

BRB No. 96-0982 BLA

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|-------------------------------|---|--------------------|
| ROSE SWANSBORO                | ) |                    |
| (Widow of CLYDE SWANSBORO)    | ) |                    |
|                               | ) |                    |
| Claimant-Petitioner           | ) |                    |
|                               | ) |                    |
| v.                            | ) |                    |
|                               | ) | DATE ISSUED:       |
| CONSOLIDATION 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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Rose Swansboro, Cadiz, Ohio, *pro se*.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel,<sup>1</sup> appeals the Decision and Order

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<sup>1</sup> Claimant is Rose Swansboro, widow of Clyde Swansboro, the miner, who died on April 8, 1993. Director's Exhibit 7. Mrs. Swansboro filed her survivor's claim on April 4, 1994. Director's Exhibit 1. Although *pro se* before the Board, Mrs. Jackson was represented by counsel below. Director's Exhibit 19.

(95-BLA-1622) of Administrative Law Judge Daniel L. Leland 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 credited the miner with twenty-nine and one-quarter years of coal mine employment, found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b), but concluded that the evidence failed to establish death due to pneumoconiosis

pursuant to Section 718.205(c) and, accordingly, denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.<sup>2</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 Co.*, 12 BLR 1-176 (1989). 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).

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<sup>2</sup> We affirm as unchallenged on appeal and supported by substantial evidence the administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

To be entitled to benefits pursuant to 20 C.F.R. §718.205(c),<sup>3</sup> claimant must demonstrate by a preponderance of the evidence that the miner's death was due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.205(c)(1), the administrative law judge correctly noted that the relevant medical evidence indicated that the miner died due to a metastatic carcinoma. Director's Exhibits 7, 8; Claimant's Exhibit 2; Employer's Exhibit 4.

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<sup>3</sup> 20 C.F.R. §718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis:

(1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c)(1)-(3).

Review of the record reveals no evidence linking the miner's carcinoma to his coal dust exposure. See 20 C.F.R. §718.201. Therefore, we affirm the administrative law judge's finding that the evidence failed to establish death due to pneumoconiosis pursuant to Section 718.205(c)(1).

Pursuant to Section 718.205(c)(2), the administrative law judge found that there was "no medical evidence in the record which makes any causal connection between the [miner's] death from metastatic carcinoma and his pneumoconiosis." Decision and Order at 4. Section 718.205(c)(2) provides that 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). 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).

Dr. Friedman, the miner's treating physician, listed only "metastatic large cell carcinoma" as the cause of death on the miner's death certificate and medical records. Director's Exhibits 7, 8. Dr. Friedman later reviewed the miner's medical records and opined that "I do not find clear evidence to support the possibility that pneumoconiosis contributed in whole or in part to [the miner's] death." Claimant's Exhibit 2. Dr. Fino also reviewed the miner's medical records and concluded that, even assuming the miner had pneumoconiosis, it "did not hasten death because he had no pulmonary impairment due to any type of underlying lung condition." Employer's Exhibit 4 at 22. Dr. Fino agreed with Dr. Friedman that the miner's death was due to cancer. Employer's Exhibit 1.

Inasmuch as the record contains no evidence that the miner's pneumoconiosis hastened his death from a metastatic carcinoma, we affirm the administrative law judge's finding that the evidence failed to establish that pneumoconiosis was a substantially contributing cause or factor leading to death. See 20 C.F.R. §718.205(c)(2); see also *Brown, supra*.

Pursuant to Section 718.205(c)(3), the administrative law judge correctly noted that the record contained no evidence of complicated pneumoconiosis and concluded that the presumption at Section 718.304 is inapplicable to this case. We therefore affirm his finding pursuant to Section 718.205(c)(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. See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

\_\_\_\_\_ JAMES F.  
BROWN  
Administrative Appeals Judge

\_\_\_\_\_ NANCY S.  
DOLDER  
Administrative Appeals Judge

\_\_\_\_\_ REGINA C.  
McGRANERY  
Administrative Appeals Judge