

BRB No. 02-0213 BLA

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

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Amy Clemons, Salyersville, Kentucky, *pro se*.

Mary Forrest-Doyle (Eugene Scalia, 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, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (01-BLA- 0682) of Administrative Law Judge Joseph E. Kane 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).<sup>2</sup> The administrative

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<sup>1</sup> Susie Davis, with the Kentucky Black Lung Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal

law judge found that the deceased miner was employed in the coal mines for five years.<sup>3</sup> Further, pursuant to claimant's request for modification, the administrative law judge found that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §§718.202(a)(1), and thereby a mistake in a determination of fact in the district director's prior denial of benefits. The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis, but failed to establish that the miner's pneumoconiosis arose, at least in part, out of coal mine employment at 20 C.F.R. §718.203(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the finding of the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order - Denying Benefits as supported by substantial

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Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> The administrative law judge adopted the finding by the administrative law judge in the miner's earlier claim of 5 years of coal mine employment as neither party in this case presented evidence to refute that finding. Moreover, evidence from the miner's claim shows that he stated that he worked "at least five years in underground coal mine employment." Director's Exhibit 8, and "five or six years." Director's Exhibit 7.

The miner's claim for benefits was filed March of 1973 and denied by the Department of Labor on December 13, 1979. The miner took no further action on that claim. Claimant, the widow of the miner who died on November 29, 1999, filed her claim for survivor's benefits on December 9, 1999.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. See 20 C.F.R. §§718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge properly found that the evidence of record failed to establish that pneumoconiosis arose, at least in part, out of coal mine employment. Addressing the medical opinions relevant to a determination of the etiology of the miner's pneumoconiosis, the administrative law judge concluded that because Dr. Burki found that claimant did not have pneumoconiosis based on claimant's short coal mine history and negative x-rays and CT scan, the doctor implicitly denied an etiology of coal mine employment. Decision and Order at 14; Director's Exhibit 18. Likewise, the administrative law judge concluded that Dr. Musgrave's opinion could not establish etiology inasmuch as Dr. Musgrave found a six year coal mine employment history and did not state that pneumoconiosis arose out of coal mine employment. Moreover, the administrative law judge noted that Dr. Musgrave's finding of pneumoconiosis itself was conclusory as the report was devoid of documentation supporting its finding. Decision and Order at 14; Director's

Exhibits 19, 26-12. Finally, the administrative law judge found that Dr. Vorghese's opinion was vague and equivocal as to the origin of the miner's "questionable" pneumoconiosis inasmuch as Dr. Vorghese responded, "? Partly" to the question of whether the miner's pneumoconiosis arose out of coal mine employment. Director's Exhibit 26. Thus, the administrative law judge found that the opinions addressing the cause of the miner's pneumoconiosis were of little probative value. This was rational. 20 C.F.R. §718.203(c); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137, 1-139 (1986); *Baumgartner v. Director, OWCP*, 9 BLR 1-65, 1-66 (1986). Decision and Order at 14; Director's Exhibits 26-29. We, therefore, affirm the administrative law judge's finding that the record lacks competent medical evidence to establish that the miner's pneumoconiosis arose out of his coal mine employment and that claimant was not, therefore, entitled to benefits. *Boyd, supra*.<sup>4</sup> Because we affirm the administrative law judge's finding that claimant failed to establish that the miner's pneumoconiosis arose out of coal mine employment, an essential element of entitlement, we do not reach the Director's arguments concerning whether the administrative law judge properly found the existence of pneumoconiosis and death due to pneumoconiosis established.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY

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<sup>4</sup> We will not address Director's contention that the administrative law judge erred in relying on the miner's smoking history as a possible cause for the miner's clinical pneumoconiosis inasmuch as the administrative law judge found that claimant failed to produce sufficient evidence to carry her burden of demonstrating the necessary relationship between the miner's coal mine employment and pneumoconiosis, and the administrative law judge could not reasonably infer such a relationship based merely upon claimant's employment history. *Baumgartner v. Director, OWCP*, 9 BLR 1-65, 1-66 (1986).

Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge