

BRB No. 07-0296 BLA

G. B.)	
(Widow of H.B.))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 12/19/2007
)	
BELLAIRE CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

H. B., Charlotte, Powhatan Point, Ohio, *pro se*.

John C. Artz (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (05-BLA-5046) of Administrative Law Judge Michael P. Lesniak rendered on a survivor's claim filed on January 8, 2004, pursuant to the provisions of the Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).¹ The administrative law judge adjudicated the claim pursuant to

¹The miner died on December 16, 2003. Director's Exhibit 3. On June 22, 2004, the district director issued a Proposed Decision and Order denying benefits on claimant's

20 C.F.R. Part 718. Employer conceded, and the administrative law judge found, that the miner worked approximately thirty-four years in coal mine employment, that employer is the responsible operator, and that the miner suffered from simple coal workers' pneumoconiosis.² The administrative law judge found, however, that the evidence was insufficient 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 generally contends that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis.³ In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.

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, 1-177 (1989). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor

survivor's claim. Director's Exhibit 17. On July 19, 2004, claimant appealed the decision to the Office of Administrative Law Judges, and on June 20, 2006 requested the administrative law judge to "make a decision for her" as she was unable to find representation. Director's Exhibit 19. On June 21, 2006 the administrative law judge issued an order cancelling the hearing and granted claimant's request for a decision on the record.

² These findings have not been challenged on appeal, are not adverse to claimant, and are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The miner filed a claim on April 15, 1982. Director's Exhibit 1. By Decision and Order issued on July 25, 1988, the administrative law judge awarded benefits. *Id.* The Board affirmed the award. [*H.B.*] *v. North American Coal Corporation*, BRB No. 88-3029 BLA (Aug. 29, 1990) (unpub.).

leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1; 718.202; 718.203; 718.205(c); 718.304. *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). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(2); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).⁴ Failure to establish any one of these elements precludes entitlement to benefits. *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).

The administrative law judge considered all of the relevant evidence under Section 718.205(c), consisting of the miner's treatment records, the miner's final hospital admission record, the death certificate, biopsy reports, and the medical opinions of Drs. Saludes, Bennett and Fino. Decision and Order at 2-6; Director's Exhibits 6, 8, 9, 15, 16; Employer's Exhibit 1. The death certificate, signed by Dr. Morris, listed lung cancer as the immediate cause of the miner's death and noted that chronic obstructive lung disease (COPD) was a significant condition contributing to the miner's death. Director's Exhibit 6. The administrative law judge found that the miner's death certificate was insufficient to support a finding of death due to pneumoconiosis because it did not attribute the miner's COPD to his coal mine employment. Decision and Order at 7.

The administrative law judge found that the miner was admitted into the hospital a month before his death and subsequently diagnosed with lung cancer. Decision and Order at 2-3. The administrative law judge found that Dr. Saludes, who examined the miner, "noted that [he] was not an appropriate surgical candidate due to his severe underlying lung disease, which included COPD and black lung." Decision and Order at 5. The administrative law judge also found that:

Dr. Saludes concluded that [the miner's] rapid deterioration due to [the] underlying lung disease of COPD and black lung[,] [the miner] could not tolerate treatment. Dr. Saludes stated, "I feel that even though the patient died of metastatic lung cancer, that his underlying lung disease was a contributing factor to his death."

Decision and Order at 5; *see* Director's Exhibit 9.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Ohio. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 4.

The administrative law judge also considered the report of Dr. Bennett, who reviewed the miner's medical records and disagreed with Dr. Saludes's opinion. The administrative law judge noted that Dr. Bennett diagnosed "significant emphysema and chronic bronchitis as a result of [a] heavy smoking history," and stated that the cause of the miner's death was bronchogenic carcinoma with COPD as a significant condition. Decision and Order at 5, *see* Director's Exhibit 15. The administrative law judge noted that Dr. Bennett indicated that:

Surgery at this advanced stage was "absolutely not an option" and that [the miner's] prognosis despite therapy was very poor....and that this would have been the case even if [the miner] had never had COPD, emphysema or pneumoconiosis.

Id. The administrative law judge stated that Dr. Bennett opined that the miner's death was not caused by pneumoconiosis, and did not hasten his death in any way. *Id.*

In considering the report of Dr. Fino, who also reviewed the medical records, the administrative law judge found that the physician opined that the miner's pneumoconiosis was not a factor in his death and that he "would have died as and when he did had he never stepped foot in a coal mine." Decision and Order at 5-6; Director's Exhibits 9, 15; Employer's Exhibit 1. The administrative law judge noted that Dr. Fino similarly opined that the rapid progression of the miner's clinical course resulting in death within a few weeks of being diagnosed with this "very, very aggressive lung cancer" was not unusual, and that the rapid progression of the tumor leading to the miner's death could not have been slowed by treatment. Decision and Order 5-7; *see* Employer's Exhibit 1.

The administrative law judge concluded that the fact that the miner's death occurred within a month of being diagnosed with cancer supports Dr. Bennett's conclusion that the miner's cancer was in an advanced stage and Dr. Fino's conclusion that the miner's cancer was very aggressive. Decision and Order at 7. Moreover, the administrative law judge found that although Dr. Saludes stated that the miner's rapid deterioration was due to the underlying lung disease of COPD and black lung, he failed to explain the basis for his statement. The administrative law judge therefore permissibly found Dr. Saludes's medical opinion, the only evidence connecting the miner's death to pneumoconiosis, not persuasive and outweighed by the contrary opinions of Drs. Bennett and Fino, whose opinions he found were better reasoned. *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003)(noting that 20 C.F.R. §718.104(d) does not call for automatic acceptance of a treating physician's opinion); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Because the administrative law judge permissibly discounted the only medical opinion of record that could support a finding that pneumoconiosis substantially contributed to or hastened the miner's death, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at Section 718.205(c)(2), (5). *Brown*, 996 F.2d at 817, 17 BLR at 2-140. In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. Part 718.205(c), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge