

BRB No. 00-0757 BLA

ADRIENNE SWINEY)
(Widow of LLOYD SWINEY))
)
Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent)

DATE

ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Adrienne Swiney, Elkhorn City, Kentucky, *pro se*.

Edward Waldman (Judith E. Kramer, Acting 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, United States Department of Labor.

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

PER CURIAM:

Claimant, the miner's widow and without the assistance of counsel¹, appeals the Decision and Order (99-BLA-53) of Administrative Law Judge Daniel J. Roketenetz denying benefits in 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).² The

¹Susie Davis, a benefits counselor with the Kentucky Black Lung Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision. The Board acknowledged the instant appeal on May 11, 2000, stating that the case would be reviewed under the general standard of review.

²The Department of Labor has amended the regulations implementing the Federal Coal

administrative law judge found ten and one-quarter years of qualifying coal mine employment, and based on the date of filing, considered entitlement in this survivor's claim pursuant to 20 C.F.R. Part 718.³ Decision and Order at 4-5. The administrative law judge, after considering all of the evidence of record, concluded that claimant failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205 (2000). Decision and Order at 5-10. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs, responds urging affirmance of the administrative law judge's Decision and Order as the denial of benefits is supported by substantial evidence.

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 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 are 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).

Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³Claimant is Adrienne Swiney, the miner's widow. The miner, Lloyd Swiney, filed a claim for benefits with the Social Security Administration on June 6, 1973, which was ultimately denied by the Department of Labor. Director's Exhibit 29. The miner took no further action. The miner died on May 18, 1997 and claimant filed her survivor's claim, the subject of the instant appeal, on August 21, 1997. Director's Exhibits 1, 2, 9.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which the parties have responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.⁴ Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201 (2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death.⁵ See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).

⁴Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

⁵This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge properly considered the entirety of the medical opinion evidence of record and rationally found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000). *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The relevant evidence of record concerning the cause of death consists of three medical opinions and the death certificate. Dr. Gibson, the miner's treating physician, opined that black lung contributed to and hastened Mr. Swiney's death. Director's Exhibit 14; Claimant's Exhibit 2. The death certificate, signed by Dr. Stomper, listed the cause of death as massive cerebral hemorrhage, due to ASHD with atrial fibrillation and rapid ventricular response and cirrhosis of the liver. Director's Exhibit 9. Dr. Jones opined that to a reasonable degree of medical certainty, coal workers' pneumoconiosis played a role in hastening and aggravating the death of Mr. Swiney. Director's Exhibit 22; Claimant's Exhibit 1. Dr. Burki opined that pneumoconiosis did not contribute to or hasten the miner's death. Director's Exhibit 15. The administrative law judge properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205(c) (2000) as Drs. Gibson and Jones, the only affirmative evidence that the miner's death was due to pneumoconiosis, failed to set forth any reasoning for their respective conclusions. *See Griffith, supra; Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*; Director's Exhibits 9, 14, 15, 22; Claimant's Exhibits 1, 2; Decision and Order at 10. Although the record indicates that Dr. Gibson was the miner's treating physician, the administrative law judge has provided a valid reason for finding his opinion insufficient to meet claimant's burden of proof. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 10; Director's Exhibit 14; Claimant's Exhibit 2.

The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000) as it is

supported by substantial evidence and is in accordance with law.⁶ *See Griffith, supra; Brown, supra; Trumbo, supra; Neeley, supra.*

Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address the administrative law judge's findings regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). *See Griffith, supra; Brown, supra; Trumbo, supra; Neeley, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

⁶The administrative law judge properly found that the presumption at 20 C.F.R. §718.304 (2000) is not applicable in this case as the record indicates that there is no evidence of complicated pneumoconiosis contained therein. *See* 20 C.F.R. §718.205(c)(3) (2000); Decision and Order at 6.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge