

BRB No. 08-0735 BLA

M.B.)
(Widow of J.B.))
)
Claimant-Petitioner)
)
v.)
)
PEABODY COAL COMPANY)
) DATE ISSUED: 07/15/2009
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

M.B., Hopkinsville, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits (2005-BLA-5743) of Administrative Law Judge Thomas F. Phalen, Jr., 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).² In a Decision and Order dated June 11, 2008, the administrative law judge credited the miner with at least sixteen years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge accepted employer’s concession that the miner had pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. However, the administrative law judge found that claimant failed to establish that the miner’s pneumoconiosis caused, contributed to or hastened his death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied survivor’s benefits.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Claimant also states that Dr. Majmudar’s statement or diagnosis on the death certificate did not include black lung simply because the doctor was not aware of the prior black lung diagnosis. Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs, has not filed a brief in this appeal.³

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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge’s Decision and

¹ Claimant is the widow of the miner, J.B., who died on December 6, 2001. Director’s Exhibit 9. Claimant filed a claim for survivor’s benefits on March 16, 2004. Director’s Exhibit 2.

² The miner filed a claim on February 25, 1987. Director’s Exhibit 1. On November 29, 1988, Administrative Law Judge Richard Huddleston denied the claim, finding that while the miner proved the existence of pneumoconiosis, he did not establish his total disability. *Id.*

³ The administrative law judge’s findings that the miner had at least sixteen years of coal mine employment, and that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) are affirmed, as they are unchallenged on appeal and are not adverse to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor’s benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors’ claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner’s death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, the miner’s death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable.⁵ *See* 20 C.F.R. §718.205(c)(1)-(3). 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)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

The record includes treatment notes from Jennie Stuart Medical Center, the miner’s death certificate, and medical opinion evidence. The treatment records from Jennie Stuart Medical Center, dating back to December 1999, relate to multiple hospitalizations, including a record by Dr. Majmudar dated December 5, 2001, the day before the miner’s death, indicating that the miner was admitted and treated for “acute respiratory failure” and “acute cardiopulmonary arrest.” Director’s Exhibit 9a at 2-3. The miner’s death certificate, signed by Dr. Majmudar, stated that the miner died of an acute myocardial infarction due to respiratory failure. Director’s Exhibit 9. Dr. Majmudar did not specify the underlying cause of the miner’s respiratory failure. *Id.*

The medical opinion evidence includes a one page letter from Dr. Crump, the miner’s treating physician. Claimant’s Exhibit 1. Dr. Crump listed the miner’s “multiple medical problems[,] including Coal Workers’ Pneumoconiosis (black lung), coronary

⁴ The record indicates that the miner’s coal mine employment occurred in Kentucky. Director’s Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

⁵ The administrative law judge correctly concluded that there is no record evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 7.

heart disease, cerebrovascular disease, and hypertension” *Id.* Dr. Crump opined that the miner “suffered myocardial infarctions and multiple strokes, which impaired his speech and swallowing,” and that the combination of the miner’s “already impaired lung status coupled with chronic aspiration from his inability to adequately swallow...” resulted in “multiple hospitalizations for pneumonia.” *Id.* Dr. Crump then stated that the miner “presented to the emergency room at Jennie Stuart Medical Center on [December 5, 2001] in full cardiopulmonary arrest . . . [and] succumbed to his illness and died on [December 6, 2001].” *Id.*

In a report dated October 6, 2005, Dr. Repsher reviewed medical records and opined that the miner’s “death was not caused by, contributed to by, or even hastened by either medical or legal coal workers’ pneumoconiosis or exposure to coal mine dust.” Employer’s Exhibit 2. In addition, Dr. Caffrey issued a report on August 25, 2005, after reviewing a number of medical records, and opined that the miner died as a result of significant atherosclerosis that involved cerebral arteries. Employer’s Exhibit 1. Dr. Caffrey concluded that the heart attacks and strokes were unrelated to coal mine employment, and that the miner’s pneumoconiosis did not cause, contribute to or hasten his death. *Id.*

The administrative law judge initially determined that the treatment records and the death certificate do not establish any relationship between pneumoconiosis and the miner’s death. Decision and Order at 7. The administrative law judge accorded the most weight to the opinion of Dr. Repsher, based on his qualifications as a Board-certified pulmonary specialist, and because he “analyzed the available evidence, and clearly and unequivocally” stated that pneumoconiosis did not contribute to the miner’s death. *Id.* at 8. The administrative law judge further found that the opinion of Dr. Caffrey, a Board-certified pathologist, that the miner’s death was due to his atherosclerosis, was well-reasoned and documented, and supported Dr. Repsher’s opinion. *Id.* at 5, 8. The administrative law judge acknowledged that Dr. Crump was the miner’s treating physician, but determined that his report was not well-reasoned and not well-documented, and that Dr. Crump did not directly address the role of pneumoconiosis, if any, in the miner’s death. *Id.* at 8. Therefore, the administrative law judge concluded that claimant failed to meet her burden of establishing that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1)-(5). *Id.* at 7, 8 n.8.

Based on our review of the administrative law judge’s Decision and Order and the evidence of record, we affirm the administrative law judge’s finding that there is no evidence from which to conclude that the miner’s death was due to pneumoconiosis. It is claimant’s burden to establish that the miner’s death is due to pneumoconiosis with affirmative evidence. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo*, 17 BLR at 1-87-88. The administrative law judge correctly found that neither the treatment records nor the death certificate “establishes a relationship between pneumoconiosis and

the miner's death," but rather they establish that the miner experienced "respiratory failure and acute cardiopulmonary arrest" and "died as a result of an acute myocardial infarction." Decision and Order at 7; Director's Exhibits 9, 9a. The administrative law judge permissibly accorded no weight to Dr. Crump's opinion because he found that the doctor did not directly address the relationship of pneumoconiosis to the cause of the miner's death. Decision and Order at 6. Furthermore, because the administrative law judge found that "Dr. Crump's report does not cite [to] any clinical test results or findings on physical examination," the administrative law judge rationally concluded that Dr. Crump's opinion is not well-reasoned or well-documented. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); Decision and Order at 8. Additionally, the administrative law judge properly found that Drs. Repsher and Caffrey specifically opined that the miner's death was not hastened by pneumoconiosis. Decision and Order at 8. Consequently, we affirm the administrative law judge's finding that the medical evidence was not sufficient to meet the claimant's burden of proof to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Because substantial evidence supports the administrative law judge's finding that claimant failed to establish that the miner's death was caused, contributed to or hastened by pneumoconiosis, it is affirmed. We, therefore, affirm the administrative law judge's conclusion that an award of benefits is precluded in this case. *See* 20 C.F.R. §718.205(c); *Trumbo*, 17 BLR at 1-88-89 n.4.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge