

BRB No. 06-0249 BLA

MARY LOU COMBS	)	
(Widow of GEORGE COMBS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PIKESVILLE COAL COMPANY d/b/a	)	
CHISHOLM COAL COMPANY	)	DATE ISSUED: 01/30/2007
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, and Rutherford), Norton, Virginia, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6163, 6560) rendered by Administrative Law Judge Linda S. Chapman with respect to a miner's claim and a survivor's claim filed 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). The administrative law judge credited the miner with forty-one years of coal mine employment and adjudicated the claims pursuant to 20 C.F.R. Part 718. After determining that the miner's claim is a subsequent claim, the administrative law judge

found that the newly submitted autopsy evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and thus, that the miner's claim was entitled to consideration on the merits.<sup>1</sup> Decision and Order at 17. The administrative law judge further found, however, that claimant failed to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.204 and 718.205(c). Accordingly, the administrative law judge denied benefits in both claims.

On appeal, claimant challenges the administrative law judge's findings under Sections 718.204(b), (c) and 718.205(c). Employer responds, urging affirmance of the 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.

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish 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 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 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); *Piney Mountain Coal Co.*

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<sup>1</sup> The procedural history is summarized in the administrative law judge's Decision and Order. Decision and Order at 2.

*v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).<sup>2</sup>

With respect to the issue of total disability due to pneumoconiosis under Section 718.204(c), claimant argues that the administrative law judge did not properly weigh the medical opinion of Dr. Rasmussen. This contention is without merit. The administrative law judge acted within her discretion in determining that Dr. Rasmussen's opinion was insufficient to establish that the miner was totally disabled due to pneumoconiosis, because Dr. Rasmussen did not address the possibility that claimant's documented history of congestive heart failure was responsible for the hypoxemia revealed on the newly submitted blood gas study of record, which produced qualifying values. Decision and Order at 19; Director's Exhibit 12; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Claimant raises no other allegation of error. We affirm, therefore, the administrative law judge's finding that claimant has not proven that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Because we have affirmed the administrative law judge's finding that claimant did not establish an essential element of entitlement, we must also affirm the denial of benefits in the miner's claim. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Regarding the administrative law judge's consideration of the survivor's claim under Section 718.205(c), claimant contends that the administrative law judge should have accorded more probative weight to the opinion of Dr. Perper, that the miner's pneumoconiosis and the associated centrilobular emphysema hastened the miner's death, because it was based on a more extensive review of the medical records than the contrary opinion of Dr. Caffrey. This allegation of error is without merit.

Pursuant to Section 718.205(c), the administrative law judge considered all of the relevant evidence including: the report and deposition of Dr. Perper; the treatment notes, hospitalization reports and death certificate by Dr. Patel; the autopsy report by Dr. Dennis; the report of Dr. Rasmussen; and the opinions of Drs. Caffrey, Vuskovich, and Rosenberg. Decision and Order at 20-27; Director's Exhibits 12, 14, 55, 57; Claimant's Exhibit 2; Employer's Exhibits 1-3, 8. The administrative law judge acted rationally in according substantial weight to the opinions in which Drs. Vuskovich and Rosenberg concluded that the miner's death was not related to coal dust exposure in any manner, as their opinions were well-supported by the objective evidence of record and thoroughly

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<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's most recent coal mine employment occurred in West Virginia. Director's Exhibits 1, 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

explained. Decision and Order at 26; Employer's Exhibits 1, 3; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. The administrative law judge also acted within her discretion in finding that the opinion in which Dr. Perper indicated that pneumoconiosis and related centrilobular emphysema hastened the miner's death was entitled to little weight. The administrative law judge acknowledged that Dr. Perper cited studies that establish that there is a causal connection between coal dust exposure and centrilobular emphysema. *Id.*; Claimant's Exhibit 3. The administrative law judge rationally determined, however, that because Dr. Perper did not identify adequate support for his conclusion that coal dust exposure caused the miner's centrilobular emphysema, Dr. Perper's opinion was insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death. *Id.*; Claimant's Exhibit 3; *Mays*, 176 F.3d 753, 21 BLR 2-587; *Shuff*, 967 F.2d 977, 16 BLR 2-90.

Finally, contrary to claimant's argument, the administrative law judge did not rely upon the opinion of Dr. Caffrey at Section 718.205(c), but rather cited the opinions of Drs. Vuskovich and Rosenberg in support of her finding. We need not address, therefore, claimant's contention regarding the administrative law judge's weighing of Dr. Caffrey's opinion under Section 718.205(c). Thus, we affirm the administrative law judge's determination that the preponderance of the evidence of record does not support a finding that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to Section 718.205(c) and the denial of benefits on the survivor's claim. *Mays*, 176 F.3d 753, 21 BLR 2-587; *Shuff*, 967 F.2d 977, 980, 16 BLR 2-90; *Neeley*, 11 BLR 1-85.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Living Miner's Claim and Denying Benefits on Survivor's Claim 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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JUDITH S. BOGGS  
Administrative Appeals Judge