

BRB No. 00-1163 BLA

THELMA MOUNTS )  
(Widow of BARNEST MOUNTS) )

Claimant-Petitioner )

v. )

MARIE COAL CORPORATION )

Employer- )  
Respondent )

DIRECTOR, OFFICE OF )  
WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )

DATE ISSUED:

DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Denial of Benefits of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Thelma Mounts, Gray, Tennessee, *pro se*.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Said and 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel,<sup>2</sup> appeals the Decision and Order - Denial of Benefits (99-BLA-1046) of Administrative Law Judge Stuart A. Levin 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).<sup>3</sup> The administrative law judge adjudicated the claim pursuant to

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<sup>1</sup> Claimant is the widow of Barnest Mounts, the miner, who died on February 18, 1998. Director's Exhibits 6, 9. The miner filed two applications for benefits during his lifetime, both of which were denied. His initial application for benefits was filed with the Social Security Administration (SSA) on April 20, 1973, which was denied in a Decision and Order issued by a SSA administrative law judge on July 3, 1975. Director's Exhibits 27-1, 27-20. Following the miner's filing of his Election Card on June 19, 1978 seeking SSA review, the claim was denied by SSA on April 27, 1979. Director's Exhibits 27-21, 27-22. The claim was thereafter transferred to the Department of Labor (DOL), which denied the claim on November 25, 1980. Director's Exhibit 26-16. No further action was taken on this claim. The miner filed a second application for benefits, this application with DOL, on May 3, 1984, which was denied by the district director on January 20, 1989. Director's Exhibits 26-1, 26-47. No further action was taken on this claim.

Claimant filed her survivor's claim on April 14, 1998, Director's Exhibit 1, and the survivor's claim is the only claim presently before the Board.

<sup>2</sup> Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, 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).

<sup>3</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for

20 C.F.R. Part 718, based on claimant's April 14, 1998 filing of her survivor's claim. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). In addition, he found the evidence insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied this survivor's claim. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this 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). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when claimant meets her burden of establishing that the miner's death was due to pneumoconiosis arising out of coal mine employment and where pneumoconiosis was a substantially contributing cause of death or where complicated pneumoconiosis is established. 20 C.F.R. §§718.201, 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,*

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those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

OWCP, 11 BLR 1-85 (1988). 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) (2001); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).<sup>4</sup>

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<sup>4</sup> The administrative law judge properly found that the miner’s last coal mine employment occurred in the Commonwealth of Virginia and, therefore, that this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 3, n.1; Director’s Exhibits 18, 26.

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that the miner's death was not due to pneumoconiosis. The administrative law judge considered all of the medical evidence of record regarding the cause of the miner's death, including the death certificate, autopsy report and several medical reports which were based on a review of the medical evidence of record, including lung tissue slides from the autopsy and the autopsy report.<sup>5</sup> Decision and Order at 3-5; Director's Exhibits 6-9; Employer's Exhibits 1, 3, 5. In reviewing this evidence, the administrative law judge properly found that none of the medical reports stated that pneumoconiosis was the cause of the miner's death. Rather, the physicians attributed the miner's death to severe bronchopneumonia and severe chronic obstructive pulmonary disease.<sup>6</sup> Decision and Order at 3-5; 20 C.F.R.

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<sup>5</sup> The record contains the death certificate which lists the cause of the miner's death as bronchopneumonia, bilateral, severe; due to severe chronic obstructive pulmonary disease and silicotic nodules in peribronchial lymph nodes. Other significant conditions noted were moderate coronary artery disease and a healed myocardial infarction. Director's Exhibits 6, 9. In addition, the record contains the autopsy report by Drs. Latimer and Soike, which stated that the miner's death was due to bronchopneumonia superimposed upon severe chronic obstructive pulmonary disease, with evidence of a remote myocardial infarction secondary to coronary artery disease. Director's Exhibits 7, 9. On gross examination, the autopsy report stated that there was moderate anthracosis. *Id.* However, no further description of this finding is noted in the report. Rather, the autopsy report provides a "Final Diagnosis" of severe, bilateral bronchopneumonia, severe chronic obstructive pulmonary disease, silicotic nodules in peribronchial lymph nodes and mucous plugging of mainstem and major bronchi. *Id.*

<sup>6</sup> In addition, the record contains the opinions of Drs. Hansbarger and Hutchins, both of whom reviewed the medical evidence, including lung tissue slides from the miner's autopsy and the autopsy report. Dr. Hansbarger opined that the miner's death was due to severe chronic obstructive pulmonary disease with acute bronchopneumonia and atherosclerotic heart disease. Employer's Exhibit 1. In addition, Dr. Hansbarger stated that there were findings of anthracotic pigmentation of the lung, but not of the degree to warrant a diagnosis of coal workers' pneumoconiosis or any other occupational pneumoconiosis. *Id.* With respect to the cause of the miner's death, Dr. Hansbarger opined that pneumoconiosis did not contribute to the miner's death and that the miner's death was not hastened in any way, shape or form by his history of coal mine employment. *Id.* Dr. Hutchins opined that the cause of the miner's death was his

§718.205(c)(1) (2000). Moreover, the administrative law judge reasonably found that none of the physicians stated that pneumoconiosis played any role in the miner's death.<sup>7</sup> Decision and Order at 3-5; 20 C.F.R. §§718.205(c)(2) (2000); see *Shuff, supra*; see also 20 C.F.R. §718.205(c)(5) (2001). Inasmuch as claimant has the burden of establishing that the miner's death was due to, or hastened by, pneumoconiosis and claimant submitted no such evidence, we affirm the administrative law judge's finding that claimant failed to prove that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).<sup>8</sup> 20

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emphysema and the superimposed pneumonia, which arose from the miner's heavy exposure to tobacco smoke and the types of emphysema seen in the miner are not due to coal dust exposure. Employer's Exhibit 3. Dr. Hutchins, in examining the autopsy slides, stated that there was a slight to moderate amount of coal dust pigment with associated birefringent silicate type particles located in the peribronchial and subpleural areas. However, he further stated that there were no macule, micronodules, macronodules or lesions of progressive massive fibrosis and, therefore, coal workers' pneumoconiosis was not present. Dr. Hutchins also noted slight to moderate anthracotic pigmentation in the lymph nodes, but did not state that there was any relation to the miner's coal mine employment or coal dust exposure, rather, he opined that more likely than not they were healed granulomas. *Id.* Dr. Hutchins concluded that neither coal dust exposure nor coal workers' pneumoconiosis played any role in or hastened the miner's death. *Id.*

Lastly, the record contains the medical report of Dr. Tuteur, who reviewed the medical evidence of record, including the autopsy report and the reviewing opinions of Drs. Hansbarger and Hutchins, and opined that the miner did have a respiratory impairment characterized by severe obstructive ventilatory defect which would have prevented the miner from performing his coal mine employment, however, this impairment was not due, in whole or in part, to the miner's dust exposure in his coal mine employment. Employer's Exhibit 5. Dr. Tuteur further opined that the miner's death was due to severe bronchopneumonia superimposed on severe cigarette smoking induced chronic obstructive pulmonary disease. *Id.* In addition, Dr. Tuteur stated that neither the miner's death nor the timing of his death was in any way contributed to by the presence of coal workers' pneumoconiosis or coal dust exposure. *Id.*

<sup>7</sup> The irrebuttable presumption of death due to pneumoconiosis is inapplicable because the record contains no evidence of complicated pneumoconiosis. 20 C.F.R. §§718.205(c)(3), 718.304 (2000).

<sup>8</sup> Inasmuch as we affirm the administrative law judge's finding that the

C.F.R. §718.205(c) (2001); *see Shuff, supra; Neeley, supra; see also Addison v. Director, OWCP, 11 BLR 1-68 (1988); Fetterman v. Director, OWCP, 7 BLR 1-688 (1985).*

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

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evidence is insufficient to establish that the miner's death was due to pneumoconiosis, we need not address the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000), as error, if any, therein is harmless. *See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984); see also Trumbo v. Reading Anthracite Co., 17 BLR 1-85 (1993).*