

BRB No. 03-0693 BLA

BILLY LOU POGUE)	
(Widow of WAYLAND POGUE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PITTSBURGH & MIDWAY COAL)	DATE ISSUED: 03/26/2004
MINING COMPANY)	
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
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 – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denial of Benefits (2002-BLA-0328) of Administrative Law Judge Robert L. Hillyard 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).² Based on a stipulation of the parties, the administrative law judge credited claimant with thirty-five years of coal mine employment, Decision and Order at 3; Hearing Transcript at 7, and adjudicated this survivor’s claim pursuant to 20 C.F.R. Part 718. Noting that the miner was receiving benefits at the time of his death based on a claim filed April 9, 1982,³ the administrative law judge found the existence of pneumoconiosis established in light of the finding of pneumoconiosis in the miner’s claim. Decision and Order at 5. However, the administrative law judge found the medical evidence of record 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 in this survivor’s claim.

On appeal, claimant contends that the administrative law judge erred in finding 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. In response, employer urges affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs, has filed a letter stating that he will not respond in this appeal.⁴

¹ Claimant is the widow of the miner, Wayland Pogue, who died on December 6, 1999. Director’s Exhibit 4.

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

³ The miner filed an application for benefits on April 9, 1982. Director’s Exhibit 20-368. Following a formal hearing, benefits were awarded in a Decision and Order dated February 23, 1987, by Administrative Law Judge V. M. McElroy. Director’s Exhibit 20-14.

⁴ The parties do not challenge the administrative law judge’s decision to credit claimant with thirty-five years of coal mine employment, employer’s designation as responsible operator or his findings that the existence of pneumoconiosis has been

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). In survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if it was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge properly set forth all of the medical evidence of record regarding the cause of the miner's death, including the death certificate and the medical opinions of Drs. Fino, Rosenberg, Crenshaw and Givens, as well as treatment notes and summaries from the miner's 1999 hospitalizations. Decision and Order at 3-5; Director's Exhibits 4, 6-9, 22; Claimant's Exhibit 1.

In reviewing the relevant evidence, the administrative law judge stated that the death certificate lists the immediate cause of the miner's death as sepsis due to gallstone pancreatitis due to cholelithiasis. Decision and Order at 3; Director's Exhibit 4. The administrative law judge, in weighing the relevant medical opinions, found that the opinions of Drs. Givens and Crenshaw, the only opinions supportive of claimant's burden, were insufficient to establish that pneumoconiosis caused or hastened the miner's death. Decision and Order at 6-7; Director's Exhibit 22; Claimant's Exhibit 1. Specifically, the administrative law judge reasonably exercised his discretion as trier-of-

established. These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

fact in finding that the opinion of Dr. Givens was insufficient to establish that the miner's death was due to pneumoconiosis as he found that the physician gave no basis for his statement that pneumoconiosis was a contributing cause of the miner's death.⁵ Decision and Order at 7; Claimant's Exhibit 1; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 1483 (2003); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Likewise, the administrative law judge reasonably found that Dr. Crenshaw's opinion was insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a contributing cause of the miner's death because the physician did not provide a definitive opinion and did not state the bases for his conclusions.⁶ Decision and Order at 6; Director's Exhibit 22; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *see also Napier*, 301 F.3d 703, 22 BLR 2-537; *Rowe*, 710 F.2d 251, 5 BLR 2-99.

Furthermore, contrary to claimant's contention, the mere presence of pneumoconiosis and a total respiratory disability is insufficient to establish entitlement to benefits in a survivor's claim. Rather, claimant has the burden of establishing that the miner's death was due to, or hastened by, pneumoconiosis. As the administrative law judge, within a reasonable exercise of his discretion as trier-of-fact, found that the only evidence supportive of claimant's burden was not credible, we affirm his finding that claimant failed to prove that pneumoconiosis caused or hastened the miner's death

⁵ Dr. Givens provided a one-page letter stating that he had treated the miner for respiratory infections and dyspnea prior to his death and that these symptoms were due to pneumoconiosis. Claimant's Exhibit 1. In addition, he stated that a contributing factor to the miner's death was acute respiratory distress syndrome that would not have occurred if the miner's lungs were disease free. Dr. Givens concluded that the miner had pneumoconiosis and that it hastened and was a contributing factor in the miner's death. *Id.*

⁶ Dr. Crenshaw, in a February 26, 2002 letter, stated that he had reviewed the medical records and that the miner "carried a diagnosis of black lung disease at the time [of the January 1999 referral from Dr. Givens]. I do not have any information or testing to confirm or refute that diagnosis. I believe Dr. Givens should address that." Director's Exhibit 22. The physician further stated that the miner did have evidence of a chronic lung disease and that at the time of his terminal hospitalization, the miner developed respiratory insufficiency and pneumonia which required intubation. Dr. Crenshaw concluded that "[h]is underlying lung disease did significantly contribute to his death. If he does have black lung disease, then that would definitely be a contributing factor." *Id.*

pursuant to Section 718.205(c).⁷ 20 C.F.R. §718.205(c); see *Griffith*, 49 F.3d 184, 19 BLR 2-111; *Brown*, 996 F.2d 812, 17 BLR 2-135; *Neeley*, 11 BLR 1-85; see also *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁷ In light of the affirmance of the administrative law judge's finding that the opinions of Drs. Crenshaw and Givens, the only evidence supportive of claimant's burden, are insufficient to establish that pneumoconiosis was a contributing cause of the miner's death, we need not address claimant's further contentions regarding the contrary evidence of record inasmuch as error, if any, in the administrative law judge's consideration of those opinions would be harmless. See generally *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).