BRB No. 98-0795 BLA

TWILA L. BREWSTER (Widow of CHARLIE BREWSTER)	)	
Claimant-Petitioner	)	
v.	)	
BANJO BRANCH COAL COMPANY, INCORPORATED	)	DATE ISSUED:
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 of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Twila Brewster, Vansant, Virginia, *pro se*.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (97-BLA-1688) of Administrative Law Judge Edward J. Murty, Jr., denying benefits in both the miner's claim and the 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

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, filed an appeal on behalf of claimant but is not representing him on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Act). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge concluded that while the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), it was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied in both the miner's claim and the survivor's claim. On appeal, claimant generally contends that she is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 on a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the miner's death was due to pneumoconiosis. *See* 20

[2] The miner filed his first claim for benefits July 24, 1979, which was denied by the Department of Labor June 20, 1980. The miner filed his second claim for benefits March 24, 1995, which was denied by the Department of Labor August 29, 1995. The miner died June 23, 1996. Claimant filed her claim for benefits February 27, 1997, which was consolidated with miner's claim and denied by the Department of Labor April 4, 1997.

C.F.R. §§718.1, 718.205, 718.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, held in *Shuff v. Cedar Coal Co*,, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1993), that any condition that actually hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205(c).

After consideration of the administrative law judge's Decision and Order, the arguments 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 therein. With respect to the miner's claim, the administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204. *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge permissibly found that total disability was not established pursuant to Section 718.204(c)(1)-(3) as all of the pulmonary function studies and blood gas studies of record produced non-qualifying values[3] and there was no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 12, 15, 17, 40; Decision and Order at 2; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the administrative law judge properly considered the entirety of the medical opinion evidence of record and permissibly found that total disability was not established as none of the physicians of record found claimant totally disabled. Director's Exhibits 16, 31, 40, 50, 72, 76; Employer's Exhibits 1, 3, 5, 7; Decision and Order at 5; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*. The administrative law judge also permissibly accorded greatest weight to the opinions of Drs. Hippensteel, Tuteur and Naeye, as they examined the entire record, explained their conclusions, and were highly qualified. Director's Exhibits 40, 46; Employer's Exhibits 3, 5, 7; Decision and Order at 5; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish total disability

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

pursuant to 20 C.F.R. §718.204(c) as it is supported by substantial evidence and is in accordance with law.

With respect to the survivor's claim, the administrative law judge permissibly determined that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *See Piccin*, *supra*. The autopsy listed failure to expectorate secretions leading to irreversible respiratory failure as the cause of death. Director's Exhibit 50. Drs. Hippensteel and Forehand found no evidence of pneumoconiosis. Drs. Naeye, Hansbarger, Tuteur and Kleinerman found the miner's pneumoconiosis too mild to have contributed to death and that death was due to coronary artery disease. Director's Exhibits 16, 31, 40, 72, 76; Employer's Exhibits 1, 3, 5, 7. The administrative law judge rationally concluded that the evidence of record was insufficient to establish death due to pneumoconiosis as the evidence indicates that death was due to heart disease and that the pneumoconiosis was too mild to have contributed to death. Decision and Order at 5. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's denial in the survivor's claim as it is supported by substantial evidence and is in accordance with law. *Trumbo*, *supra*; *Shuff*, *supra*; *Neeley*, *supra*.

Inasmuch as claimant has failed to establish that the miner was totally disabled or that the miner's death was due to pneumoconiosis, entitlement to benefits in both the miner's claim and the survivor's claim is precluded.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge