

BRB No. 01-0581 BLA

MARTHA R. WARD	)	
(Widow of DONALD E. WARD)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED:
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Martha R. Ward, Winifred, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order Denying

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<sup>1</sup> Claimant, Martha R. Ward, is the widow of Donald E. Ward, the miner, who died on April 16, 1998. Director's Exhibit 21. The miner's first application for benefits was filed on May 20, 1981, and finally denied on March 16, 1982. Director's Exhibit 38. The miner took no further action on this claim, and subsequently, filed a duplicate claim for benefits on March 13, 1990, which was finally denied on September 7, 1990. Director's Exhibit 39. Claimant, the miner's widow, filed her survivor's claim for benefits on June 10, 1998. Director's Exhibit 1.

Benefits (99-BLA-0703) of Administrative Law Judge Richard A. Morgan 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> Adjudicating this claim pursuant

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<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9,

to 20 C.F.R. Part 718, the administrative law judge credited the miner with fourteen and one-half years of qualifying coal mine employment. Next, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), but failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, the administrative law judge denied benefits.<sup>3</sup>

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2001) (order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). In the instant case, the administrative law judge rejected employer's argument that the new regulations would impact the outcome of this case and applied the newly promulgated regulations. *See* Decision and Order at 11-15.

<sup>3</sup>Regarding claimant's appearance at the formal hearing before the administrative law judge without representation, a review of the record and hearing transcript reveals that claimant was afforded a full and fair hearing in accordance with 20 C.F.R. §725.362(b) inasmuch as the administrative law judge fully complied with the procedural safeguards delineated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *see* [Dec. 2000] Hearing Transcript at 7-17.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he is not participating in this appeal.<sup>4</sup> Employer and the Director also argue that the new regulations will not affect the outcome of this case.

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 Co.*, 12 BLR 1-176 (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'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). For survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, 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. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *accord Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Lukosevicz v.*

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<sup>4</sup> We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.202(a) and 718.203(b), which are not adverse to claimant, inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-3 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 13.

*Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Relevant to Section 718.205(c), the record contains the opinions of eight physicians. Dr. Shinwai completed the death certificate and listed lung cancer with metastasis and severe cachexia as the immediate causes of death and coronary artery disease and chronic obstructive pulmonary disease as other significant conditions. Director's Exhibit 21.<sup>5</sup> Drs. Kleinerman, Fino, Castle, Zaldivar, Caffrey, and Hutchins, each reviewed the miner's medical records, diagnosed the existence of mild, simple coal worker's pneumoconiosis, and opined that the miner's mild simple pneumoconiosis did not cause, contribute to, or hasten the miner's death in any way, did not contribute in any way to his respiratory impairment and disability, and did not contribute to his lung cancer or hasten his death from lung cancer. Director's Exhibit 21; Employer's Exhibits 2-8. Dr. Naeye found evidence of a small amount of black pigment present in the miner's lungs, but opined that it failed to meet the minimal criteria for a diagnosis of coal workers' pneumoconiosis, and therefore, that coal workers' pneumoconiosis played no role in the miner's death. Dr. Naeye went on to state that the miner died due to lung cancer and would have died at the same time and in the same way if he had never mined coal. Employer's Exhibits 1, 4.

The administrative law judge properly found that all of the physicians of record opined that the direct cause of the miner's death was lung cancer. Decision and Order at 14. Therefore, we affirm the administrative law judge's determination that claimant failed to establish that pneumoconiosis was the cause of the miner's death pursuant to Section 718.205(c)(1). *See* 20 C.F.R. §718.205(c)(1). We also affirm the administrative law judge's determination that claimant failed to establish that pneumoconiosis substantially contributed to or hastened the miner's death pursuant to Section 718.205(c)(2), (5) inasmuch as this determination is rational, contains no reversible error, and is supported by substantial evidence. The administrative law judge, within a proper exercise of his discretion, found that the medical evidence of record failed to establish that pneumoconiosis either hastened or substantially contributed to the miner's death. *See Shuff, supra; Dillon v. Peabody Coal Co.,*

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<sup>5</sup> Dr. Shinwai listed chronic obstructive pulmonary disease as an "other significant condition contributing to death...." Director's Exhibit 21. However, because Dr. Shinwai's diagnosis of chronic obstructive pulmonary disease failed to state that the condition arose out of coal mine employment, it does not meet the definition of pneumoconiosis under the Act. 20 C.F.R. §718.201; *see Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

11 BLR 1-113 (1988); *Neeley, supra*. Specifically, the administrative law judge permissibly credited the physicians who opined that the pathological evidence established the presence of mild, simple coal workers' pneumoconiosis, but that this pneumoconiosis was too mild to have caused any change in the miner's pulmonary function before his death or to have caused, contributed to, or hastened the development of the miner's lung cancer. Decision and Order at 14. The administrative law judge found the reports of Drs. Kleinerman, Fino, Castle, Zaldivar, Caffrey, and Hutchins entitled to determinative weight inasmuch as these physicians rendered opinions that cited extensive medical literature and authority as support for their conclusions that coal mine dust was not related to the development of lung cancer. *See Hunter v. Director, OWCP*, 803 F.2d 800, 803, 9 BLR 2-140, 2-146 (4th Cir. 1986); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 14. Consequently, the administrative law judge reasonably found that there was no medical opinion of record that contradicted the opinions of the aforementioned physicians that, although both lung cancer and pathological coal workers' pneumoconiosis were present, there was no relationship between these two pulmonary conditions in the cause of the miner's death. *See Dillon, supra; Neeley, supra*; Decision and Order at 14. Hence, the administrative law judge properly found that claimant failed to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. *See* 20 C.F.R. §718.205(c)(2), (5). Similarly, the administrative law judge properly found that the presumption, relating to the existence of complicated pneumoconiosis, at Section 718.304 was inapplicable because the record did not contain evidence demonstrating the presence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.205(c)(3), 718.304; Decision and Order at 14.

Accordingly, the administrative law judge properly found that claimant failed to satisfy her burden of affirmatively establishing that pneumoconiosis caused, contributed to, or hastened the miner's death. 20 C.F.R. §718.205(c)(1)-(5). *See Shuff, supra; Dillon, supra; Neeley, supra*. Hence, we affirm the administrative law judge's Section 718.205(c) finding. *See Shuff, supra*.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge