

BRB No. 08-0350 BLA

R.M. (Surviving Spouse))
)
 Claimant-Petitioner)
)
 v.)
)
 STRAIGHT CREEK MINING COMPANY) DATE ISSUED: 03/25/2009
)
 and)
)
 HORIZON NATURAL RESOURCES)
)
 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 – Denying Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky,
Inc.), Barbourville, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denying Benefits (2006-BLA-5256
and 2006-BLA-5257) of Administrative Law Judge Joseph E. Kane rendered on a

¹ Claimant, R.M., is the surviving spouse of the miner, B.M. Following the
miner's death on January 12, 2004, and while his claim was still pending, claimant filed a

miner's subsequent claim² and 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). The administrative law judge accepted the parties' stipulation to fifteen years of qualifying coal mine employment, as supported by the record. The administrative law judge found that inasmuch as claimant conceded that the newly submitted evidence did not establish that the miner was totally disabled due to pneumoconiosis, the miner's subsequent claim must be denied for failure to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).³ With respect to the survivor's claim, the administrative law judge determined that the evidence of record failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on both claims.

On appeal, claimant contends that the administrative law judge erred in admitting medical reports from employer that exceeded the evidentiary limits at 20 C.F.R. §725.414(a)(3)(1). Claimant also contends that the administrative law judge erred in finding that the miner's death was not due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits and arguing that the administrative law judge's evidentiary rulings were correct. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a brief in this matter.

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30

survivor's claim on February 18, 2004. The miner's claim and the survivor's claim were subsequently consolidated for adjudication prior to the formal hearing before the administrative law judge. Decision and Order at 2-3.

² The miner's initial claim for benefits, filed on October 6, 1986, was finally denied by the district director on April 30, 1991. A duplicate claim, filed on July 27, 1994, was finally denied on April 16, 1998. The miner filed a request for modification on August 3, 1998. The Board affirmed the denial of the request for modification on April 10, 2001. [*B.M.*] *v. Straight Creek Mining Co.*, BRB No. 00-0698 BLA (Apr. 10, 2001) (unpub.). The miner took no further action, until the filing of a subsequent claim on April 17, 2002.

³ The denial of the miner's claim is affirmed, as unchallenged on appeal. Claimant's Brief at 4, 12; *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983). Accordingly, our review is limited to the administrative law judge's denial of the survivor's claim.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. Decision

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 by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). In a survivor’s claim filed on or after January 1, 1982, death due to pneumoconiosis may be established by showing pneumoconiosis caused the miner’s death, was a substantially contributing cause or factor leading to the miners death, that the miner’s death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(3). 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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

At the outset, we note that we will not consider claimant’s contention that the administrative law judge erred in admitting medical reports from employer that exceeded the evidentiary limitations at Section 725.414(a)(3)(1). Because the administrative law judge found that the medical opinions submitted by claimant failed to establish that the miner’s death was due to pneumoconiosis, *see* discussion *infra*, error, if any, at Section 725.414(a)(3)(1) would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Turning to the merits, claimant contends that the administrative law judge erred in finding that the miner’s death was not due to pneumoconiosis by crediting the opinion of Dr. Baker, that the miner’s death from lung cancer was unrelated to pneumoconiosis, over the contrary opinions of the miner’s treating physicians, Drs. Vaezy and Woolum, that pneumoconiosis hastened the miner’s death. Claimant asserts that the administrative law judge erred in failing to consider that Drs. Vaezy and Woolum were treating the miner at the time of his death, while Dr. Baker only examined the miner once, on May 11, 2002, more than one and one-half years before the miner’s death on January 12, 2004. Claimant contends that Dr. Baker’s opinion is not, therefore, as credible as those of Drs. Vaezy and Woolum, because Dr. Baker did not have “the test results, examination results, consultative reports, etc. from after 11 May 2002 which were available to Dr. Vaezy and Dr. Woolum.” Claimant’s Brief at 10-11.

and Order at 2, n. 1; Director’s Exhibit 5 at 1; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In his analysis of the evidence, the administrative law judge acknowledged that Dr. Woolum had been the miner's treating physician for over thirty years. However, the administrative law judge noted that while Dr. Woolum indicated on a questionnaire that the miner had pneumoconiosis and that pneumoconiosis hastened his death, "[t]he portion of the form requesting a rationale for the conclusion that pneumoconiosis contributed to the miner's death was left blank." Decision and Order at 5; Director's Exhibit 51. Consequently, the administrative law judge properly found that Dr. Woolum's opinion did not establish that the miner's death was due to pneumoconiosis, because it contained "no reasoning" in support of its conclusion. Decision and Order at 8-9; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Addressing the medical opinion of Dr. Vaezy, the administrative law judge noted that Dr. Vaezy had treated the miner from 1995 until his death in 2004. The administrative law judge noted that Dr. Vaezy opined that the miner "died of respiratory failure due to lung cancer and COPD... his coal worker's pneumoconiosis contributed to his respiratory symptoms and hastened his death." Decision and Order at 6; Claimant's Exhibit 1. The administrative law judge properly concluded that "Dr. Vaezy's opinion, although more reasoned, failed to establish that pneumoconiosis caused the miner's death because the doctor failed to explain how his documentation, *i.e.*, three x-rays and non-qualifying pulmonary function studies, supported his conclusion that pneumoconiosis contributed to the miner's death. Decision and Order at 9; *see Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Clark*, 12 BLR at 1-155.

Consequently, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish death due to pneumoconiosis at Section 718.205(c). Further, because the opinions of Drs. Woolum and Vaezy are the only opinions that could carry claimant's burden of establishing death due to pneumoconiosis, we will not consider claimant's argument regarding the administrative law judge's evaluation of Dr. Baker's opinion that the miner's death was due to lung cancer, and unrelated to pneumoconiosis.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge