

BRB No. 07-0800 BLA

P.S.)	
(Widow of O.S.))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 05/28/2008
)	
SHARPLES COAL CORPORATION)	
c/o ACORDIA EMPLOYERS SERVICE)	
)	
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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

P.S., Logan, West Virginia, *pro se*.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order (04-BLA-6263) of Administrative Law Judge Pamela Lake Wood denying benefits on a 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). This case involves a

¹ Claimant is the surviving spouse of the deceased miner who died on March 26, 2001. Director's Exhibit 10.

survivor's claim filed on July 29, 2002.² After crediting the miner with forty years of coal mine employment,³ the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence did not 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 generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁴ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

² The miner filed a claim for benefits on June 7, 1973. Director's Exhibit 1. The district director denied this claim because he found that the evidence did not establish that the miner was totally disabled due to pneumoconiosis. *Id.*

³ The record reflects that the miner's coal mine employment occurred in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴ Section 718.205(c) provides 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

OWCP, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

The administrative law judge properly found that there was no evidence in the record supportive of a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Dr. Snyder, the miner's treating physician, completed the miner's death certificate. Dr. Snyder attributed the miner's death to metastatic lung cancer. Director's Exhibit 10. No other causes or conditions were listed. In a June 9, 2006 report, Dr. Snyder opined that the miner died from "non-small cell carcinoma and bronchopneumonia." Claimant's Exhibit 1. Dr. Snyder did not relate either of these conditions to the miner's coal dust exposure.⁵ *Id.* The administrative law judge,

(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.

(4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(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).

⁵ In his June 9, 2006 report, Dr. Snyder stated:

Although there is not a direct length [sic] between coal workers' pneumoconiosis and non small cell carcinoma, I feel that [the miner's] years of coal mine and dust exposure and coal workers' pneumoconiosis were significant factors in his disability and pulmonary decline over the years that I treated him.

Claimant's Exhibit 1.

Although Dr. Snyder attributed the miner's disability and pulmonary decline to his coal dust exposure and coal workers' pneumoconiosis, the doctor did not opine that the

therefore, properly found that the miner's death certificate and Dr. Snyder's June 9, 2006 report did not support a finding of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 26-27.

Although Dr. DeLara, the autopsy prosector, diagnosed coal workers' pneumoconiosis, the doctor attributed the miner's death to severe acute bronchopneumonia. Director's Exhibit 11. The administrative law judge accurately noted that Dr. DeLara did not attribute the miner's bronchopneumonia to pneumoconiosis or otherwise state that the miner's pneumoconiosis played any role in his death. Decision and Order at 26-27. The administrative law judge, therefore, properly found that Dr. DeLara's opinion did not support a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

The administrative law judge further properly found that the opinions of Drs. Oesterling and Castle, the only other physicians of record to address the cause of the miner's death, did not support a finding that the miner's death was due to pneumoconiosis.⁶ Dr. Oesterling attributed the miner's death to bronchopneumonia and carcinoma. Employer's Exhibit 6 at 21. Dr. Oesterling opined that neither of these conditions was attributable to the miner's coal dust exposure. *Id.* at 28. Dr. Castle opined that the miner died as a result of complications of non small cell carcinoma of the lung, including severe bronchopneumonia. Employer's Exhibits, 4, 7. Dr. Castle opined that the miner's death was not caused by, contributed to, or hastened by, coal workers' pneumoconiosis or any process that arose from his coal mine employment. *Id.*

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁷

miner's death was related to the miner's coal dust exposure or coal workers' pneumoconiosis.

⁶ The administrative law judge noted correctly that Drs. Cinco and Spagnolo did not address the cause of the miner's death. Decision and Order at 26; Claimant's Exhibit 2; Employer's Exhibit 3.

⁷ Because there is no evidence in the record supportive of a finding of complicated pneumoconiosis, the administrative law judge properly found that claimant was precluded from establishing entitlement based on the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 11-17; *see* 20 C.F.R. §718.205(c)(3).

Claimant indicates, in her statement in support of her appeal, that she intends to produce additional evidence concerning her case. In order to have additional evidence considered, claimant may file a petition for modification with the district director.⁸ See 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.310; *Lee v. Consolidation Coal Co.*, 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986).

Finally, we note that employer, in its response brief, argues that the administrative law judge erred in excluding Dr. Bush's report from the record because it exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer also argues that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). We need not address employer's arguments. In a response brief, a party is limited to raising arguments which either respond to arguments raised in petitioner's brief or support the decision below. 20 C.F.R. §802.212(b). Employer's argument regarding the admissibility of Dr. Bush's report neither responds to arguments raised in claimant's brief nor supports the administrative law judge's decision. Consequently, this argument is not properly before the Board.⁹ *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Cabral v. Eastern Associated Coal Corp.*, 18 BLR 1-25 (1993); *King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87 (1983).

Additionally, in light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we need not address employer's arguments regarding the administrative law judge's finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁸ The sole ground available for modification of a survivor's claim is a mistake in a determination of fact. See *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

⁹ Employer states that it was unable to file a Notice of Cross-Appeal within thirty days of the administrative law judge's denial of benefits because claimant did not provide it with a copy of her Notice of Appeal. However, the regulations provide that, in the event that a party is not properly served with the first notice of appeal, such party may initiate a cross-appeal by filing a notice of appeal within fourteen days of the date that service is effected. 20 C.F.R. §802.205(b). The Board acknowledged claimant's notice of appeal on July 9, 2007 and employer filed its response brief on August 16, 2007, outside the time period in which it was permitted to file a notice of cross-appeal. 20 C.F.R. §802.205(c).

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