

BRB No. 10-0514 BLA

VICKIE B. FORESTER )  
(Widow of JAMES S. FORESTER) )  
 )  
Claimant )  
 )  
v. )  
 )  
CUMBERLAND RIVER COAL COMPANY ) DATE ISSUED: 05/12/2011  
 )  
Self Insured through )  
 )  
ARCH COAL COMPANY )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order on Survivor's Claim Denying Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Vickie B. Forester, Harlan, Kentucky, *pro se*.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order on Survivor's Claim Denying Benefits (08-BLA-05994) of Administrative Law Judge Robert B. Rae (the administrative law judge) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)), as amended, 30 U.S.C. §901 *et seq.* (the Act). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with ten years of coal mine employment, as stipulated by the parties and supported by the Social Security Administration records, and determined that the amendments to Section 422(c)(4) of the Act, 30 U.S.C. §921(c)(4), were inapplicable because the miner lacked the requisite fifteen years of coal mine employment.<sup>2</sup> The administrative law judge found that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or 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 generally challenges the administrative law judge's denial of survivor's benefits, asserting that the medical opinion of Dr. Dieter, as supported by the miner's treatment records, is sufficient to establish that the miner had pneumoconiosis and that his death was due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief, but agrees with the administrative law judge's finding that the amendments to the Act have no impact on this case.

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, and in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30

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<sup>1</sup> Claimant is the widow of the miner, James S. Forester, who died on November 30, 2004. Director's Exhibit 13. The miner did not file a claim for federal black lung benefits during his lifetime. Decision and Order at 2. Claimant filed her survivor's claim for benefits on October 1, 2007. Director's Exhibit 2.

<sup>2</sup> Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-149, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4).

<sup>3</sup> The record indicates that the miner was employed in the coal mining industry in Kentucky. Claimant's Exhibit 63. Accordingly, the Board will apply the law of the

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 in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, that the miner’s death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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 also Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining, Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1989). Failure to establish anyone of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

After consideration of the administrative law judge’s Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge correctly determined that the record contains no evidence of complicated pneumoconiosis, and thus, we affirm his finding that claimant is not entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304, as supported by substantial evidence. Decision and Order at 8. Relevant to the cause of the miner’s death, the administrative law judge determined that the miner’s death certificate made no mention of pneumoconiosis, but listed the immediate causes of death as cancer of the esophagus, pulmonary metastasis, aspiration pneumonia, and chronic obstructive lung disease (COLD). Decision and Order at 14; Director’s Exhibit 13. As the record provided no indication that Dr. Dahhan, who signed the death certificate, possessed any relevant qualifications or personal knowledge of the miner from which to assess the cause of death, the administrative law judge properly accorded the death certificate little weight.<sup>4</sup> Decision and Order at 14-15; *see Smith v. Camco Mining*,

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United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup> As Dr. Dahhan did not link the miner’s chronic obstructive lung disease to dust exposure in coal mine employment, *see* 20 C.F.R. §718.201, Director’s Exhibit 13, the death certificate, even if credited, could not support claimant’s burden of establishing that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

*Inc.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). The administrative law judge accurately summarized the medical opinion of Dr. Jarboe, that the miner's death was not contributed to, caused by and/or hastened by pneumoconiosis, Employer's Exhibit 4, and the opinion of Dr. Dieter, the treating thoracic surgeon for the miner's esophageal cancer, who responded to a form question as to whether pneumoconiosis contributed to the miner's death by circling both the "yes" and "no" boxes, rather than checking one, and wrote "I don't know. I was not involved in [the miner's final] hospitalization and do not have autopsy results," Claimant's Exhibit 45. Decision and Order at 11-12. As the administrative law judge found that Dr. Dieter's opinion was vague and equivocal, he permissibly accorded the opinion "very little weight." Decision and Order at 11; see *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

It is the function of the administrative law judge to evaluate the physicians' opinions, see *Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); and the Board will not substitute its inferences for those of the administrative law judge. *Clark*, 12 BLR at 1-155. As substantial evidence supports the administrative law judge's permissible discounting of Dr. Dieter's opinion, and as the record contains no other medical opinion which, if credited, is sufficient to meet claimant's burden, claimant cannot establish that the miner's death was due to pneumoconiosis under Section 718.205(c) as a matter of law. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Consequently, we affirm the administrative law judge's determination that the evidence of record does not support a finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and affirm the denial of benefits.<sup>5</sup>

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<sup>5</sup> Because we hold that the evidence of record is insufficient as a matter of law to establish that pneumoconiosis hastened the miner's death, a requisite element of entitlement in a survivor's claim, we need not reach the issue of whether the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Accordingly, the administrative law judge's Decision and Order on Survivor's Claim Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge