

BRB No. 05-0169 BLA

GERALDINE BISHOP )  
(Widow of BRADLEY T. BISHOP) )

Claimant-Petitioner )

v. )

DATE ISSUED: 07/28/2005

EASTERN DOMINION COAL )  
COMPANY, INCORPORATED )

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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Geraldine Bishop, Duffield, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order (2003-BLA-05352) of Administrative Law Judge Thomas M. Burke denying benefits 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>

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<sup>1</sup> Claimant is Geraldine Bishop, the surviving spouse of the miner, Bradley T. Bishop. Director's Exhibit 2. Ron Carson, a benefits counselor with Stone Mountain Health Services, requested an appeal on behalf of claimant but is not representing her on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, BRB No. 94-3940 BLA (May 19, 1995) (Order).

The administrative law judge credited the miner with fourteen years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>2</sup> The administrative law judge found that the evidence of record was insufficient to establish either the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or that pneumoconiosis caused or contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

Employer has responded to claimant's appeal and urges affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in 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 Co.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. *See* 20 C.F.R. §§718.202(a), 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). 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)(2); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980, 16 BLR 2-90 (4th Cir. 1992).<sup>3</sup>

In the present case, the administrative law judge rationally determined that claimant did not meet her burden of establishing that the miner's death was due to

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<sup>2</sup>The miner died on June 16, 2000. Director's Exhibit 15. Claimant filed her application for benefits on August 27, 2001. Director's Exhibit 2.

<sup>3</sup>This claim 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 the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3, 10.

pneumoconiosis. Decision and Order at 11-12. The administrative law judge noted correctly that esophageal cancer was identified as the sole cause of death on the miner's death certificate. *Id.*; Director's Exhibit 15. The administrative law judge also properly determined that the remainder of the evidence consists of hospital records, which detail the miner's treatment for cancer of the esophagus and its complications, and radiographic evidence which, although it in part suggests the possible presence of pneumoconiosis, does not include a medical opinion in which a physician identifies a causal connection between pneumoconiosis and the miner's death.<sup>4</sup> We must affirm, therefore, the administrative law judge's finding that claimant has not proven that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *Mays*, 176 F.3d 753, 21 BLR 2-587; *Shuff*, 967 F.2d 977, 980, 16 BLR 2-90; *Neeley*, 11 BLR 1-85. Because the administrative law judge properly determined that claimant did not establish a requisite element of entitlement in a survivor's claim, we must also affirm the denial of benefits. *Id.*

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<sup>4</sup> The administrative law judge determined correctly that claimant was not entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304, as none of the physicians of record interpreted a chest x-ray or CT scan as positive for the presence of complicated pneumoconiosis nor was there other medical evidence qualifying under Section 718.304. Decision and Order at 9.



Accordingly, the Decision and Order of the administrative law judge denying benefits in this survivor's claim is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge