

BRB No. 03-0117 BLA

FRANCES E. POOLE (On behalf of and as Widow of STERLING E. POOLE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
FREEMAN UNITED COAL MINING COMPANY)	DATE ISSUED: 09/17/2003
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS=)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest		DECISION and ORDER

Appeal of the Decision and Order B Denying Benefits of Lee J. Romero, Jr.,
Administrative Law Judge, United States Department of Labor.

Frances E. Poole, Holden, Louisiana, *pro se*.

John A. Washburn (Gould & Ratner), Chicago, Illinois, for employer.

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order B Denying Benefits (01-BLA-1092 and 01-BLA-1093) of Administrative Law Judge Lee J. Romero, Jr. rendered on a miner=s 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).¹ The administrative law judge credited the miner with fourteen years of coal mine employment and considered the claims under 20 C.F.R. Part 718 based on the dates of filing. Considering the miner=s claim, the administrative law judge found that total disability was established but that the evidence failed to establish the existence of pneumoconiosis or that total disability was due to pneumoconiosis. Benefits were accordingly denied on the miner=s claim. Turning to the survivor=s claim, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis and that death was due to pneumoconiosis. Benefits were accordingly denied on the survivor=s claim.

On appeal, claimant generally challenges the administrative law judge=s denial of benefits on both the miner=s and the survivor=s claim. Employer responds, contending that the administrative law judge=s Decision and Order denying benefits on both the miner=s and the survivor=s claim should be affirmed. The Director, Office of Workers= Compensation Programs (the Director), however, requests that the case be remanded to the district director because he has failed to provide claimant with a complete, credible pulmonary examination addressing the existence of legal pneumoconiosis and whether claimant=s total disability is due to pneumoconiosis, as required by the Act.

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. *Hodges v. BethEnergy Mines, Inc.*, 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 the existence of pneumoconiosis, that the

¹. 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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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*).

To establish entitlement to survivor=s benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner=s death was due to pneumoconiosis. *See* 20 C.F.R. ' '718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In survivor=s claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner=s death, pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death, death was caused by complications of pneumoconiosis, or the presumption, related to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. '718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner=s death if it hastens the miner=s death. 20 C.F.R. '718.205(c)(5); *see Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).²

It is well established that the Department of Labor (DOL) has a statutory duty to provide the miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate his claim. 30 U.S.C. '923(b); *Hodges*, 18 BLR 1-84; *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *accord Cline v. Director, OWCP*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1992); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*).

The Director concedes that he failed to provide the miner with a complete, credible pulmonary evaluation addressing the elements of entitlement because Dr. Hebert=s report did not state a meaningful diagnosis of the miner=s lung disease under Section 718.202(a)(4), *i.e.*, it failed to address whether the miner suffered from legal pneumoconiosis, and because it completely failed to address the relationship (if any) between the miner=s lung disease and total disability. Hence, we grant the Director=s request to vacate the administrative law judge=s Decision and Order denying benefits on the miner=s claim and remand this case to the district director for further development of expert medical evidence regarding the cause of the miner=s chronic obstructive pulmonary disease, *see* 20 C.F.R. '718.201(a)(2), 718.202(a)(4), and whether there was a relationship between the disease and the miner=s total disability. *See* 20 C.F.R. '718.204(c). Likewise, although the Director has not

² The miner=s coal mine employment was in Pennsylvania and Illinois, but his last coal mine employment was in Illinois. Director=s Exhibit 2.

requested remand of the survivor=s claim, that claim must also be remanded for further development regarding the issue of the existence of legal pneumoconiosis at Section 718.202(a)(4). Although the administrative law judge found that claimant did not establish that the miner=s death was due to pneumoconiosis, that finding cannot be affirmed because the administrative law judge=s evaluation of the credibility of opinions was based, in part, on their consistency with his finding of no pneumoconiosis, Decision and Order at 27, and the Director has conceded that the evidence was not sufficiently developed concerning the existence of legal pneumoconiosis. *See* 20 C.F.R. ' ' 718.201(a)(2), 718.202(a)(4).

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is vacated and the case is remanded to the district director for further development of the evidence consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge