BRB No. 01-0708 BLA

NANCY M. KAMENOS (Widow of EDWARD KAMENOS)	)	
Claimant-Petitioner	)	
v.	)	
DUQUESNE LIGHT COMPANY	)	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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Daniel J. Iler, Washington, Pennsylvania, for claimant.

Edward Waldman (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (00-BLA-0592) of Administrative

[1]Claimant is the widow of the miner, Edward Kamenos, who died on March 4, 1997. Director's Exhibits 1, 5, 20. The miner filed a claim on April 23, 1985. Director's Exhibit 19. This claim was denied by the Department of Labor (DOL) on August 15, 1985. *Id*.

Law Judge Richard A. Morgan denying benefits 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).[2] The administrative law judge credited the miner with at least eleven years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. Because claimant's 1999 survivor's claim was not filed within a year of the denial of claimant's prior 1997 survivor's claim, the administrative law judge denied benefits in accordance with 20 C.F.R. §725.309 (2000).[3]

On appeal, claimant challenges the administrative law judge's denial of survivor's benefits in accordance with 20 C.F.R. §725.309 (2000). Claimant also challenges the administrative law judge's alternative 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). The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, claimant contends that the administrative law judge erred in denying survivor's benefits in accordance with 20 C.F.R. §725.309 (2000). Specifically, claimant asserts that the administrative law judge erred in finding that the 1997 survivor's claim is not viable. Claimant's assertion is based upon the premise that the district director violated her right to due process in considering the 1997 survivor's claim. The administrative law judge stated, "I find the facts of this case insufficient to justify [a] re-opening of the claimant's initial claim, and although the claimant's counsel has made argument that either the original claim is still valid, or a second claim should be opened, he has cited no case law in support of

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Because the miner did not pursue this claim any further, the denial became final.

[2]The DOL has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The revisions to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001.

his position." Decision and Order at 9.

The pertinent procedural history of this case is as follows: Claimant's initial survivor's claim was filed on April 30, 1997. Director's Exhibit 20. On August 27, 1997, the Department of Labor (DOL) denied this survivor's claim because claimant failed to establish the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis. *Id*. The DOL advised claimant that she could pursue the claim further by submitting additional evidence or requesting a hearing within sixty days. *Id*. In a letter dated September 29, 1997, claimant indicated that she disagreed with the DOL's denial of the survivor's claim, and submitted additional medical evidence. *Id*. On October 7, 1997, the DOL advised claimant that additional medical evidence must come from the "originating source." *Id*. The DOL also advised claimant that it was granting her an additional sixty days beyond the original time frame to either submit additional evidence or request a hearing. *Id*. Claimant requested additional time beyond the new deadline on December 4, 1997. On December 9, 1997, the DOL advised claimant that it was granting her an additional thirty days for the submission of evidence.[4] *Id*. Further, the DOL advised claimant that the survivor's claim would be considered closed if she did not submit additional evidence, ask for another extension, or request a hearing by the new deadline of January 24, 1998. *Id*. Claimant subsequently submitted a copy of Dr. Iracki's December 15, 1997 report. *Id*. On January 23, 1998, the DOL acknowledged receipt of Dr. Iracki's report but advised claimant that it could not consider it in support of a request for reconsideration because it did not come from the "originating source."[5] *Id*. Nonetheless, the DOL granted claimant an additional thirty days

[4]In a letter dated December 9, 1997, the DOL stated, "[p]lease be advised you are hereby granted an additional sixty (30) days for the submission of evidence beyond the due date set in our prior letter." Director's Exhibit 20. The DOL also stated that "[t]his means all evidence must be in this office by January 24, 1998." *Id*. In a prior letter dated October 7, 1997, the DOL stated that "[t]he new deadline is December 25, 1997." *Id*. Since the deadline of January 24, 1998 was thirty days later than the prior deadline of December 25, 1997, the DOL's reference to sixty days in its December 9, 1997 letter appears to be a clerical error.

[5]The administrative law judge considered the district director's handling of the 1997 survivor's claim. However, the administrative law judge did not address the district director's refusal, in the January 23, 1998 letter, to consider Dr. Iracki's December 15, 1997 opinion because of the district director's requirement that additional medical evidence must come from the "originating source." Director's Exhibit 20. Because the pertinent regulations do not require that additional medical evidence must come from the "originating source," the district director erred in failing to consider Dr. Iracki's 1997 opinion on this basis.

to either submit additional evidence or request a hearing. *Id*. The DOL advised claimant that the survivor's claim would be considered closed if she did not submit additional evidence, request additional time to obtain evidence, or request a hearing by February 23, 1998. *Id*. The record does not indicate that claimant pursued this survivor's claim any further.[6] Claimant's most recent survivor's claim was filed on March 19, 1999. Director's Exhibit 1.

Claimant asserts that the administrative law judge erred in finding that the 1997 survivor's claim is not viable since, claimant argues, the district director erroneously advised her that she did not need an attorney. The record does not indicate that the district director advised claimant that she did not need an attorney. To the contrary, the DOL's August 27, 1997 denial of claimant's 1997 survivor's claim specifically advised claimant that she could obtain a representative in order to be sure that her rights were fully protected if she intended to pursue the survivor's claim. Director's Exhibit 20. During the October 16, 2000 hearing before the administrative law judge, claimant testified that the district director did not recommend to her that she should obtain an attorney. Hearing Transcript at 16. The administrative law judge stated that "[claimant's] testimony on direct examination...reflects that she was aware that she needed an attorney, and discussed the case with attorneys who did not take the case, for reasons not disclosed in testimony or the record." Decision and Order at 8. Since the administrative law judge reasonably found that claimant was aware of the need for an attorney in her first claim, we reject claimant's assertion that the administrative law judge erred in finding that the 1997 survivor's claim is not viable because the district director erroneously advised her that she did not need an attorney.[7]

[6]The administrative law judge stated that "[i]t is not disputed that [claimant] had no more contact with the [DOL] until she filed the present claim on March 18, 1999, some 14 months after her own last letter to Mr. Bloomfield [of the DOL]." Decision and Order at 6.

[7]The administrative law judge concluded that "claimant was aware at some point that it might be advisable to pursue an attorney, but for whatever reasons did not retain counsel for her first claim." Decision and Order at 8.

Citing *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988), claimant also asserts that the district director failed to fulfill his obligation to assist claimant in developing the evidence in the survivor's claim.[8] Claimant's assertion is based upon the premise that the district director did not ask Dr. Iracki if the miner's pneumoconiosis hastened his death. Section 718.205(d) provides that "[t]he initial burden is upon the claimant, with the assistance of the district director, to develop evidence which meets the requirements of paragraph (c) of this section." 20 C.F.R. §718.205(d). Further, Section 725.405(c) (2000) provides that "[i]n the case of a claim filed by or on behalf of a survivor of a miner, [the district director] shall obtain whatever medical evidence is necessary and available for the development and evaluation of the claim." 20 C.F.R. §725.405(c) (2000). In the instant case, as the Director asserts, the district director obtained copious medical records in the 1997 survivor's claim. Director's Exhibit 20. Further, although it was not admitted into the record in the 1997 survivor's claim, Dr. Iracki's December 15, 1997 opinion did address the issue of whether pneumoconiosis contributed to the miner's death. Director's Exhibit 7. Moreover, since claimant did not assert that the district director failed to fulfill his obligation to assist claimant in developing the evidence in the survivor's claim while the case was before the administrative law judge, we reject claimant's assertion as untimely raised. *See Lyon v. Pittsburg & Midway Coal Co.*, 7 BLR 1-199 (1984).

Further, claimant asserts that the administrative law judge erred in finding that the 1997 survivor's claim is not viable since, claimant argues, the district director erred by failing to send the January 23, 1998 letter, warning of termination by reason of abandonment, by certified mail. The administrative law judge stated, "I note that at no time does [claimant] actually claim that she did not receive the letter, only that she does not recall receipt." Decision and Order at 6. The pertinent regulation provides that "[i]f [the district director] determines that a denial by reason of abandonment is appropriate, he or she shall notify the claimant of the reasons for such denial and of the action which must be taken to avoid a denial by reason of abandonment." 20 C.F.R. §725.409(b) (2000). The pertinent regulation does not require the district director to send the notice by certified mail.[9] *Id*. Thus, since the administrative law judge reasonably found that the district director sent the January 23, 1998 letter to claimant in accordance with the regulations, we reject claimant's assertion that the

[8]As the Director asserts, contrary to claimant's implication, the United States Court of Appeals for the Third Circuit, in *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988), did not address the scope of the district director's obligation to assist a claimant in developing medical evidence in a survivor's claim.

[9]The revised regulation at 20 C.F.R. §725.409(b) requires the district director to send letters, warning of denial by reason of abandonment, by certified mail. However, the revised regulation applies to claims filed after January 19, 2001. 20 C.F.R. §725.2(c).

administrative law judge erred in finding that the 1997 survivor's claim is not viable because the district director erroneously failed to send the January 23, 1998 letter by certified mail.

In addition, claimant asserts that the administrative law judge erred in finding that the 1997 survivor's claim is not viable since, claimant argues, the January 23, 1998 letter by the DOL is defective on its face because it does not apprise claimant of her appeal rights. The administrative law judge stated, "I find that (sic) the above history of the claim, and the correspondence between the [DOL], sufficient to put the claimant on notice that failure to comply with the very clear directives of the [DOL], would have consequences, and that the consequence would be dismissal of her claim." Decision and Order at 7. We hold that any error by the administrative law judge in this regard is harmless, however, in light our disposition of the case at 20 C.F.R. §718.205(c). *See infra* at 7; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Next, we address claimant's contention that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Benefits are payable on survivors' claims filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.[10] *See* 20

[10]Section 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 establishes that pneumoconiosis was the cause of the miner's death, 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.

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. *See* 20 C.F.R. §718.202(a)(1)-(4); *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. *See* 20 C.F.R. §718.203; *Boyd*, *supra*.

> ...
> (5) 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).

The relevant evidence of record consists of a death certificate signed by Dr. Hahn and the reports of Dr. Iracki.[11] In the death certificate, Dr. Hahn indicated that lung cancer was the immediate cause of the miner's death. Director Exhibits 5, 20. In a report dated December 15, 1997, Dr. Iracki opined that pneumoconiosis contributed to the miner's death. Director's Exhibit 7. In subsequent reports dated November 23, 1998 and March 10, 1999, Dr. Iracki opined that pneumoconiosis hastened the miner's death. *Id*. The administrative law judge permissibly discredited Dr. Iracki's opinion because it is not well reasoned.[12] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Since the administrative law judge permissibly discredited the only medical opinion of record that could support a finding that pneumoconiosis caused, substantially contributed to, or hastened the miner's death, we affirm 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). *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

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, *see* 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 survivor's benefits.

[11]The administrative law judge stated that "[t]he record is replete with medical records that describe [the miner's] seven-year battle with lung cancer that culminated in his March 4, 1997 death." Decision and Order at 9. The administrative law judge further stated that "[t]here was no autopsy performed and, correspondingly, there are no opinions from pathologists regarding the cause of death." *Id*.

[12]The administrative law judge stated that "Dr. Iracki does not explain how the underlying medical data supports his opinion." Decision and Order at 9.

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