indicated she would likely have found that the evidence was insufficient to establish the survivors' eligibility. Accordingly, the administrative law judge denied benefits on all three claims.

On appeal, claimant generally disagrees with the denial of benefits. Employer responds to claimant's appeal, asserting that the Board should affirm the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to respond to this appeal unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.⁴ 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, 363 (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 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(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); *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). 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).

⁴ Since the miner's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 3, 6, 37.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the denial of survivor's benefits is supported by substantial evidence, consistent with applicable law, and must be affirmed. The death certificate attributed the miner's immediate cause of death to congestive heart failure and listed chronic obstructive pulmonary disease (COPD) and hypertension as contributing causes. Decision and Order at Director's Exhibits 50, 83. Dr. Abad, the miner's treating physician, authored treatment notes reflecting the miner's hospitalization from April 7, 2005 to May 2, 2005 with an acute exacerbation of his COPD. Director's Exhibit 55. In his consulting opinion, Dr. Westerfield opined that pneumoconiosis played no role in the miner's death and that the miner's COPD was due to cigarette smoking. Employer's Exhibit 2.

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the miner's death certificate and the medical opinions of Drs. Abad and Westerfield, as well as hospital records, treatment notes and post-hearing submissions of lay comments. Decision and Order at 25-26. The administrative law judge assessed the credibility of the death certificate and found that there was no evidence in the record to indicate whether the deputy coroner who signed the miner's death certificate was a physician or medical professional or that he had any basis upon which to conclude the miner's death was due to congestive heart failure. Decision and Order at 25. Upon reviewing all of the relevant evidence, the administrative law judge determined that, "except for the death certificate, discussed above, there is no evidence directly addressing the cause of the [m]iner's death." *Id.* Consequently, the administrative law judge rationally found that the causes of the miner's death listed on the death certificate were entitled to no weight and that the medical opinions of Drs. Abad and Westerfield were insufficient to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49 (6th Cir. 2003) (the opinions of treating physicians get the deference they deserve based on their power to persuade); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), cert. denied, 537 U.S. 1147 (2003) (the administrative law judge as fact-finder should decide whether a physician's report is sufficiently reasoned and documented); *Griffith*, 49 F.3d at 186, 19 BLR at 2-117; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88-89; Decision and Order at 25.

Substantial evidence supports the administrative law judge's finding that the death certificate and medical opinion evidence were insufficient to establish that the miner's death was due to pneumoconiosis.⁵ *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70

⁵ The administrative law judge fully explained, pursuant to 20 C.F.R. §718.202(a)(4), her determination that the evidence failed to establish that the miner's

(1988); Decision and Order at 25. Because the administrative law judge permissibly discounted the only medical evidence of record arguably supportive of claimant's burden, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *Griffith*, 49 F.3d at 186, 19 BLR at 2-117; *Brown*, 996 F.2d at 817, 17 BLR at 2-140.

Because claimant failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), an essential element of entitlement to benefits in a survivor's claim under Part 718, an award of benefits is precluded. *Trumbo*, 17 BLR at 1-87-88.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

chronic obstructive pulmonary disease was coal mine employment related. Decision and Order at 10-18.