

BRB No. 02-0885 BLA

CARMA LEE BLAIR (Widow of EVERETT LEE BLAIR)))
))
Claimant-Petitioner))
v.)	DATE ISSUED:
))
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR))
))
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Carma Lee Blair, Hagerhill, Kentucky, *pro se*.

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; and 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow,¹ appeals, without the assistance of legal counsel, the Decision and Order (2002-BLA-0167) of Administrative Law Judge Joseph E. Kane 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

¹ Claimant is Carma Lee Blair, the surviving spouse of the deceased miner, Everett Lee Blair, who died on March 5, 2000. Decision and Order at 3; Director's Exhibit 1.

amended, 30 U.S.C. §901 *et seq.* (the Act).²

The administrative law judge credited the miner with three years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge considered all of the evidence of record and found it sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but insufficient to establish that the miner's pneumoconiosis was related to coal mine employment pursuant to 20 C.F.R. §718.203(c). Accordingly, benefits were denied. On appeal, claimant contends generally that she is entitled to benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's length of coal mine employment finding and affirmance of the administrative law judge's determination that claimant failed to establish causation at Section 718.203(c), but argues that the administrative law judge erred in finding pneumoconiosis established at Section 718.202(a)(4) and for that reason requests that the Board vacate the administrative law judge's decision on the merits and remand this case for reconsideration of the medical evidence.

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. *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, are supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the

² 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).

cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

With respect to the administrative law judge's finding regarding the length of the miner's coal mine employment, claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). The Board will uphold the administrative law judge's length of coal mine employment determination if it is based on a reasonable method of computation and supported by substantial evidence in the record considered as a whole. *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith, supra*; *Miller, supra*; *Maggard, supra*.

Claimant alleged that the miner had ten to thirteen years of coal mine employment. Decision and Order at 3; Director's Exhibit 2; Hearing Transcript at 14. The administrative law judge discussed the evidence pertaining to the miner's coal mine employment, which consisted of statements by the miner in his application for benefits, affidavits regarding his employment history, claimant's hearing testimony, the district director's findings and Social Security Administration (SSA) earnings records. Decision and Order at 3; Director's Exhibits 1-3, 15; Hearing Transcript at 20-22. The administrative law judge found that claimant's testimony regarding specific years of coal mine employment was vague and did not provide a basis upon which to credit claimant with any specific period of coal mine employment. Decision and Order at 3. The administrative law judge relied on the SSA earnings records and determined that claimant established three years of coal mine employment for the period between 1947 and 1952 as computed by the method set forth in Section

725.101(a)(32)(iii). Decision and Order at 3-4. The administrative law judge's determination with respect to the length of coal mine employment is the product of a reasonable method of computation. We, therefore, affirm the administrative law judge's length of coal mine employment finding, as it is rational and supported by substantial evidence. *Vickery, supra*; *Green v. Director, OWCP*, 7 BLR 1-276 (1984). Because the miner had less than ten years of qualifying coal mine employment, we also affirm the administrative law judge's finding that claimant is not entitled to the rebuttable presumption contained in Section 718.203(b) that the miner's pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203.

With respect to Section 718.203(c), the administrative law judge considered the medical reports of record and found that there was no credible and reliable evidence linking the miner's lung disease to his coal mine employment. The administrative law judge considered the May 23, 2002 medical opinion of Dr. Belhasen and concluded that it did not link the miner's coal mine employment to pneumoconiosis. Decision and Order at 12. The administrative law judge noted that Dr. Belhasen diagnosed severe pulmonary disease as well as severe pulmonary impairment, but stated only that the etiology of the impairment was "[p]ossibly dust exposure in coal mining," as well as smoking. Decision and Order at 12; Claimant's Exhibit 1. The administrative law judge then permissibly found Dr. Belhasen's opinion was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge's finding that claimant failed to produce sufficient evidence to link the miner's pneumoconiosis to coal mine employment pursuant to Section 718.203(c) is supported by substantial evidence.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element of entitlement. See *Trent, supra*; *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Because claimant has failed to establish that the miner's pneumoconiosis was related to coal

mine employment, an essential element of entitlement pursuant to 20 C.F.R. Part 718, benefits are precluded.³ *Trent, supra; Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and in accordance with law. *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986).

³ As we affirm the denial of benefits based on the administrative law judge's consideration of the merits pursuant to 20 C.F.R. §718.203(c), we deny the Director's request to remand the case for reconsideration of the medical evidence, even though we agree with the Director that a finding of legal pneumoconiosis requires a finding that the pulmonary condition arises out of coal mine employment.

Accordingly, the Decision and Order of the administrative law judge denying benefits in this survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge