

BRB No. 02-0134 BLA

SHIRLEY J. McKINNEY)
(Widow of BOBBY H. McKINNEY))

Claimant-Petitioner)

v.)

DATE ISSUED:

WESTMORELAND COAL COMPANY)

Employer-)

Respondent)

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

DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Shirley J. McKinney, Pennington Gap, Virginia, *pro se*.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and

¹ Claimant is the widow of the miner, Bobby H. McKinney, who died on January 25, 1998. Director's Exhibit 65. The miner originally filed an application for benefits on May 17, 1994, the denial of which was affirmed by the Board in a Decision and Order issued on June 25, 1997. *McKinney v. Westmoreland Coal*

Order - Denying Benefits (2000-BLA-0763 and 2000-BLA-0764) of Administrative Law Judge Mollie W. Neal on a 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 Act).³ The administrative law judge determined that this case involves a request for modification, pursuant to 20 C.F.R. §725.310 (2000), of the denial of the miner's claim by Administrative Law Judge Jeffrey Tureck, in a Decision and Order issued on August 22, 1996, and affirmed by the Board in a Decision and Order issued June 25, 1997. See *McKinney v. Westmoreland Coal Co.*, BRB No. 99-1723 BLA (Jun 25, 1997)(unpub.). Initially, the administrative law judge credited the miner with twenty-seven and fifty-two hundredths (27.52) years of coal mine employment

Co., BRB No. 96-1723 BLA (Jun 25, 1997) (unpub.); Director's Exhibits 1, 62. Following the miner's death in January 1998, claimant filed a request for modification on behalf of the miner with the district director on June 2, 1998. Director's Exhibit 64. In a proposed decision dated February 2, 1999, the district director awarded benefits. Director's Exhibit 71. However, by Order dated March 31, 1999, the district director rescinded the decision and issued a Show Cause Order as to why the request for modification should not be denied. Director's Exhibit 75. Subsequently, the district director issued a proposed Decision and Order again awarding benefits. Director's Exhibits 77, 81. The case was thereafter transferred to the Office of Administrative Law Judges. Director's Exhibit 113.

Claimant filed a survivor's claim for benefits on October 27, 1999, which was denied by the district director. Director's Exhibits 90, 101, 107. The survivor's claim was also transferred to the Office of Administrative Law Judges on May 23, 2000. Director's Exhibit 113. Both the miner's request for modification and the survivor's claim are currently before the Board.

² Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, 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).

³ 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

and adjudicated the case pursuant to 20 C.F.R. Part 718. In considering claimant's request for modification in the miner's claim, the administrative law judge found the newly submitted medical evidence sufficient to establish the existence of pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). Therefore, the administrative law judge found the new evidence sufficient to establish a change in conditions pursuant to Section 725.310 (2000).⁴ Weighing all of the medical evidence, the administrative law judge further found that the evidence was sufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found the medical evidence insufficient to establish that the miner's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). With regards to the survivor's claim, the administrative law judge found that the medical evidence was 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). Accordingly, the administrative law judge denied benefits in both the miner's claim and the 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 on the merits of this appeal.⁵

⁴ The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claims, which were pending on January 19, 2001. See 20 C.F.R. §725.2.

⁵ The parties do not challenge the administrative law judge's decision to credit the miner with 27.52 years of coal mine employment, or her findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b) and 725.310. Because these findings are not adverse to claimant, they are affirmed. See

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). The Board's scope of review is defined by statute. 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'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 under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

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 weight of the medical evidence of record is insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c). The administrative law judge, in the instant case, considered the relevant medical opinion evidence and acted within his discretion in concluding that claimant's totally disabling respiratory impairment was not due to pneumoconiosis pursuant to Section 718.204(c).⁶ See *Hicks, supra*. The administrative law judge properly set forth the evidence of record, incorporating the evidence submitted prior to claimant's request for modification, see Decision and Order at 9-15, and concluded that the evidence was insufficient to establish that pneumoconiosis contributed to claimant's total disability. Decision and Order at 18-19; 20 C.F.R. §718.204(c). The administrative law judge permissibly relied on the opinions of Drs. Naeye, Kleinerman, Roggli, Tomashefski, Broudy, Bush, Dahhan, Fino and Morgan, who stated definitively that claimant's respiratory impairment was due to smoking and not coal mine employment. Specifically, the physicians opined that the degree of pneumoconiosis found in the post-mortem lung biopsy was too minimal to have caused any respiratory or pulmonary impairment prior to the miner's death. Decision and Order at 18-19; Director's Exhibits 69, 74, 78, 82, 99, 108; Employer's Exhibits 1-5, 8; see *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995)(Butzner, J., dissenting); see also *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). Because the administrative law judge considered the relevant evidence, we affirm her finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), as it is supported by substantial evidence and is in accordance with law.

⁶ Pursuant to Section 718.204(c), claimant must prove by a preponderance of the evidence that pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); see *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

With respect to the survivor's claim, we conclude that substantial evidence supports the administrative law judge's findings that the miner's death was not due to pneumoconiosis pursuant to Section 718.205(c).⁷ The administrative law judge considered all of the medical evidence of record regarding the cause of the

⁷ 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, 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, 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

miner's death, including the death certificate, post-mortem lung biopsy report and the numerous medical reports which were based on a review of the medical evidence of record, including lung tissue slides from the post-mortem lung biopsy and the biopsy report.⁸ Decision and Order at 10-15; Director's Exhibits 65, 68, 69, 73, 74, 76, 78, 80, 82, 95, 97-99, 108, 111; Employer's Exhibits 1-5, 8. In reviewing this evidence, the administrative law judge reasonably found that the preponderance of the physicians stated that pneumoconiosis did not play any role in the miner's death.⁹ Decision and Order at 20-21; 20 C.F.R. §§718.205(c)(1), (2), (5); *see Shuff, supra*. We therefore 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). 20 C.F.R. §718.205(c); *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)*.

⁸ The record contains the death certificate which lists the cause of the miner's death as bronchopneumonia; due to septicemia. Other significant conditions noted were chronic obstructive pulmonary disease and hypertension. Director's Exhibits 65, 95. In addition, the record contains the post-mortem lung biopsy report by Dr. Patel, who provided a diagnosis of emphysema with anthracosis. In addition, Dr. Patel stated that both lungs showed focal inflammatory focus with fungal hyphae suggestive of a focal fungal infection. However, Dr. Patel did not provide a specific opinion regarding the exact cause of the miner's death. Director's Exhibits 68, 96.

⁹ 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.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge