

BRB No. 07-0987 BLA

E.J.C.)
(Widow of G.L.C.))
)
Claimant-Petitioner)
)
v.)
)
SLAB FORK COAL COMPANY)
)
and)
)
WEST VIRGINIA PNEUMOCONIOSIS) DATE ISSUED: 07/30/2008
FUND)
)
Employer/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 - Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

E.J.C., MacArthur, West Virginia, *pro se*.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (06-BLA-5920) of Administrative Law Judge Richard A. Morgan (the administrative law judge) 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). The administrative law judge adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established that the miner had thirty-eight years of coal mine employment and that he had simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), but that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(2), (3), (5).¹ Accordingly, benefits were denied.

On appeal, claimant generally contends that she is entitled to benefits.² Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response 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 and is in accordance with law.³ *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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).

¹ There was no evidence establishing death due to pneumoconiosis at 20 C.F.R. §718.205(c)(1). The administrative law judge did not address subsection (c)(1).

² The miner was awarded benefits by the district director on the miner's February 17, 1984 claim. Employer did not contest the Decision and Order awarding benefits. Closed LM Claim. The miner died on August 31, 2005. The death certificate, signed by Dr. Zinzuwadia, listed the immediate cause of death as pneumonia, due to pulmonary aspergillosis, complicated pneumoconiosis, and cardiomyopathy. Director's Exhibit 10. Claimant, the miner's surviving spouse, filed a claim on September 28, 2005. Director's Exhibit 2. On March 21, 2006, the district director issued a proposed Decision and Order awarding benefits. Director's Exhibit 17. Employer requested a hearing. Director's Exhibit 18.

³ The record indicates that the miner was last employed in the coal mining industry in Virginia. Director's Exhibit 1. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, 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, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (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)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

At the outset, we note that the administrative law judge found that claimant was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 718.304 and could not, therefore, establish death due to pneumoconiosis at Section 718.205(c)(3). The administrative law judge found that the preponderance of the evidence, including evidence in the miner's treatment records, *i.e.*, x-ray and CT scan readings and doctors' opinions, was negative for complicated pneumoconiosis. Further, the administrative law judge properly found that the death certificate, listing complicated pneumoconiosis, was undocumented and unreasoned on its face because no rationale was provided to support the finding of complicated pneumoconiosis. *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 15. The administrative law judge, therefore, rationally found that complicated pneumoconiosis was not established. Decision and Order at 5-6. Thus, we affirm the administrative law judge's finding that death due to pneumoconiosis was not established at Section 718.205(c)(3).

Considering the relevant medical opinion evidence on death causation, the administrative law judge accorded no weight to the opinion of Dr. Zinzuwadia, the miner's treating physician, the only physician to opine that pneumoconiosis hastened the miner's death, because he found it "equivocal and ambiguous." Decision and Order at 15. The administrative law judge noted that Dr. Zinzuwadia stated, in a one page letter, that the miner's final hospitalization "was for multilobular pneumonia, bilateral lung cavity lesions, *probably from* pulmonary fibrosis/pneumoconiosis with super imposed pulmonary aspergilloma, which resulted into [sic] hemoptysis and further worsen[ed]...his already compromised lung function." *Id.* Further, the administrative law judge noted that Dr. Zinzuwadia, in the same letter, opined that the miner's "underlying lung conditions, including complicated pneumoconiosis, pulmonary fibrosis, cavitory lung disease *probably did contribute to some extent* in making him susceptible to the above mentioned pulmonary complications and adversely affected his ability to recover." *Id.*; *see Director's Exhibit 11 at 69.*

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. *See White v. Director, OWCP*, 6 BLR 1-368 (1983). Claimant, therefore, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

The administrative law judge properly found that Dr. Zinzuwadia's one page explanatory letter was insufficient to establish death due to pneumoconiosis at Section 718.205(c)(2), (5) because it was "equivocal and ambiguous." *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Therefore, the administrative law judge permissibly accorded no weight to the opinion of Dr. Zinzuwadia and properly found that the evidence failed to establish that pneumoconiosis hastened the miner's death at Section 718.205(c)(2), (5). Consequently, the administrative law judge properly found that claimant failed to carry her burden of establishing death due to pneumoconiosis at Section 718.205(c), an essential element of entitlement in her survivor's claim. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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); *Trumbo*, 17 BLR at 1-87. Because claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law judge properly denied benefits on the survivor's claim.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge