

BRB Nos. 02-0765 BLA
and 02-0765 BLA-A

MAVIS DEEL)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 BLACK HOLLOW COAL COMPANY,) DATE ISSUED:
)
 INCORPORATED)
)
 and)
)
 ROCKWOOD INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DEEL BROTHERS COAL COMPANY,)
 INCORPORATED)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)
)
)
 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 Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

Mavis G. Deel, Haysi, Virginia, *pro se*.

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

Timothy S. Williams (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (01-BLA-1041) of Administrative Law Judge Jeffrey Tureck, 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.*¹ Deel Brothers Coal Company (Deel Brothers), has filed a cross-appeal. The administrative law judge found that the miner's most recent employer for whom he worked at least one year, Black Hollow, is out of business, and that its carrier, Rockwood Insurance Company, is bankrupt. Therefore, the administrative law judge found that Deel Brothers, as the next most recent employer for whom the miner worked for at least one year, is the proper responsible operator pursuant to 20 C.F.R. §725.495(a)(3). In addition, the administrative law judge found that the evidence established that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203, but that the evidence was 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 the claim.

Claimant generally challenges the administrative law judge's denial of benefits. Deel Brothers, in response, urges affirmance of the administrative law judge's denial of benefits. In its cross-appeal, Deel Brothers asserts that the administrative law judge erred when he determined that it is the putative responsible operator in the instant claim. The Director, Office of Workers' Compensation Programs, responds to Deel Brothers's cross-appeal, asserting that it may be

¹ 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. (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

unnecessary to address the administrative law judge's responsible operator finding if the Board should affirm the administrative law judge denial of benefits on the merits.

The Director concedes, however, that the administrative law judge failed to provide an adequate explanation with respect to his responsible operator finding, and thus, it violates the requirements of the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §919(d), and 30 U.S.C. §932(a). Director's Brief at 2. Deel Brothers replies, generally reiterating the contentions in its cross-appeal.

In an appeal filed by claimant² 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. *McFall v. Jewell Ridge Coal Co.*, 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address the administrative law judge's consideration of the evidence at Section 718.205(c). Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to at 20 C.F.R. §718.205(c). See 20 C.F.R. §§718.1; 718.202, 718.203; 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

² Claimant is the widow of the miner, Paul Deel, who died on July 2, 1999. Director's Exhibit 14. Claimant filed her survivor's claim with the Department of Labor on October 19, 1999. Director's Exhibit 1.

The record contains five medical opinions relevant to the miner's cause of death. Dr. Michos, who is a Board-certified pulmonary specialist, opined that the miner's death was caused or hastened by coal workers' pneumoconiosis due to the severity of the chronic obstructive pulmonary disease, but he offered no explanation for this conclusion. Director's Exhibit 54.³ Dr. Thakkar, the miner's treating cardiologist, opined that the miner had arteriosclerotic heart disease which caused his death, but also stated, without further explanation, that chronic obstructive pulmonary disease and pneumoconiosis contributed to the miner's death. Director's Exhibits 23, 49. Dr. Patel treated the miner for his pulmonary condition, and completed the miner's death certificate. On the miner's death certificate, Dr. Patel stated that the miner died due to "cardiopulmonary arrest due to acute respiratory failure and a right pneumothorax." Director's Exhibit 14. Dr. Patel also stated that other significant causes contributing to the miner's death were "angina and CWP (Possible)." *Id.* Dr. Naeye reviewed the relevant evidence, including the autopsy slides and report, and concluded that pneumoconiosis did not contribute to or hasten the miner's death. Director's Exhibit 18; Employer's Exhibit 1. Dr. Naeye opined that the miner's death was due to a bilateral pneumothorax related to emphysema. Employer's Exhibit 1. Finally, Dr. Fino reviewed the medical evidence, and concluded at deposition that the miner died due to a pneumothorax related to emphysema, and that pneumoconiosis did not contribute to or hasten the miner's death. Employer's Exhibit 3.

The administrative law judge, within his discretion, rejected the opinions of Drs. Michos and Thakkar on the basis that they provided no explanation for their conclusions. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1987); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1986); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 5. Further, the administrative law judge permissibly rejected Dr. Patel's opinion because the administrative law judge found it to be equivocal, as Dr. Patel stated that it was *possible* that coal workers' pneumoconiosis contributed to the miner's death. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Ziegler Coal Co.*, 9 BLR 1-106 (1986); Decision and Order at 5; Director's Exhibit 14. As the administrative law judge permissibly rejected all of the evidence supportive of claimant's burden to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant

³ Dr. Michos further opined that "the etiology of the miner's COPD was predominantly tobacco induced but a small contributing component to his COPD from simple CWP cannot be excluded." Director's Exhibit 54.

to Section 718.205(c). *Shuff, supra; Tackett v. Armco, Inc.*, 17 BLR 1-103 (1993); *Trumbo, supra; see also Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). We affirm, therefore, the administrative law judge's denial of benefits in the instant survivor's claim.

⁴

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge

⁴ We decline to address the issues raised in Deel Brothers's cross-appeal relative to whether it is the properly designated responsible operator. In light of our affirmance of the administrative law judge's denial of benefits on the merits, it is unnecessary to do so. See *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).