

BRB No. 06-0357 BLA

CARRIE N. SHERER	)	
(Widow of HOWARD K. SHERER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
McWANE COAL COMPANY,	)	
INCORPORATED	)	DATE ISSUED: 09/28/2006
	)	
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 – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Carrie N. Sherer, Jasper, Alabama, *pro se*.

C. Andrew Kitchen (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Rejection of Claim (03-BLA-6507) rendered by Administrative Law Judge Edward Terhune Miller with respect to a survivor’s claim filed pursuant to the provisions of the Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, credited the miner with twenty-five years of coal mine

employment,<sup>1</sup> and found that employer is the responsible operator. The administrative law judge found that the evidence did not establish either the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.205(c).<sup>2</sup> Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.<sup>3</sup>

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17

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<sup>1</sup> The record indicates that the miner's coal mine employment occurred in Alabama. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>2</sup> The miner filed a claim for benefits on October 20, 1977. Director's Exhibit 1. In a Decision and Order-Denying Benefits issued on October 22, 1985, Administrative Law Judge Tom M. Allen found that although the miner established invocation of the interim presumption that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(4), employer rebutted the presumption pursuant to 20 C.F.R. §727.203(b)(3), (b)(4) by establishing both that the miners' disability did not arise out of coal mine employment and that he did not have pneumoconiosis. Director's Exhibit 1. The miner died on June 6, 1988. Director's Exhibit 11. Claimant filed her claim for survivor's benefits on July 25, 2002. Director's Exhibit 2.

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding crediting the miner with twenty-five years of coal mine employment, and his finding that employer is the responsible operator. *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a "substantially contributing cause or factor leading to" the miner's death. 20 C.F.R. §718.205(c)(2), (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); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 1367, 21 BLR 2-166, 2-176 (11th Cir. 1997).

The record indicates that the miner died at home on June 6, 1988. Director's Exhibit 11; Hearing Tr. at 22. No autopsy was performed. The miner's death certificate, completed by his treating physician, Dr. Tai, listed cardiopulmonary arrest due to coronary artery disease as the cause of death. Director's Exhibit 11. No other causes or conditions were listed.

Three medical reports addressed whether pneumoconiosis caused or hastened the miner's death. Dr. Tai, who practices General Medicine, noted that the miner was diagnosed with chronic obstructive lung disease by another physician, Dr. Hamilton, in 1977. Claimant's Exhibit 1 at 1. Dr. Tai opined that the miner's chronic obstructive lung disease was caused by his coal mine dust exposure. *Id.* Dr. Tai further opined that chronic obstructive lung disease contributed to the miner's death by reducing the oxygen entering his lungs, thereby causing his heart to work harder, resulting in stress on the heart that contributed to heart failure leading to the miner's death. Claimant's Exhibit 1 at 1-2. By contrast, Drs. Goldstein and Russakoff, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, reviewed the miner's records and concluded that his death was unrelated to pneumoconiosis and was due solely to heart disease. Employer's Exhibits 1-3. Dr. Russakoff explained that there was no medical data in the miner's medical records to support a diagnosis of chronic obstructive lung disease. Employer's Exhibit 3 at 2-4.

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered all of the relevant evidence and found that despite Dr. Tai's status as the miner's treating physician, Dr. Tai's opinion as to the cause of the miner's death was not convincing. Substantial evidence supports the administrative law judge's finding, which is in accordance with law. *See* 20 C.F.R. §718.104(d)(5); *McFall*, 12 BLR at 1-177.

Specifically, the administrative law judge noted that although Dr. Tai stated in his report that chronic lung disease due to coal mine employment contributed to the miner's death, the death certificate that Dr. Tai had completed "did not suggest any pulmonary cause of death." Decision and Order at 7. The administrative law judge also noted that Drs. Goldstein and Russakoff, "both qualified pulmonary specialists," had reviewed the miner's medical records and found no evidence of chronic obstructive lung disease. *Id.* The administrative law judge concluded that Dr. Tai's diagnosis of chronic obstructive

lung disease “appears to have been based almost exclusively upon Dr. Hamilton’s undocumented diagnosis in 1977 . . . .” *Id.* Whether Dr. Tai’s report was adequately documented and reasoned was a credibility matter for the administrative law judge. *See U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004). Additionally, the administrative law judge permissibly found that the contrary opinions of Drs. Russakoff and Goldstein outweighed Dr. Tai’s opinion because “[t]hese physicians provided documentation and reasoning which was at least equal to and essentially superior to, and much more convincing than, Dr. Tai’s,” in opining that the miner’s death was unrelated to pneumoconiosis. Decision and Order at 7; *see* 20 C.F.R. §718.104(d)(5); *Jones*, 386 F.3d at 992, 23 BLR at 2-238. Because substantial evidence supports the administrative law judge’s permissible finding that Dr. Tai’s opinion did not establish that pneumoconiosis contributed to or hastened the miner’s death, we affirm the administrative law judge’s finding pursuant to 20 C.F.R. §718.205(c).

Since claimant did not establish that the miner’s death was due to pneumoconiosis, an essential element of entitlement in a survivor’s claim, we must affirm the denial of benefits.<sup>4</sup> *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo*, 17 BLR at 1-87.

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<sup>4</sup> We need not address the administrative law judge’s determination that claimant did not prove that the miner had pneumoconiosis. Error, if any, in the administrative law judge’s findings under 20 C.F.R. §718.202(a) is harmless in light of our affirmance of the administrative law judge’s determination that claimant did not establish that the miner’s death was due to pneumoconiosis, an essential element of entitlement. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge