

BRB No. 97-1752 BLA

BEULAH WILLIAMS	)	
(Widow of FLOYD WILLIAMS)	)	
	)	
Claimant-Petitioner	)	)
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED:
	)	
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 of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Ray E. Ratliff, Jr., Charleston, West Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0094) of Administrative Law Judge Edith Barnett denying benefits on a 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). The administrative law judge determined initially that no miner's claim was pending. Upon consideration of the survivor's claim, the administrative law judge credited the deceased miner with thirty-six and one-half years of coal mine employment, found that the medical evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20

C.F.R. §§718.202(a)(2) and 718.203(b), but concluded that claimant failed to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, she denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that there was no living miner's claim before her. Claimant further asserts that the administrative law judge erred when she found that no physician of record opined that the miner's death was due to or hastened by pneumoconiosis. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.<sup>1</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The miner filed a claim for benefits on November 17, 1983 which he withdrew on April 30, 1987. Director's Exhibit 22 at 2, 131; see 20 C.F.R. §725.306. The record contains no further claims by the miner. The miner died on December 3, 1995, and claimant filed her application for survivor's benefits on January 2, 1996. Director's Exhibit 1. Despite the absence from the record of a miner's application for benefits (Form CM-911), claimant's counsel asserted at the hearing that both a miner's claim and a survivor's claim were pending. Hearing Transcript at 4. Claimant's testimony on this issue was rather unclear, but she appeared to state that at the time she filed her own claim for survivor's benefits, she intended to also claim any benefits due the miner for total disability due to pneumoconiosis. Hearing Transcript 8-10, 12, 15.

Claimant asserts that because she intended to claim benefits on behalf of the miner, the administrative law judge erred in concluding that no miner's claim was

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<sup>1</sup> We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

filed. Claimant's Brief at 3-4. The applicable regulations provide that a claim must be filed on a form prescribed and approved by the Office of Workers' Compensation Programs (OWCP) of the Department of Labor. 20 C.F.R. §§725.301, 725.304, 725.305. In addition, under certain circumstances, the filing of a signed statement with the OWCP indicating an intention to claim benefits will also be considered the filing of a claim. 20 C.F.R. §725.305. In such a case, the OWCP will notify the miner or the party acting on his behalf of the need to file the prescribed form within six months. *Id.* Review of the record reveals no miner's claim form filed subsequent to the withdrawal of the miner's 1983 claim, no evidence of a written statement from the miner indicating his intention to pursue a claim, and no notice from the OWCP instructing the miner or a proper party acting on his behalf to file a claim form. Because the record indicates that no miner's claim was filed subsequent to the withdrawal of his 1983 claim, the administrative law judge properly concluded that no miner's claim was pending. See 20 C.F.R. §725.301(d); *Bianco v. Director, OWCP*, 12 BLR 1-94, 1-96 (1989). Therefore, we reject claimant's contention and we turn to the merits of the case.

To establish entitlement to survivor's benefits, in addition to proving the existence of pneumoconiosis arising out of coal mine employment, see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993), claimant must also establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if pneumoconiosis hastens death in any way, it is a substantially contributing cause of death pursuant to Section 718.205(c)(2). *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Pursuant to Section 718.205(c), claimant contends that the administrative law judge erred by failing to construe the autopsy prosector's diagnosis of pneumoconiosis as evidence of death due to pneumoconiosis. Claimant's Brief at 6-7.

Dr. Dy, the autopsy prosector, listed under the heading "Final Anatomic Diagnosis" the diagnoses of lung cancer, pneumonia, emphysematous bleb, fibrosis, and mild to moderate macular anthracotic pneumoconiosis. Director's Exhibit 9 at 1. In this part of his report, Dr. Dy did not specify a cause of death or state whether any of the diagnosed conditions contributed to death. In another part of his report, labeled "Correlated Summary," Dr. Dy stated that the miner died of lung cancer, adding that the miner's lung tissues "showed also" pneumonia, hemorrhages and edema, fibrosis, emphysema, and pleural fibrosis. Director's Exhibit 9 at 5.

The miner's death certificate listed pneumonia and lung cancer as the causes of death, and no contributing conditions were listed. Director's Exhibit 8. Drs. Kleinerman and Naeye examined the autopsy lung tissue slides, reviewed the autopsy report and the miner's medical records, and concluded that the miner had pneumoconiosis which was too mild to have hastened his death due to smoking-related lung cancer. Employer's Exhibits 1, 2. Drs. Fino and Zaldivar reviewed the autopsy report and the miner's medical records and reached the same conclusion. Employer's Exhibits 5, 6.

The administrative law judge discussed all of the relevant evidence and found that since none of the physicians “believed that pneumoconiosis caused, contributed to[,] or hastened [the miner's] death,” claimant “failed to prove that her husband's death was due to pneumoconiosis.” Decision and Order at 6. Claimant asserts that the autopsy prosector's diagnosis of pneumoconiosis was “on its face, a finding of cause of death” that the administrative law judge ignored. Claimant's Brief at 6.

It is the administrative law judge's duty to consider all of the evidence and draw his or her own inferences, see *Lafferty v. Cannelton Industries, Inc.* 12 BLR 1-190, 1-192 (1989), and the Board is not empowered to reweigh the evidence. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Thus, contrary to claimant's contention, the administrative law judge was not bound to read Dr. Dy's diagnosis of pneumoconiosis as an affirmative statement by him that pneumoconiosis caused or hastened the miner's death. Claimant bears the burden of proving this fact, and no report in the record states that pneumoconiosis caused or hastened the miner's death. The administrative law judge considered the only explicit death causation statement that Dr. Dy made, which was that lung cancer caused the miner's death. Decision and Order at 3; Director's Exhibit 9 at 5. Substantial evidence supports the administrative law judge's finding that the miner's death was unrelated to pneumoconiosis but was instead due to smoking-related lung cancer.<sup>2</sup> Director's Exhibits 8, 9; Employer's Exhibits 1, 2, 5, 6. Therefore, we reject claimant's contention and we affirm the administrative law judge's finding that claimant failed to prove that pneumoconiosis caused or hastened the miner's death pursuant to Section 718.205(c)(1), (2). See *Shuff, supra*.

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<sup>2</sup> Claimant does not challenge on appeal the administrative law judge's finding that the smoking histories recorded by various physicians indicated “at least a 30 pack[-]year history” of cigarette smoking. Decision and Order at 3.

Because claimant has failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), a necessary element of entitlement in a survivor's claim under Part 718, we affirm the denial of benefits.<sup>3</sup> See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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<sup>3</sup> The administrative law judge did not make a finding at 20 C.F.R. §718.205(c)(3). This section is inapplicable because the record contains no evidence of complicated pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge