

BRB No. 00-0486 BLA

DONNA J. DANCY)
(Widow and on behalf of)
CHARLES S. DANCY))
)
Claimant-Petitioner)
)
v.)
)
NOSEMAN BRANCH MINING,) DATE ISSUED:
INCORPORATED)
)
and)
)
WOLF CREEK MINING COMPANY)
)
and)
)
WEST VIRGINIA COAL-WORKERS')
PNEUMOCONIOSIS FUND)
)
Employers/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits and Denying Survivor's Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order Awarding Living Miner's Benefits and Denying Survivor's Benefits (99-BLA-0910) of Administrative Law Judge Daniel F. Sutton on a living miner's 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). The administrative law judge found that the parties stipulated to twenty years of coal mine employment, and the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). In addition, the administrative law judge found that the West Virginia Coal-Workers' Pneumoconiosis Fund (the Fund) withdrew its controversion of the living miner's claim in its post-hearing brief and that it no longer disputed that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(b) and (c), although the Fund continued to contest entitlement in the survivor's claim. Accordingly, the administrative law judge awarded benefits on the living miner's claim. The administrative law judge found, however, that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and denied benefits on the survivor's claim. Claimant appeals, contending that the administrative law judge erred in failing to find that the miner's death was caused by pneumoconiosis. None of the employers, the Fund, or the Director, Office of Workers' Compensation Programs (the Director), has participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and

¹ The miner filed a claim for benefits on July 25, 1997. Director's Exhibit 1. Subsequent to the miner's death September 11, 1997, claimant notified the Department of Labor that she wished to pursue the miner's claim. Additionally, she filed a survivor's claim on March 24, 1998. Director's Exhibit 32. The administrative law judge's Decision and Order encompasses both claims.

² We affirm the administrative law judge's finding that the Fund withdrew its controversion of the living miner's claim, the findings of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) and (c), and the subsequent award of benefits on the living miner's claim, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ We affirm the administrative law judge's finding that death due to pneumoconiosis cannot be established at 20 C.F.R. §718.205(c)(1), (2) and (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

conclusions of law of the administrative law judge are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant contends that inasmuch as the miner had established in his claim that he was totally disabled due to pneumoconiosis arising from coal mine employment it follows, in light of his death from a breathing problem, that pneumoconiosis contributed to his death. We disagree.

In a survivor’s claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. §§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). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that death due to pneumoconiosis may be established where the miner’s death was hastened by pneumoconiosis. See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR 2- (4th Cir. 2000); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Kirk v. Director, OWCP*, 86 F. 3d 1151, 20 BLR 2-276 (4th Cir. 1996); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

In the instant case, the death certificate attributes death to cardio-pulmonary arrest due to acute myocardial infarction due to cancer of the bladder or kidneys. Pneumoconiosis is not listed as a contributing cause of death. Director’s Exhibit 24. Dr. Dy performed an autopsy and diagnosed the existence of pneumoconiosis, but did not state that it contributed to or hastened the miner’s death in any way. Director’s Exhibit 41. Dr. Fino also found the presence of pneumoconiosis, but stated that coal workers’ pneumoconiosis “played no role in this man’s death” and further stated that “this man would have died as and when he did had he never stepped foot in the mines.” Employer’s Exhibit 1.

⁴ Although claimant generally alleges that the miner’s death due to cardio-pulmonary arrest shows that the miner died from a breathing problem, Claimant’s Brief at 5; Director’s Exhibit 24, he has provided no evidence to support this allegation. Moreover, Dr. Fino explicitly states in his report that coal workers’ pneumoconiosis played no role in the miner’s death, that there is no increased incidence of coronary artery disease as a result of coal workers’ pneumoconiosis, and that there is no increased incidence of coronary artery disease in individuals who have worked in the coal mining industry. Employer’s Exhibit 1.

⁵ The record also contains a medical report by Dr. Rasmussen who examined the

As none of the medical evidence of record establishes that pneumoconiosis played any role in hastening or contributing to the miner's death, the administrative law judge properly found that claimant failed to establish death due to pneumoconiosis. *See Sparks, supra; Kirk, supra; Shuff, supra; see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We, therefore, 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) and has failed, therefore, to establish entitlement in the survivor's claim. *See Neeley, supra.*

miner prior to his death, but did not issue a report following the miner's death or offer an opinion regarding the cause of death. Director's Exhibit 9. In addition, the record contains various hospital records treating the miner for cancer. Director's Exhibits 42, 43.

Accordingly, the Decision and Order of the administrative law judge Awarding Living Miner's Benefits and Denying Survivor's Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge