

BRB No. 12-0417 BLA

ALMA G. IRICK)
(Widow of RONALD IRICK))
)
 Claimant-Petitioner)
)
 v.)
)
 MARFORK COAL COMPANY,) DATE ISSUED: 03/27/2013
 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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2010-BLA-05662) of Administrative Law Judge Richard A. Morgan, rendered on a survivor's claim filed on July 21, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited the

¹ Claimant is the surviving spouse of the miner, Ronald Irick, who died on May 25, 2009. Director's Exhibit 9.

miner with at least thirty-eight years of coal mine employment and adjudicated the claim under the regulations at 20 C.F.R. Part 718. Relevant to the applicability of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),² the administrative law judge determined that claimant did not establish that the miner had fifteen years of underground coal mine employment or employment in conditions substantially similar to those in an underground mine, and also failed to establish that the miner had a totally disabling respiratory or pulmonary impairment. Therefore, he found that claimant was not entitled to the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4). The administrative law judge further found that while the evidence was sufficient to establish that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the credibility of employer's medical opinion evidence and argues generally that the evidence is sufficient to establish death due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.³

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,

² On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Relevant to this claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner worked at least fifteen years in underground coal mine employment or in conditions that are substantially similar to those found in an underground mine, and the miner also had a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). Additionally, pursuant to amended Section 422(l), 30 U.S.C. §932(l), if a miner was awarded benefits during his lifetime, an eligible survivor is not required to establish death due to pneumoconiosis and is automatically entitled to benefits. Claimant is not eligible for benefits pursuant to amended Section 932(l), as there is no indication in the record that the miner was receiving benefits at the time of his death.

³ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant failed to invoke the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 19.

and in accordance with applicable law.⁴ 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 under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor’s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner’s death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, that death was caused by complications of pneumoconiosis, or that 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)-(4). 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 Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

In evaluating whether claimant could establish death due to pneumoconiosis, pursuant to 20 C.F.R §718.205(c), the administrative law judge correctly noted that “none of the physicians found that the miner’s pneumoconiosis hastened his death.” Decision and Order at 21. The miner’s death certificate lists the cause of death as cardiac arrest due to, or as a consequence of, natural causes. Director’s Exhibit 9. Pneumoconiosis is not listed as a cause of death. *Id.* The miner’s emergency treatment records from Raleigh General Hospital also report that he suffered from cardiac arrest. Employer’s Exhibit 2. The autopsy prosector, Dr. Dy, diagnosed pneumoconiosis, but offered no opinion regarding the cause of death. Director’s Exhibit 11. Drs. Castle, Basheda, Bush, and Oesterling were unanimous in their opinions that pneumoconiosis did not play any role in causing, contributing to, or hastening the miner’s death. Employer’s Exhibits 3, 6, 4, 7, 5; Director’s Exhibit 24. Therefore, the administrative law judge found that the evidence did not establish that pneumoconiosis was a substantially contributing cause of the miner’s death. Decision and Order at 21.

Claimant, on appeal, challenges the credibility of employer’s medical opinion evidence and generally states that “the evidence in this claim demonstrates that [the

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner’s most recent coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director’s Exhibit 6.

miner's] pneumoconiosis contributed to and hastened [] his untimely death." Claimant's Brief (unpaginated) at [4]. Claimant's arguments are without merit.

Claimant's arguments regarding the sufficiency of employer's evidence must be rejected, as it is claimant, not employer, who 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 *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge correctly noted that there is no medical evidence that establishes that pneumoconiosis caused, substantially contributed to, or hastened the miner's death, claimant has not met her burden of proof at 20 C.F.R. §718.205(c). See *Sparks* 213 F.3d at 190, 22 BLR at 2-259; *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93; *Anderson*, 12 BLR at 1-112; Decision and Order at 21. In addition, while claimant generally contends that the evidence is sufficient to establish death due to pneumoconiosis, claimant fails to allege any specific error with regard to the manner in which the administrative law judge weighed the evidence at 20 C.F.R. §718.205(c). As the Board must limit its review to contentions of error that are specifically raised by the parties, we affirm the administrative law judge's findings at 20 C.F.R. §718.205(c). See 20 C.F.R. §§802.211, 802.301; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Because claimant failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement, benefits are precluded. See *Anderson*, 12 BLR at 1-112.

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