

BRB No. 06-0866 BLA

KATHY LYNNE HOWARD )  
(Widow of ROGER HOWARD) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 P & C MINING COMPANY )  
 ) DATE ISSUED: 08/16/2007  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY )  
 )  
 Employer/Carrier-Respondent )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION AND ORDER

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

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C.,  
for employer.

Before: DOLDER, Chief Administrative Appeals Judge,  
McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits  
(03-BLA-5436) 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>1</sup> This is the second time that this case has been before the Board. In his initial Decision and Order, the administrative law judge found that employer is the responsible operator in this claim, credited the miner with ten years of coal mine employment and found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>2</sup> Accordingly, the administrative law judge awarded benefits.

Upon considering employer's appeal, the Board affirmed the administrative law judge's decision to exclude several items of evidence proffered by employer because they did not satisfy the terms of 20 C.F.R. §725.414. With respect to the merits, the Board vacated the administrative law judge's finding under Section 718.205(c) and remanded the case to the administrative law judge for reconsideration of the medical evidence relevant to the cause of the miner's death. *Howard v. P & C Mining Co.*, BRB No. 05-0379 BLA (Jan. 19, 2006)(unpub.).

On remand, the administrative law judge determined that the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant argues on appeal that the administrative law judge did not properly weigh the opinions of Drs. Rosenberg and Breeding. Employer responds, urging affirmance of the denial of benefits.<sup>3</sup> The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief in this appeal.

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

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<sup>1</sup> The miner died on November 29, 2000. Director's Exhibit 4. Claimant, the miner's surviving spouse, filed her application for survivor's benefits on February 22, 2001. *Id.*

<sup>2</sup> The record indicates that claimant's coal mine employment occurred in Kentucky. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

<sup>3</sup> Employer has also indicated in its brief that it wishes to preserve the issue of whether the administrative law judge properly applied the evidentiary limitations set forth in 20 C.F.R. §725.414. Employer's Brief at 2 n 2.

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *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 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), (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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.205(c), the administrative law judge considered the death certificate and the medical opinions of Drs. Burrows, Thorne, Alam, Caffrey, Rosenberg, and Breeding. The death certificate, prepared by the coroner, identified cardiorespiratory failure due to coronary artery disease as the primary cause of death with chronic obstructive pulmonary disease and diabetes being contributing causes of death. Drs. Burrows and Thorne performed an autopsy of the miner's torso. They diagnosed coal workers' pneumoconiosis, but indicated that they could not definitively identify a cause of death due to the limited nature of the autopsy. Director's Exhibit 14. Dr. Alam, one of the miner's treating physicians, responded to a questionnaire concerning the cause of the miner's death, checking boxes indicating that pneumoconiosis contributed to the miner's demise. Claimant's Exhibit 1. Dr. Caffrey performed a record review and examined the tissue slides obtained during the miner's autopsy. Dr. Caffrey concluded that pneumoconiosis did not contribute to or hasten the miner's death. Employer's Exhibit 3. Dr. Rosenberg reviewed the miner's medical records and the autopsy report and opined that pneumoconiosis did not play any role in the miner's death. Employer's Exhibit 1. Dr. Breeding, another of the miner's treating physicians, indicated that the miner's pneumoconiosis contributed to his death. Claimant's Exhibit 2 at 14.

The administrative law judge determined that the death certificate was entitled to little weight because it was prepared by the coroner, who had no personal knowledge of the miner's condition. Decision and Order on Remand at 3 (unpaginated). The administrative law judge found that the autopsy report did not support a finding that the miner's death was due to pneumoconiosis, as Drs. Burrows and Thorne stated that they could not definitively identify a cause of death. *Id.* With respect to the opinion of Dr. Alam, the administrative law judge determined that it was entitled to little weight because Dr. Alam relied upon

inaccurate working and smoking histories. *Id.* The administrative law judge credited Dr. Rosenberg’s opinion as well-reasoned and well-documented. *Id.* Regarding Dr. Caffrey’s opinion, the administrative law judge accorded it “little or no probative weight” on the ground that Dr. Caffrey did not identify the smoking history upon which he relied in rendering his conclusions. *Id.* at 4 (unpaginated). The administrative law judge determined that “the chain link causation approach” used by Dr. Breeding “does not qualify as hastening death.” *Id.* at 5 (unpaginated). The administrative law judge also noted that Dr. Breeding stated that his conclusions were only within the realm of “medical probability” and that Dr. Breeding indicated that he relied upon Dr. Alam’s opinion, which the administrative law judge had discredited. *Id.* Based upon his findings regarding the medical evidence relevant to the etiology of the miner’s demise, the administrative law judge concluded that claimant failed to prove that pneumoconiosis caused or contributed to the miner’s death pursuant to Section 718.205(c).

Claimant alleges that the administrative law judge erred in crediting Dr. Rosenberg’s opinion and in determining that Dr. Breeding’s opinion was insufficient to establish that pneumoconiosis was a contributing cause of the miner’s death.<sup>4</sup> Upon review of the relevant evidence, the administrative law judge’s findings, and claimant’s arguments on appeal, we affirm the administrative law judge’s finding that Dr. Breeding’s opinion does not satisfy the standard adopted by the United States Court of Appeals for the Sixth Circuit in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The court noted in *Williams* that, pursuant to Section 718.205(c)(5), pneumoconiosis is a substantially contributing cause of death if it hastens death. The court held that in order to establish the requisite hastening, a physician must describe “a specifically

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<sup>4</sup> Because claimant has not challenged the administrative law judge’s findings that the death certificate, the autopsy report prepared by Drs. Burrows and Thorne, and the medical opinions of Drs. Alam and Caffrey are insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1984).

defined process that reduces the miner's life by an estimable time.”<sup>5</sup> *Williams*, 338 F.3d at 518, 22 BLR at 2-655.

Dr. Breeding's only statement regarding the cause of the miner's death was in response to a question at his deposition concerning whether pneumoconiosis played a hastening role in the miner's demise. Dr. Breeding said, "I believe it did. His lung condition led him to be unable to work, which led to weight gain. His weight gain contributed to his death as did his lung disease [and] his shortness of breath." Claimant's Exhibit 2 at 14. The administrative law judge rationally determined that the causal connection that Dr. Breeding described was too remote to establish that pneumoconiosis hastened the miner's death, as Dr. Breeding did not identify the processes by which the miner's lung disease caused the miner's weight gain and by which the weight gain shortened the miner's life. In addition, Dr. Breeding did not identify an estimable time by which the miner's lung disease reduced the length of his life. We affirm, therefore, the administrative law judge's finding that Dr. Breeding's opinion was insufficient to prove that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(5). *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Because we have affirmed, as unchallenged on appeal, the administrative law judge's determination that the remaining medical opinion evidence does not assist claimant in carrying her burden of proof, we also affirm the administrative law judge's finding that claimant has not established that the miner's death was due to pneumoconiosis under Section 718.205(c).<sup>6</sup>

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<sup>5</sup> Claimant also maintains that the administrative law judge did not properly apply the "hastening death" standard, as the Sixth Circuit held in *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995), that pneumoconiosis is a substantially contributing cause of death if it hastens death in any way. Because the court's decision in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), postdates *Griffith* and contains a more detailed explanation of what the term "hastens" means in the context of Section 718.205(c)(5), the administrative law judge did not err in applying the court's holding in *Williams* in this case.

<sup>6</sup> In light of our affirmance of the administrative law judge's decision to discredit the medical evidence which supported a finding of death due to pneumoconiosis pursuant to Section 718.205(c), we need not address claimant's arguments regarding the administrative law judge's weighing of the opinion in which Dr. Rosenberg stated that pneumoconiosis did not play any role in the miner's death. See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).



Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge