

BRB No. 99-0774 BLA

DORIS J. POWELL)	
(Widow of EDWARD POWELL))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
U.S. STEEL MINING)	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 Thomas F. Phalen, Jr.,
Administrative Law Judge, United States Department of Labor.

Mark D. Goss (Goss & Goss Attorneys), Harlan, Kentucky, for claimant.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (98-BLA-0622) of Administrative
Law Judge Thomas F. Phalen, Jr. denying benefits in a survivor's claim filed
pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

¹Claimant is the widow of the miner, Edward Powell, who died on February 21,
1997. Director's Exhibits 1, 8. The miner filed a claim on November 22, 1985.
Director's Exhibit 22. This claim was denied by the Department of Labor on March
10, 1986, April 7, 1987 and August 6, 1987. *Id.* Inasmuch as the miner did not
pursue this claim any further, the denial became final. Claimant filed her survivor's
claim on April 18, 1997. Director's Exhibit 1.

of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with thirty-two years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), he found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, the administrative law judge found the evidence 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. On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Neither employer nor the Director, Office of Workers' Compensation Programs, has participated in this appeal.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

²Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.202(a)(1)-(4) are not challenged on appeal, we affirm these findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We disagree. Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.³ See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. See *Boyd, supra*. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) in a case in which the disease actually hastens his death. See *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

³Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

The administrative law judge correctly stated that “no physician found pneumoconiosis to be a contributing...cause of death.” Decision and Order at 11. The administrative law judge considered the death certificate signed by Dr. Dahhan on March 5, 1997 and the relevant August 13, 1997 medical report of Dr. Dahhan. In the death certificate, Dr. Dahhan indicated that the miner’s death was caused by acute respiratory acidosis, chronic obstructive lung disease, emphysema and pneumonia. Director’s Exhibit 8. In the medical report, Dr. Dahhan opined that the miner’s “simple coal workers’ pneumoconiosis, if indeed [it] was present, did not cause or contribute to his death, which was a result of emphysema and had resulted from his smoking habit and not from his simple coal workers’ pneumoconiosis.” Director’s Exhibit 14.

Claimant asserts that the administrative law judge erred in failing to consider Dr. Dahhan’s February 27, 1997 hospital discharge summary which notes a history of pneumoconiosis. Director’s Exhibits 10, 13. Specifically, claimant asserts that Dr. Dahhan’s notation of a history of pneumoconiosis implicitly establishes that pneumoconiosis was a contributing factor of the miner’s death. Contrary to claimant’s assertion, the hospital discharge summary is not sufficient to establish that pneumoconiosis contributed to the miner’s death. Although Dr. Dahhan noted a history of pneumoconiosis in the hospital discharge summary, he did not indicate that it was a condition that he diagnosed. Director’s Exhibits 10, 13. Moreover, Dr. Dahhan did not render an opinion that pneumoconiosis contributed to the miner’s death in either the hospital discharge summary or the subsequent death certificate. Director’s Exhibits 8, 10, 13. Rather, as the administrative law judge correctly stated, in a subsequent report, “Dr. Dahhan specifically found [that] the pneumoconiosis present was not a contributing cause of death.” Decision and Order at 11. Thus, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge’s finding that the evidence is insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). See *Brown, supra*.

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor’s claim, see *Trumbo, supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits in the survivor’s claim.

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