

BRB No. 06-0309 BLA

LUCY ROARK)
(On Behalf of and Widow of ALFRED)
ROARK))
)
Claimant-Petitioner) DATE ISSUED: 08/31/2006
)
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

Lucy Roark, Manchester, Kentucky, *pro se*.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (04-BLA-6346) of Administrative Law Judge Jeffrey Tureck issued with respect to a miner's subsequent claim and 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). This case involves a subsequent claim filed by the miner on July 26, 2001,¹ which is being pursued by his widow, the claimant.

¹ The miner filed a claim for benefits on May 1, 1978, which was denied by the district director and was later abandoned. The miner's second claim was filed on January

Director's Exhibit 1. Following the miner's death on January 4, 2003, claimant also filed a survivor's claim on May 22, 2003. Director's Exhibits 3, 9. The district director issued a Proposed Decision and Order denying benefits with respect to the survivor's claim. Director's Exhibit 21. Both of the claims were consolidated by the district director for a formal hearing, which was held on June 2, 2005. In his Decision and Order dated December 14, 2005, the administrative law judge reviewed all of the record evidence, without regard to the evidentiary limitations, relevant to both claims. The administrative law judge first considered the miner's subsequent claim and found that claimant failed to establish the existence of pneumoconiosis or that the miner was totally disabled by a respiratory or pulmonary impairment. With respect to the survivor's claim, the administrative law judge likewise found that the miner did not have coal worker's pneumoconiosis, and that claimant failed to establish that pneumoconiosis either caused or hastened the miner's death. Accordingly, the administrative law judge denied benefits in both claims.

In response to claimant's appeal, the Director, Office of Workers' Compensation Programs, (the Director) has filed a brief urging the Board to affirm the administrative law judge's denial of benefits. As a preliminary matter, the Director notes that the administrative law judge erred by failing to apply the evidentiary limitations at 20 C.F.R. §725.414, ruling that he was permitted under 20 C.F.R. §725.460 to consider all evidence from both claims as being introduced into the consolidated record.² Director's Brief at 4. The Director maintains, contrary to the administrative law judge's ruling, that Section 725.460 must be considered in concert with Section 725.414; however, the Director concedes that the administrative law judge's error was harmless since "[t]he 1992

31, 1992, and was also denied by the district director on the grounds that the miner failed to establish all of the requisite elements of entitlement.

² Section 725.460 provides that, when claims are consolidated for hearing, "the evidence introduced in one claim may be considered as introduced in the others." 20 C.F.R. §725.460. Citing Section 725.460, the administrative law judge ruled that since the miner's and the survivor's claims had been consolidated by the district director he was permitted to consider all of the evidence contained in the record with respect to both claims. Decision and Order at 2. It is the Director's position, however, that Section 725.460 "must be considered in concert with the evidentiary limitations imposed on both the miner's and the survivor's claims by Section 725.414." Director's Brief at 4. We decline to address the propriety of the administrative law judge's ruling with regard to Sections 725.460 and 725.414 based on the Director's concession that the administrative law judge's failure to apply the evidentiary limitations was harmless error as it did not affect the disposition of the case or otherwise prejudice claimant. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

evidence did not support the miner's entitlement, and the 2001 evidence complied with the evidentiary limitations." *Id.* The Director also notes that while the administrative law judge found that the miner did not have pneumoconiosis, the administrative law judge failed to recognize that the district director did not contest the issue of the existence of pneumoconiosis relevant to the miner's claim (the existence of pneumoconiosis was listed only as a contested issue with respect to the survivor's claim). Director's Brief at 4. The Director contends, however, that "[a]ny error in the [administrative law judge's] consideration of the existence of pneumoconiosis is harmless in view of his proper alternative findings that the evidence does not establish a totally disabling respiratory or pulmonary impairment, thus precluding an award of benefits in the miner's claim; and does not establish that pneumoconiosis contributed to the miner's death, thus precluding an award of survivor's benefits." *Id.*

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. *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.³ 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).

To establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must prove the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under Section 718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Claimant may

³ Because the miner's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

establish that pneumoconiosis was a substantially contributing cause of a miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5).

After reviewing the administrative law judge's Decision and Order, the issues on appeal, and the Director's brief, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence. We specifically affirm the administrative law judge's finding in the miner's claim that claimant failed to carry her burden of proof in establishing that the miner was totally disabled.⁴ Under Section 718.204(b)(2)(i), a claimant may establish total disability based on qualifying pulmonary function studies, but in this case, neither of the miner's pulmonary function studies dated March 17, 1992 or January 15, 2002 was qualifying for total disability. *See* 20 C.F.R. §718.204(b)(2)(i). Therefore, claimant was unable to establish the miner's total disability pursuant to that subsection. Similarly, the arterial blood gas studies dated March 17, 2002 and January 15, 2002 were non-qualifying; therefore, claimant was unable to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(ii). The record also does not contain evidence to establish that the miner suffered from cor pulmonale with right-sided congestive heart failure, which would allow claimant to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iii).

The final method by which claimant may establish total disability in the miner's claim is based on medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). With respect to Section 718.204(b)(2)(iv), the administrative law judge properly noted that the miner was examined by Dr. Baker, who specifically opined that the miner was not totally disabled for work by a respiratory or pulmonary impairment. On March 17, 1992, Dr. Baker examined the miner and diagnosed a minimal respiratory impairment. Dr. Baker did not address, at that time, whether the miner's minimal impairment had any effect on the miner's ability to work. Director's Exhibit 1, pages 125-129; Decision and Order at 5. However, following his examination of the miner on July 26, 2001, Dr. Baker

⁴ The administrative law judge erred in the miner's subsequent claim by failing to determine whether claimant had established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, before considering the merits of the claim. We note, however, that claimant satisfied the requirements of Section 725.309, as the district director had conceded that the miner had pneumoconiosis, which was an element of entitlement previously ruled against the miner in his prior claim. Because claimant has established, as a matter of law, a change in an applicable condition of entitlement under Section 725.309, the administrative law judge could properly reach the merits of the miner's claim. Thus, we consider harmless his error in holding Section 725.309 inapplicable to the miner's subsequent claim. *See Larioni*, 6 BLR at 1-1276; Decision and Order at 2.

interpreted the miner's pulmonary function and arterial blood gas study values as being normal, and specifically opined that the miner had no respiratory impairment that would preclude him from performing his usual coal mine work. Director's Exhibit 1, pages 57-61; Decision and Order at 5. As there was no other medical opinion evidence stating that the miner was totally disabled by a respiratory or pulmonary impairment, the administrative law judge concluded that claimant failed to carry her burden of proof to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). This finding is affirmed as supported by substantial evidence. Consequently, we affirm the administrative law judge's denial of benefits in the miner's claim as claimant failed to establish total disability, a requisite element of entitlement. *See Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

With regard to the survivor's claim, we also affirm the administrative law judge's finding that the miner's death was not hastened by pneumoconiosis. In discussing the evidence relevant to the survivor's claim, the administrative law judge noted that the death certificate signed by Dr. Mahboob listed a single cause of death – "colon cancer with metastasis." Director's Exhibit 9; Decision and Order at 5. The administrative law judge found that the only evidence supportive of claimant's entitlement to benefits in the survivor's claim consisted of a questionnaire completed by the miner's treating physician, Dr. Koura, wherein the doctor "checked a box indicating that 'pneumoconiosis contributed to or played a hastening role in the miner's death.'" Decision and Order at 5. However, as noted by the administrative law judge, when asked to explain the basis of his opinion, Dr. Koura wrote, "worsen patient symptoms/dyspnea." Claimant's Exhibit 1; Decision and Order at 5. The administrative law judge permissibly found that Dr. Koura's brief response did not specifically address how pneumoconiosis hastened the miner's death due to colon cancer, and therefore that Dr. Koura's statement did not constitute credible evidence to support claimant's burden of proving that pneumoconiosis hastened the miner's death. Decision and Order at 5; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-623, 2-647 (6th Cir. 2003) (opinions of treating physicians get the deference they deserve based on their power to persuade).

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), and to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when his findings are rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because substantial evidence supports the administrative law judge's conclusion that the miner's death was not hastened by pneumoconiosis, we affirm his

finding pursuant to 20 C.F.R. §718.205(c) and his denial of benefits in the survivor's claim.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge