

BRB No. 08-0281 BLA

J.C.)
(Survivor of and o/b/o D.C.))
)
Claimant-Petitioner)
)
v.)
)
RAUER COAL CORPORATION)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 10/29/2008
PNEUMOCONIOSIS FUND)
)
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 Benefits of Michael P. Lesniak,
Administrative Law Judge, United States Department of Labor.

J.C., Elkins, West Virginia, *pro se*.

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Benefits (06-BLA-5650 and 06-BLA-5097) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a subsequent miner's claim and 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 administrative law judge credited the miner with thirty-two years of qualifying coal mine employment and found that employer was the responsible operator. Adjudicating the subsequent miner's claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an element of entitlement previously adjudicated against the miner, and, therefore, established a change in an applicable condition of entitlement in the miner's claim pursuant to 20 C.F.R. §725.309. The administrative law judge also found that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence of record failed to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Benefits were, accordingly, denied on the miner's subsequent claim. Turning to the survivor's claim, the administrative law judge found that while the evidence established that the miner had pneumoconiosis at Section 718.202(a), and that the miner's pneumoconiosis arose out of coal mine employment at Section 718.203(b), it failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Benefits were, accordingly, denied on the survivor's claim.

Employer responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order Denying Benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

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 and is in accordance with law.² *Hodges v. BethEnergy Mines, Inc.*,

¹ Claimant, the widow of a miner who died on November 24, 2004, is pursuing her survivor's claim filed on January 13, 2005, and the miner's subsequent claim filed on January 31, 2001. Miner's Director's Exhibit 6; Widow's Director's Exhibit 2. In the miner's most recent prior claim, the administrative law judge found that the miner failed to establish pneumoconiosis arising from coal mine employment or that he was totally disabled therefrom. 20 C.F.R. §§718.202(a), 718.203, 718.204(b), (c) (2000).

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

18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. Death will be considered to be due to pneumoconiosis if pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, the miner's death was caused by complications of pneumoconiosis, or the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); see also *Shuff v. Cedar Coal Co.*, 969 F.2d 977-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert denied*, 506 U.S. 1050 (1993).

TOTAL DISABILITY - 20 C.F.R. §718.204(b)

Considering the evidence of total disability at Section 718.204(b)(i)-(iv) on the miner's subsequent claim, the administrative law judge correctly found that none of the objective studies was qualifying at Section 718.204(b)(2)(i)-(ii), that there was no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii), and that none of the medical opinions found that the miner had a totally disabling respiratory impairment at Section 718.204(b)(2)(iv).³ Weighing all of

³ Specifically, the administrative law judge noted that: Dr. Crouch opined that the miner did not have any clinically significant degree of respiratory impairment or disability; Dr. Bellotte opined that the miner had a mild respiratory impairment; and Dr. Renn opined that the miner did not have a totally disabling respiratory impairment and could perform his usual coal mine employment; and Dr. Basheeda opined that the miner was not totally disabled from his usual coal mine employment.

this evidence together, the administrative law judge rationally concluded that total disability was not established at Section 718.204(b)(2). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Consequently, we affirm the administrative law judge's finding that total disability, an essential element of entitlement, *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*), was not established at Section 718.204(b) on the miner's subsequent claim and that the administrative law judge, therefore, properly denied benefits on the miner's subsequent claim.

DEATH DUE TO PNEUMOCONIOSIS - 20 C.F.R. §718.205(c)

Next, the administrative law judge considered whether the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) in the survivor's claim. The administrative law judge correctly noted that the death certificate listed multisystem organ failure due to, or as a consequence of, a ruptured abdominal aortic aneurysm as the immediate cause of death and did not list any other conditions as contributing to death. Widow's Director's Exhibit 8. The administrative law judge also correctly noted that the autopsy report did not indicate that pneumoconiosis contributed in any way to the miner's death. Widow's Director's Exhibits 10, 15. Further, the administrative law judge correctly noted that Dr. Crouch, a pathologist, stated that the pneumoconiosis in the miner's lungs "...could not have caused, contributed to, or otherwise hastened this patient's death secondary to complications of a ruptured aortic aneurysm." Employer's Exhibit 1. Similarly, the administrative law judge correctly noted that Dr. Fino opined that pneumoconiosis did not cause or contribute to the miner's death in any way. Employer's Exhibit 15. The administrative law judge properly concluded, therefore, that, as none of the physicians attributed the miner's death to pneumoconiosis, claimant failed to meet her burden of establishing death due to pneumoconiosis at Section 718.205(c). Decision and Order at 15. Lacking sufficient evidence, the administrative law judge properly found that claimant, who bears the burden of proving entitlement, failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). The administrative law judge's finding that claimant failed to establish death due to pneumoconiosis at Section 718.205(c) and entitlement to benefits on the survivor's claim is, therefore, affirmed. *See Trumbo*, 17 BLR at 1-87.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on both the miner's subsequent claim and the survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge