

BRB No. 98-1329 BLA

CHARLOTTE MATHENEY )  
(Widow of LESTER MATHENEY) )

Claimant-Petitioner )

v. )

PEABODY COAL COMPANY )

Employer- )  
Respondent )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT OF )  
LABOR )

DATE ISSUED: 7/6/99

DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Denying Benefits of J. Michael O'Neill,  
Administrative Law Judge, United States Department of Labor.

Joseph Kelly, Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY,  
Administrative Appeals Judge and NELSON, Acting Administrative Appeals  
Judge.

PER CURIAM:

Claimant, the spouse of a deceased miner, appeals the Decision and Order - Denying Benefits (97-BLA-1950) of Administrative Law Judge J. Michael O'Neill 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> The administrative law judge credited the miner with seventeen and one-quarter years of coal

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<sup>1</sup>The miner died on January 17, 1989. The coroner identified acute bronchopneumonia as the cause of death. Director's Exhibit 11.

mine employment and considered the claim, filed on July 5, 1996, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2). The administrative law judge further found, however, that as there was no evidence of record supporting a finding that pneumoconiosis caused or contributed to the miner's demise, claimant did not satisfy her burden of proof pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge erred in failing to determine, under Section 718.205(c)(2), that pneumoconiosis hastened the miner's death. Claimant also asserts that remand is required to allow the administrative law judge to render a finding under 20 C.F.R. §718.203. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.<sup>2</sup>

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 applicable 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 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 substantial 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; see *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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the present case arises, has held that, for the purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death where pneumoconiosis actually hastened death. See *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

The evidence of record pertaining to Section 718.205(c)(2) consists of the death certificate, an autopsy report prepared by Dr. Pitzer, and the medical reports of Drs. Caffrey and Fino. On the death certificate, the coroner identified the sole cause of death

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<sup>2</sup>We affirm the administrative law judge's findings under 20 C.F.R. §718.205(c)(1) and (c)(3), as they are not challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

as acute bronchopneumonia. Director's Exhibit 11. Based upon the autopsy examination, Dr. Pitzer diagnosed, *inter alia*, pulmonary anthracosis, arteriosclerosis, and severe acute bronchopneumonia. Director's Exhibits 12, 25. Dr. Pitzer concluded that "[t]erminally, this patient developed associated severe pulmonary edema on top of the pneumonia, resulting in respiratory insufficiency and death." *Id.* Dr. Caffrey reviewed the medical evidence of record and tissue slides prepared by Dr. Pitzer and concluded that the miner was not suffering from any form of occupational pneumoconiosis. Employer's Exhibit 1. Dr. Caffrey further indicated that although he could not identify the cause of the miner's death from the material before him, inasmuch as pneumoconiosis was not present, it did not cause, contribute to, or hasten the miner's demise. *Id.* Dr. Fino reviewed the medical evidence of record and concluded that it did not support a diagnosis of coal workers' pneumoconiosis or any occupationally acquired lung condition. Employer's Exhibit 2. Dr. Fino also found that the miner's death was due to pneumonia and, therefore, coal dust inhalation did not cause, contribute to or hasten the miner's death. *Id.*

After discussing the death certificate, autopsy report, and medical reports, the administrative law judge determined that the record did not contain any medical evidence which supports a finding that the miner's death was hastened by pneumoconiosis. Decision and Order at 8. Claimant contends that the death certificate and autopsy report are sufficient to establish that pneumoconiosis hastened the miner's death. Claimant asserts specifically that because both documents indicate that the miner died a respiratory death, pneumoconiosis, as diagnosed by Dr. Pitzer, must have been a contributing factor. Claimant's allegation of error is without merit.

Claimant's argument constitutes, in essence, a request that the Board adopt a presumption that if a miner dies due to a disease which impaired the functioning of his lungs, pneumoconiosis was a contributing cause of death because it is a disease of the lung. Although there is a presumption, set forth in 20 C.F.R. §718.303, similar to the one urged by claimant, it does not apply in this case, as the application for survivor's benefits was filed after January 1, 1982. See 20 C.F.R. §718.303(c). Furthermore, that presumption can be rebutted by evidence, *inter alia*, showing that pneumoconiosis did not contribute to the miner's death. *Id.* In *Brown*, the United States Court of Appeals for the Sixth Circuit held that under Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death *where the evidence establishes* that pneumoconiosis actually hastened death. The administrative law judge determined properly that the evidence in this case does not satisfy the *Brown* standard, as neither the coroner nor the physicians of record concluded that the pulmonary anthracosis diagnosed on autopsy hastened the miner's demise. Decision and Order at 8; see *Brown, supra*. We affirm, therefore, the administrative law judge's finding under Section 718.205(c)(2).

Finally, claimant maintains that the present case must be remanded to permit the administrative law judge to render a finding pursuant to Section 718.203. Claimant suggests that the successful invocation of the presumption, set forth in Section

718.203(b), that the miner's pneumoconiosis arose out of coal mine employment would bolster her contention that pneumoconiosis contributed to the miner's death. There is no merit in claimant's argument. Even if the administrative law judge concluded that the miner's pneumoconiosis arose out of coal mine employment, this finding would not, by itself, establish the requisite causal connection between pneumoconiosis and the miner's death. See 20 C.F.R. §718.205(c); *Brown, supra*, *Neeley, supra*; *Boyd, supra*. Thus, the administrative law judge's omission of a finding under Section 718.203 does not constitute an error requiring remand. We affirm, therefore, the denial of benefits under Part 718.<sup>3</sup> See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge

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<sup>3</sup>As employer has noted, inasmuch as the administrative law judge determined properly that death due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.205(c), the Board need not address his findings under 20 C.F.R. §718.202(a), as any error therein would be harmless. See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).