

BRB No. 08-0865 BLA

I. S.)	
(Widow of L.S.))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 09/14/2009
)	
BRADFORD COAL COMPANY)	
)	
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

I. S., Cranks, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denial of Benefits (2003-BLA-06430) of Administrative Law Judge Thomas F. Phalen, Jr., 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). Claimant¹ filed her application for benefits on December 17, 2001. Director’s Exhibit 3.

¹ Claimant is the widow of the miner, who died on December 17, 2001. Director’s Exhibit 19. On November 8, 1979, the miner filed an application for benefits, which was

In a Decision and Order dated April 25, 2005, the administrative law judge credited the miner with twenty-five years of coal mine employment, but found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 41. Accordingly, the administrative law judge denied benefits.

By letter dated May 19, 2005, claimant appealed the administrative law judge's Decision and Order. Claimant's appeal letter was received by the Office of the Solicitor on May 26, 2005, but was not forwarded to the Board until September 25, 2008. On October 24, 2008, the Board acknowledged claimant's appeal as timely filed pursuant to 20 C.F.R. §802.207(a)(2).² *I.S. v. Bradford Coal Co.*, BRB No, 08-0865 BLA (unpub. Order) (Oct. 24, 2008).

On appeal, claimant asserts, "the [administrative law judge] and all other fact finders for the government in this claim have failed to consider relevant and probative evidence" as to whether the miner's death was due to pneumoconiosis. Claimant's Brief at 1. Specifically, claimant asserts that proper consideration has not been given to a state workers' compensation award for total disability due to pneumoconiosis, the miner's death certificate, and medical records from Harlan Appalachian Regional Hospital.

denied on May 7, 1980, on the grounds that he failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. The miner subsequently filed a request for modification, which was denied on August 19, 1985. *Id.* The miner took no further action with regard to the denial of his claim.

² In the period between the filing of claimant's 2005 appeal letter with the Office of the Solicitor and the Board's 2008 Order acknowledging that appeal, claimant filed a request for modification with the district director on April 12, 2006. Director's Exhibit 42. The case was forwarded to the Office of Administrative Law Judges and was assigned to Administrative Law Judge Joseph E. Kane, who issued a Decision and Order – Denying Request for Modification and Denying Claim for Benefits on May 28, 2008. Because claimant took no action with regard to Judge Kane's 2008 Decision and Order, the Board's jurisdiction in this appeal is limited to review of the Decision and Order issued by Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), on April 25, 2005.

Employer responds to claimant's appeal, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.³

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational and are in accordance with applicable law.⁴ 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).

In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Pursuant to Section 718.205(c), the administrative law judge found that there is no evidence from which to conclude that pneumoconiosis caused, contributed to or hastened the miner's death.⁵ As noted by the administrative law judge, the miner's death certificate was signed by his treating physician, Dr. Dahhan, who identified the immediate causes of the miner's death as respiratory failure, cor pulmonale and atrial

³ We affirm, as unchallenged by the parties on appeal, and not adverse to claimant, the administrative law judge's finding that the miner worked twenty-five years in coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 4.

⁵ The administrative law judge correctly found that claimant was not eligible for a presumption that the miner's death was due to pneumoconiosis. Decision and Order at 8; 20 C.F.R. §§718.304, 718.305, 718.306.

fibrillation. Director's Exhibit 19. Dr. Dahhan completed a questionnaire after the miner's death, indicating that he had treated the miner from 1997 through 2001 for chronic obstructive pulmonary disease (COPD), cor pulmonale and heart failure. Director's Exhibit 12. Dr. Dahhan check-marked a box indicating that the miner did not have an occupational lung disease that was caused by his coal mine employment. *Id.* He reported that the miner had a chronic lung disease caused by smoking. Dr. Dahhan also check-marked a box indicating that pneumoconiosis did not contribute to or hasten the miner's death. *Id.*

Similarly, in a report dated April 15, 2004, Dr. Branscomb reviewed the miner's medical records, including the material from Dr. Dahhan, and opined that the miner's death was unrelated to coal dust exposure. Director's Exhibit 36. Dr. Branscomb opined that the miner died as a result of leukemia, thromboembolism, coronary disease, heart failure and COPD caused by smoking. *Id.* Dr. Branscomb stated that the miner "would have died as he did[,] at the same time [and] in the same way[,] had he never mined." *Id.*

Contrary to claimant's assertion, in finding that claimant failed to satisfy her burden of proof under Section 718.205(c), the administrative law judge did not fail to consider relevant evidence as to whether the miner's death was due to pneumoconiosis. The administrative law judge acknowledged that the miner "received an award of benefits for occupational pneumoconiosis from Kentucky's state workers' compensation until the time of his death." Decision and Order at 3, *citing* Hearing Transcript at 12. The administrative law judge also specifically considered the medical treatment records from Harlan Appalachian Regional Hospital, including a discharge note from June 21, 1997, which stated that the miner had a *history of pneumoconiosis*.⁶ Decision and Order at 5; Director's Exhibit 12. However, because none of the evidence cited by claimant in this appeal attributes the miner's death to pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to satisfy her burden of proof under Section 718.205(c). *See Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown*, 996 F.2d at 817, 17 BLR at 2-140.

Because the administrative law judge properly determined that "[t]here is no evidence in the record to indicate that the miner's death was due to pneumoconiosis," we reject claimant's allegations of error and her request that we remand this case for

⁶ A discharge entry dated April 28, 1995, from Harlan Appalachian Regional Hospital, which claimant references in her brief, was not submitted by claimant as part of the record before the administrative law judge. We note that if claimant has additional evidence that she wants considered with respect to her survivor's claim, she may submit that evidence to the district director, along with a request for modification, pursuant to 20 C.F.R. §725.310.

consideration of all relevant evidence. Decision and Order at 10. We therefore affirm the administrative law judge determination that the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) and the denial of survivor's benefits.⁷

Accordingly, we affirm the administrative law judge's April 25, 2005 Decision and Order – Denial of Benefits.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁷ The administrative law judge also found that there was no medical evidence to establish that the miner had pneumoconiosis. It is not necessary that we address the administrative law judge's findings as to the existence of pneumoconiosis at 20 C.F.R. §718.202(a), as he properly determined that there was no medical evidence that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), thereby precluding claimant's entitlement to survivor's benefits.