

BRB No. 93-1175 BLA

ELLA BARNES)	
(Widow of SIM BARNES))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Bernard J. Gilday, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Edward Waldman (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (92-BLA-0158) of Administrative

¹ Claimant is Ella Barnes, widow of the miner, Sim Barnes, who died on August 25, 1989. Director's Exhibit 8. Claimant filed her survivor's claim on October 26, 1989, which was administratively denied on March 27, 1990. Director's Exhibits 1, 29. Thereafter, claimant filed a request for modification on March 25, 1991, which was denied on June 6 and July 26, 1991. Director's Exhibits 34, 38. Claimant then

Law Judge Bernard J. Gilday, Jr. 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). Reviewing all the evidence of record to determine whether a mistake in a determination of fact had been

requested a hearing before an administrative law judge. Director's Exhibit 39.

made pursuant to 20 C.F.R. §725.310, the administrative law judge credited the miner with one and three-quarter years of coal mine employment and found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found the evidence insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantial contributing cause or factor leading to the miner's death pursuant to Section 718.205(c) and, accordingly, denied modification and benefits.

On appeal, claimant contends that the administrative law judge should have applied the true doubt rule to the x-ray evidence at Section 718.202(a)(1). Claimant's Brief at 2-4. Further, claimant asserts that the administrative law judge failed to apply the proper legal standard in analyzing the medical opinions at Section 718.205(c), Claimant's Brief at 3-4, and also argues that she is entitled to benefits because the evidence establishes that the miner was totally disabled due to pneumoconiosis at the time of his death. Claimant's Brief at 5-6. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.²

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).

Initially, claimant contends that the administrative law judge erred by failing to apply the true doubt rule at Section 718.202(a)(1). Claimant's Brief at 2-4. The United States Supreme Court has invalidated the true doubt rule as violative of Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *Director, OWCP v. Greenwich Collieries*, U.S. , 114 S.Ct. 2251 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (10th Cir. 1993). Therefore, we reject claimant's contention. Further,

² We affirm as unchallenged on appeal the administrative law judge's finding that the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the administrative law judge found the existence of pneumoconiosis established at Section 718.202(a)(4). Decision and Order at 10; see *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Claimant next asserts that the administrative law judge applied the wrong legal standard in analyzing the opinions of Drs. Bushey and Krasnopolsky at Section 718.205(c). Claimant's Brief at 3. Specifically, claimant contends that because she need not prove that pneumoconiosis was the sole cause of the miner's death, the administrative law judge should have found that the opinions of Drs. Bushey and Krasnopolsky attributed the miner's death to pneumoconiosis because both physicians diagnosed pneumoconiosis. Claimant's Brief at 3-4.

To establish entitlement to benefits, claimant must prove that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a). For survivor's claims filed after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes 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), (4). The United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Initially, we note that neither Dr. Bushey nor Dr. Krasnopolsky addressed the cause of the miner's death or whether pneumoconiosis hastened his death.³ Director's Exhibits 13, 15. The death certificate specifies lung cancer as the immediate cause of death and lists no other causes or conditions. Director's Exhibit 8. Further, a review of the record reveals no evidence linking the miner's lung cancer to coal dust exposure.

The administrative law judge found that the death certificate was the only

³ After examining the miner on October 10, 1973, Dr. Bushey diagnosed chronic lung disease with pulmonary fibrosis compatible with coal workers' pneumoconiosis, advising the miner to avoid further exposure to dust and cigarette smoke. Director's Exhibit 13. Dr. Krasnopolsky, who treated the miner at the Appalachian Regional Medical Center in September 1988, diagnosed lung cancer, pneumonitis, severe hypoxia, hyponatremia, and leukocytosis. Director's Exhibit 15. Dr. Krasnopolsky noted Dr. Bushey's 1973 diagnosis and stated that the miner was treated for his cancer, pneumoconiosis, chronic obstructive pulmonary disease, and related problems until his death. *Id.*

evidence regarding the cause of death and that, because it listed only lung cancer, it was insufficient to establish that pneumoconiosis caused or was a substantial contributing cause of the miner's death. Decision and Order at 10; Section 718.205(c)(1), (2), (4). We affirm this finding as supported by substantial evidence. See *Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986); *Gouge v. Director, OWCP*, 8 BLR 1-307 (1985).

Lastly, claimant contends that she is entitled to benefits because the evidence establishes that the miner was totally disabled by pneumoconiosis at the time of his death. Claimant's Brief at 5-6. In a survivor's claim, the only issue is death due to pneumoconiosis. See *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988). Moreover, there is no miner's claim pending before us by which claimant could establish derivative entitlement to benefits.⁴ See 30 U.S.C. §932(l); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989). Therefore, we reject claimant's contention.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

_____ JAMES F.
BROWN
Administrative Appeals Judge

_____ NANCY S.
DOLDER
Administrative Appeals Judge

⁴ A claim for benefits filed by the miner was denied on October 3, 1973. Director's Exhibit 28. The record contains no further information regarding the miner's claim.