

BRB No. 00-0627 BLA

LYNDA S. SERGENT)
(Widow of PERRY W. SERGENT))
)
 Claimant-Petitioner)
)
 v.)

DATE ISSUED:

APOGEE COAL COMPANY)
(formerly known as ARCH OF)
KENTUCKY, INCORPORATED))
)
 Employer-)
 Respondent)
)
 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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Lynda E. Sergent, Cumberland, Kentucky, *pro se*.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

Rita Roppolo (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid 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: SMITH, McGRANERY and McATEER, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (99-BLA-0978) of Administrative Law Judge Robert L. Hillyard on a 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 The administrative law judge accepted the parties' stipulation of thirty-four

¹ Claimant, Lynda S. Sergent, is the widow of the miner, Perry W. Sergent, who died on October 10, 1993. Director's Exhibit 6. The miner filed an application for benefits on June 8, 1992, which was denied by the district director on February 25, 1993. Director's Exhibit 35. No further action was taken on the miner's claim. Claimant's application for survivor's benefits was filed on February 16, 1998, Director's Exhibit 1, and is the only claim presently before the Board.

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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the

years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000), based on claimant's February 16, 1998 filing date. In weighing the medical evidence of record, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). In addition, he found the medical evidence insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that she will not file a response brief in this appeal.³

amendments.

³ The parties do not challenge the administrative law judge's decision to credit the miner with thirty-four years of coal mine employment. Inasmuch as this finding is not adverse to claimant, it is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by Order issued on February 21, 2001, to which only the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant and employer have not responded to this Order.⁴ Based on the brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated 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 benefits pursuant to Part 718 (2000) in a survivor’s claim filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c) (2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death if it actually hastens the miner’s death.⁵ See *Griffith v.*

⁴ Pursuant to the Board’s instructions, the failure of a party to submit a brief within 20 days following receipt of the Board’s Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

⁵ This case arises within the jurisdiction of the United States Court of

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 1-135 (6th Cir. 1993).

Appeals for the Sixth Circuit, as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that the relevant medical evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. The administrative law judge considered all of the medical evidence of record, and found that the only evidence to address the cause of the miner's death was the death certificate. The death certificate, signed by the deputy coroner, lists the cause of the miner's death as colon cancer but lists no further contributing cause of death or other significant conditions. Director's Exhibit 6. In addition, the record contains the medical reports of Drs. Bogartz, Dahhan, Lane, Wiot and Wright. The administrative law judge reasonably found that none of the medical reports provided an opinion regarding the cause of the miner's death. Rather, the medical reports only address the miner's condition prior to his death.⁶ Decision and Order at 6-8, 12; Director's Exhibits 6, 19-21, 28, 35; Employer's Exhibit 4. Inasmuch as claimant has the burden of establishing that the miner's death was due to, or hastened by, pneumoconiosis and claimant submitted no such evidence, we affirm the administrative law judge's finding that claimant failed to prove that the miner's death was due to pneumoconiosis.⁷ See *Griffith, supra*, *Brown, supra*; *Neeley, supra*; see also *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

⁶ The medical reports of Drs. Bogartz, Dahhan, Lane and Wright, all address the miner's condition prior to his death in 1993. Director's Exhibits 19-21, 28, 35. In addition, the record contains the 1999 deposition of Dr. Wiot, which addresses his rereadings of the miner's August 22, 1991 and October 2, 1992 x-ray films, but does not address the cause of the miner's death. Employer's Exhibit 4.

⁷ Inasmuch as we affirmed the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis, error, if any, in the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); see also *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge