

BRB No. 02-0108 BLA

PAULINE DAMICO )  
(Widow of DAVID G. DAMICO) )  
 )  
 Claimant-Petitioner )

v. )

UNIVERSAL MINERALS, INCORPORATED )

DATE ISSUED: \_\_\_\_\_

and )

STATE WORKMEN'S INSURANCE 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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Pauline Damico, Windber, Pennsylvania, *pro se*.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order (00-

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<sup>1</sup>Claimant is the widow of the miner, David G. Damico, who died on May 10, 1997.

BLA-1033) of Administrative Law Judge Richard A. Morgan 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>2</sup> The administrative law judge credited the miner with at least twenty years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718.

The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.203(b). The administrative law judge also found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer

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Director's Exhibits 1, 21. The miner filed a claim with the Social Security Administration on September 16, 1970. Director's Exhibit 62. This claim was denied by the Social Security Administration on August 20, 1971, July 12, 1973 and September 17, 1975. *Id.* The miner filed a claim with the Department of Labor on September 8, 1980. *Id.* On October 2, 1986, Administrative Law Judge Daniel L. Leland issued a Decision and Order denying benefits. *Id.* The record does not indicate that the miner pursued this claim any further. Claimant filed a survivor's claim on September 3, 1999. Director's Exhibit 1.

<sup>2</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.<sup>3</sup>

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>3</sup>Since the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.203(b), which are not adverse to this *pro se* claimant, are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.<sup>4</sup> See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §718.203; *Boyd, supra*.

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<sup>4</sup>Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- ...
- (5) 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).

The relevant evidence of record at 20 C.F.R. §718.205(c) consists of a death certificate certified by Dr. Bencie and the reports of Drs. Bush, Griffin, Fino, Hurwitz, Kleinerman, Mendelow, Mittal, Naeye and Perper. In the death certificate, Dr. Bencie indicated that an acute massive myocardial infarction was the immediate cause of the miner's death and that pneumoconiosis was a possible contributing cause of the miner's death. Director's Exhibit 21. Whereas Drs. Mittal and Perper opined that pneumoconiosis contributed to the miner's death,<sup>5</sup> Director's Exhibits 19, 25; Claimant's Exhibit 1, Drs. Bush, Fino, Griffin, Hurwitz, Kleinerman, Mendelow and Naeye opined that pneumoconiosis did not contribute to the miner's death,<sup>6</sup> Director's Exhibits 39-42, 44-48; Employer's Exhibits 1, 2. The administrative law judge permissibly discredited the death certificate certified by Dr. Bencie because it is not well reasoned.<sup>7</sup> See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Further, the administrative law judge properly accorded greater weight to the opinions of Drs. Bush, Griffin, Kleinerman, Mendelow and Naeye than to the contrary opinions of Drs. Mittal and Perper because he found their opinions to be better supported by the

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<sup>5</sup>The administrative law judge noted that “[o]f the nine reviewing physicians, seven of them are Board-certified in pathology.” Decision and Order at 17. The administrative law judge also noted that “Dr. Mittal, who conducted the autopsy, is a qualified staff pathologist, with both practical and teaching experience, but less experienced and published as many of the other reviewing pathologists.” *Id.* Further, the administrative law judge noted that “Dr. Mittal submitted a supplemental report based on a review of the autopsy slides.” *Id.* The administrative law judge therefore stated, “I find that [Dr. Mittal] is not entitled to greater weight just because he conducted the autopsy; nor do I find that he had an advantage over the other reviewing pathologists.” *Id.*

<sup>6</sup>The administrative law judge stated that “[i]n addition to reviewing pathologists, two additional physicians [Drs. Hurwitz and Fino] reviewed the medical records.” Decision and Order at 18. The administrative law judge noted that the opinions of the pathologists are entitled to greater weight because the contested issue in the case is the cause of the miner's death. *Id.* Nonetheless, the administrative law judge stated that “the opinions of Drs. Hurwitz and Fino are important to the consideration of [the miner's] condition prior to his death.” *Id.*

<sup>7</sup>The administrative law judge stated that “Dr. Bencie, [the miner's] treating physician, provided little medical reasoning when he certified the death certificate.” Decision and Order at 17.

underlying documentation of record.<sup>8</sup> See *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). In addition, the administrative law judge found the opinions of Drs. Bush, Griffin, Kleinerman, Mendelow and Naeye to be supported by the opinions of Drs. Fino and Hurwitz. See *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). See *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, see *Trumbo, supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief

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<sup>8</sup>The administrative law judge found that the opinions of Drs. Bush, Griffin, Kleinerman, Mendelow and Naeye are supported by "the objective medical evidence, including pulmonary function and arterial blood gas studies, and no lifetime medical records revealing the presence or treatment of a chronic pulmonary disease." Decision and Order at 19.

Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

PETER A. GABAUER, Jr.  
Administrative Appeals Judge