

BRB No. 05-0659 BLA

SHELBY J. SHEPPARD	)	
(Widow of JOHN E. SHEPPARD, JR.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLUE SPRINGS COAL COMPANY	)	DATE ISSUED: 03/30/2006
	)	
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 – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia for employer.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5603) of Administrative Law Judge Richard A. Morgan 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). Claimant filed her claim for survivor’s benefits on October 17, 2002. Director’s Exhibit 7. The district director issued a Proposed Decision and Order awarding benefits on September 5, 2003. Director’s Exhibit 26. Employer requested a hearing, which was held on October 28, 2004. The administrative law judge determined that while the autopsy evidence showed the existence of simple coal workers’ pneumoconiosis, claimant failed 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 asserts that the administrative law judge erred in relying on the biased opinions of employer's experts to deny benefits in this case. Claimant also argues that she has not received proper consideration of a prior motion for modification filed with respect to her husband's living miner's claim. She maintains that she is entitled to benefits with respect to the miner's claim since the autopsy evidence now establishes that he suffered from pneumoconiosis prior to his death.<sup>1</sup> Employer responds, urging affirmance of the denial of benefits in the survivor's claim. Employer further argues that the living miner's claim is no longer viable, and that any consideration by the Board of claimant's argument regarding the living miner's claim is a violation of employer's due process rights. In the alternative, employer argues that if the Board holds that the living miner's claim is still viable, then any liability for benefits should transfer to the Black Lung Disability Trust Fund. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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<sup>1</sup> The miner filed five claims for benefits prior to his death, all of which were denied. Director's Exhibits 1-5. The miner's most recent claim was filed on January 5, 2000. Director's Exhibit 5. Judge Morgan, the instant administrative law judge, was assigned to hear the matter and issued a Decision and Order denying benefits on November 20, 2001. Following an appeal to the Board, the miner died on September 5, 2002. While the case was still pending before the Board, the miner's widow, claimant herein, apparently filed a petition for modification with the district director on November 25, 2002. In her petition, she requested that the Board remand the miner's claim for modification proceedings in light of the autopsy evidence showing that the miner suffered complicated pneumoconiosis. The Board, however, retained jurisdiction of the miner's claim, and issued a decision affirming the administrative law judge's denial of benefits. *Sheppard v. Blue Springs Coal Co.*, BRB No. 02-0258 BLA-A (Dec. 16, 2002) (unpub.). The Board also denied claimant's request for reconsideration. *Sheppard v. Blue Springs Coal Co.*, BRB No. 02-0258 BLA-A (Mar. 19, 2003).

In this appeal, claimant asserts that she has not been given proper consideration of her modification request in the miner's claim. Because the Board did not receive a copy of the petition for modification, the Board was unaware of the outstanding modification request when it issued its December 16, 2002 decision affirming the administrative law judge's denial of benefits. However, since the record does not disclose whether the district director ever ruled on claimant's petition for modification, claimant raises a valid argument that she is entitled to further consideration of the living miner's claim. If claimant seeks to pursue this matter, she must do so before the district director.

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).

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 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 a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980, 16 BLR 2-90, 2-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). The Fourth Circuit held in *Shuff*, 967 F.2d at 980, 16 BLR at 2-93, that any condition that hastens the miner's death is a substantially contributing cause of death. See 20 C.F.R. § 718.205(c)(2).

In the instant case, the administrative law judge assigned determinative weight to the medical opinions of Drs. Oesterling, Bush, Zaldivar and Jarboe, who opined that the miner did not suffer from complicated pneumoconiosis, and that simple coal workers' pneumoconiosis neither caused nor hastened the miner's death. Although claimant states that the administrative law judge erred in relying on the opinions of Drs. Zaldivar, Bush and Osterling, whose opinions are "tailored to the demands of their clients (the coal companies)," there is no merit to her general assertions of bias on the part of employer's experts. Claimant's Brief in Support of Petition for Review at 2.

Employer's experts are not considered to be biased solely because they receive a fee for their services and their opinions were obtained by employer in anticipation of litigation. A finding of bias on the part of a physician must be supported by evidence in the record. See *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992), *citing Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35 (1991) (*en banc*). In the absence of supporting evidence to establish bias by employer's experts in this case, we reject claimant's general contention that the administrative law judge erred in his consideration of the medical opinion evidence.

Since claimant has not raised any other allegation of error by the administrative law judge, see *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983), we affirm,

as supported by substantial evidence, the administrative law judge's findings pursuant to 20 C.F.R. §718.205(c).

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

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge