

BRB No. 04-0782 BLA

JOSEPHINE B. CHERPAK)	
(Widow of LEO CHERPAK))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
)	DATE ISSUED: 04/28/2005
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	
)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Robert C. Laity, Tonawanda, New York, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denying Benefits (03-BLA-0551) of

¹ Josephine B. Cherpak is the surviving spouse of Leo Cherpak, the miner, who died on April 14, 1997. Director's Exhibit 7. During his lifetime, the miner filed a claim on April 18, 1980, which was denied by the district director on February 20, 1981. Director's Exhibit 1. Although the miner subsequently filed a request for reconsideration, he did not submit any additional evidence and his claim was administratively closed. *Id.*

Administrative Law Judge Paul H. Teitler 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).² Claimant filed a survivor's claim on March 26, 2002. Director's Exhibit 3. The district director issued a Proposed Decision and Order Denying Benefits on November 13, 2002. Director's Exhibit 23. At claimant's request, the case was forwarded to the administrative law judge for a review on the record. The administrative law judge credited the miner with eight and one-half years of coal mine employment, but found that the evidence was insufficient to establish that the miner had coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge thus found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in determining the length of the miner's coal mine employment.³ Claimant also argues that the administrative law judge erred by not finding that the miner suffered from coal workers' pneumoconiosis. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits. Claimant also filed a statement in reply to the Director's response.⁴

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

² On July 2, 2004, Robert C. Laity filed a Notice of Appeal and supporting statement on claimant's behalf before the Board. On July 13, 2004, the Board inadvertently acknowledged claimant's appeal as *pro se*. We correct that error herein. Inasmuch as Mr. Laity is acting as a *bona fide* lay representative in this case, we will use the standard of review applicable when a claimant is represented by counsel. See 20 C.F.R. §§725.363(b), 725.365, 725.366, 802.211(a),(b),(d); *Burkholder v. Director, OWCP*, 8 BLR 1-58 (1985); see also *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

³ Claimant maintains that the miner worked twelve years in coal mine employment and that she would be entitled to the presumption at 20 C.F.R. §718.203(b).

⁴ On August 19, 2004, Mr. Laity filed a motion requesting that the Board toll the time given to him to file a reply brief. He indicated that he had received an incomplete copy of the Director's response brief and was awaiting a copy of page three of the brief to be provided to him by Director's counsel. The Board herein acknowledges receipt of Mr. Laity's motion, which is granted. Mr. Laity's reply statement is considered timely filed.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivors’ benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner’s death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor’s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner’s death, pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, death was caused by complications of pneumoconiosis, or the irrebuttable presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. § 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *see Lango v. Director, OWCP*, 104 F.3d 73, 21 BLR 2-12, (3d Cir. 1997); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).⁵ The administrative law judge must make a threshold determination as to the existence of pneumoconiosis under 20 C.F.R. §718.202(a) prior to consideration of whether the miner’s death was due to the disease. *See Trumbo*, 17 BLR at 1-85.

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the relevant evidence of record, we find that substantial evidence supports the administrative law judge’s denial of benefits. First, we affirm the administrative law judge’s determination that the miner had less than ten years of coal mine employment as that finding is corroborated by the miner’s social security records.⁶

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner’s last coal mine employment occurred in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibits 4, 5.

⁶ The administrative law judge misspelled claimant’s last name as “Cherpack” on his Decision and Order. However, the Social Security Earnings Statement obtained by the district director used the correct spelling for the miner’s name, “Leo Cherpak,” and the correct Social Security number as identified by the miner and claimant. Director’s Exhibit 5; Claimant’s Brief (July 2, 2004) at 1.

We note that the administrative law judge’s finding at 20 C.F.R. §718.202(a) is not dependent on his determination as to length of coal mine employment. Consequently, any error committed by the administrative law judge with regard to the length of the miner’s coal mine employment would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Director's Exhibit 3; Decision and Order at 3. Contrary to claimant's contention, time the miner spent performing military service must be excluded from the computation of coal mine employment. *See Kosack v. Director, OWCP*, 7 BLR 1-248 (1984). Insofar as the miner had less than ten years of coal mine employment, the administrative law judge properly found that claimant was precluded from invoking the rebuttable presumption that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b).⁷

As to the merits of entitlement, the administrative law judge correctly noted that none of the x-ray evidence developed prior to the miner's death was positive for the existence of pneumoconiosis; therefore, claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).⁸ Decision and Order at 4-5. Because the record contains no biopsy or autopsy evidence, the administrative law judge properly found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 5. Additionally, since claimant was unable to avail herself of any of the presumptions provided at 20 C.F.R. §§718.304, 718.305, or 718.306, the administrative law judge properly determined that she failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). *Id.*

With respect to 20 C.F.R. §718.202(a)(4), the administrative law judge correctly noted that the record contained a June 10, 2002 report from the miner's treating physician, Dr. Sullivan, who stated that the miner complained of shortness of breath, cough, and sputum beginning in April 1983. Director's Exhibit 20; Decision and Order at 6. Although the miner personally attributed his symptoms to coal dust exposure, the administrative law judge correctly found that neither Dr. Sullivan's report nor the miner's medical records included a diagnosis of pneumoconiosis. Decision and Order at 6. Similarly, the administrative law judge properly found that the miner's death certificate made no mention of pneumoconiosis, and listed the immediate cause of death as cardio respiratory arrest due to heart failure, ischemic cardiomyopathy, and end-stage renal failure. Director's Exhibit 7; Decision and Order at 6. Furthermore, the administrative law judge noted that the medical record was reviewed by Dr. Sherman, a Board-certified pulmonary specialist, who opined that the miner did not suffer from any chronic obstructive pulmonary disease, and that the miner's symptoms as described on the

⁷ This presumption also would not apply as claimant failed to establish the existence of pneumoconiosis.

⁸ The record contains three x-rays dated January 26, 1981, April 5, 1997, and April 14, 1997. The January 26, 1981 x-ray was read by two separate readers as negative for pneumoconiosis. Director's Exhibit 1. Both the April 5, 1997 and April 14, 1997 x-rays were read as negative for pneumoconiosis. Directors' Exhibit 16, 17.

treatment records were attributable to his heart condition and not coal mine employment. Director's Exhibit 22; Decision and Order at 6. Because the administrative law judge reasonably credited Dr. Sherman's superior credentials and his reasoned opinion that the miner did not have pneumoconiosis, *see Trumbo*, 17 BLR at 1-85; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 7.

Consequently, as claimant failed to carry her burden of proof to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Lango*, 104 F.3d at 73, 21 BLR at 2-12; *Lukosevicz*, 888 F.2d at 1001, 13 BLR at 2-101; Decision and Order at 7.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge