BRB No. 03-0142 BLA

CLEO W. ARNETT (Widow of ELLIS JUNIOR ARNETT) Claimant-Petitioner v. ISLAND CREEK COAL COMPANY c/o ACORDIA EMPLOYER SERVICE and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/28/2003 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Cleo W. Arnett, Graham, Kentucky, *pro se*.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order – Denial of Benefits (01-BLA-0650) of Administrative Law Judge Thomas F. Phalen, Jr., (the administrative law judge), 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).[3] In his Decision and Order, the administrative law judge noted the unusual procedural history of this case. The administrative law judge noted that the miner filed his application for benefits on July 12, 1978, and that the miner's claim was referred to the Office of Administrative Law Judges on May 27, 1981. Director's Exhibit 43. On August 30, 1981, the miner died, and on July 2, 1982, claimant filed her application for survivor's benefits. Director's Exhibit 44. On August 31, 1983, Administrative Law Judge Edward J. Murty, Jr., issued a Decision and Order – Rejection of Claim. No further action was taken on the miner's claim. On December 20, 1999, claimant filed a second claim for survivor's benefits.

The administrative law judge reviewed Judge Murty's Decision and Order and stated:

> [B]ecause: (1) there is no evidence that the district director first adjudicated the survivor's claim, as required by the regulations; (2) there is nothing in the record showing that the miner's claim and the widow's claim were consolidated; (3) the claim number assigned to the case decided by Judge Murty was the same as that of the miner's

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[1] Claimant is Cleo W. Arnett, the widow of Ellis Junior Arnett, the miner, who died on August 30, 1981. Director's Exhibit 4-14.

[2] Claimant submitted a letter in support of her appeal which was written by her daughter, Barbara Matheney, who represented claimant while the case was before the administrative law judge. In an Order issued on February 11, 2003, the Board advised claimant that it would consider her appeal under the general standard of review. *See* Order dated February 11, 2003; *see also* 20 C.F.R. §§802.211(e), 802.220.

[3] The Department of Labor 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

> claim when it was referred to this office; and (4) the regulations that should have governed the widow's claim, 20 C.F.R. Part 718, were not implemented, I conclude that the original widow's claim was never properly adjudicated, and, therefore, automatic denial pursuant to §725.309(b) is not warranted.

2002 Decision and Order at 4. The administrative law judge then considered the merits of the survivor's claim. He credited the miner with twelve years and eleven months of qualifying coal mine employment and he found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also reviewed the evidence concerning the cause of the miner's death and found it 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.

Employer responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[4]

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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).

We first consider the administrative law judge's findings at Section 718.205(c). In finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge found that the only evidence supporting a finding of death due to pneumoconiosis is the miner's death certificate. The administrative law judge found that "it cannot be discerned on what basis the coroner[, who signed the death certificate,] made [his] finding," and the administrative law judge stated that the coroner "apparently has no medical credentials." 2002 Decision and Order at 19. The administrative law judge accorded greater weight to

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[4] We affirm the administrative law judge's finding that the 1982 survivor's claim was not adjudicated, and his concomitant decision to consider the survivor's claim on the merits, as these findings have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the opinions of Drs. Miller, O'Connor, Hansbarger, Caffrey, Naeye and Crouch, because they each viewed the autopsy slides, and the administrative law judge noted that Drs. Caffrey, Naeye, Castle and Jarboe reviewed all of the medical evidence, which provided them with a "more accurate picture of the miner's health over time." 2002 Decision and Order at 20. The administrative law judge stated "for these reasons, and because of the expertise these physicians hold in their fields, I place greater weight on their opinions." 2002 Decision and Order at 20.

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death.[5] 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish 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. *See* 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).

As the administrative law judge found, the only evidence of record supportive of claimant's burden of establishing that the miner's death was due to pneumoconiosis, is the death certificate. The death certificate is signed by Charles L. Nelson who, in the

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[5] 20 C.F.R. §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.
> ...
> (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)(1)-(3), (5).

section of the form requesting his "degree or title," identified himself as "coroner." The death certificate lists the immediate cause of death as myocardial infarction, due to history of acute pulmonary disease, due to "Co Workers (sic) Disease Pneumoconiosis." Director's Exhibit 11. Drs. Caffrey, O'Connor, Hansbarger, Jarboe, Crouch, Naeye and Castle each stated that the miner died a coronary or cardiac death, and each opined that his death was not related to his coal mine employment or coal workers' pneumoconiosis. Director's Exhibits 27, 29, 30, 42-44; Employer's Exhibits 1, 3, 4. Dr. Miller stated that the immediate cause of death is probably related to an acute coronary occlusion.[6] Director's Exhibits 23, 43.

Claimant asserts that the administrative law judge erred by discounting the miner's death certificate. We disagree. The administrative law judge may not rely upon a death certificate as substantial evidence unless the record reveals the basis for the opinion it offers. *Farmer v. Matthews*, 584 F.2d 796, 801 (6th Cir. 1978); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). The administrative law judge correctly found that the record does not contain evidence of any medical credentials of the coroner, nor does it provide an explanation for the basis of the coroner's conclusions. We, therefore, hold that the administrative law judge properly discounted the miner's death certificate.

Inasmuch as we affirm the administrative law judge's discounting of the only evidence supportive of claimant's burden of establishing that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), we also affirm the administrative law judge's finding that claimant has not established that the miner's death was due to pneumoconiosis thereunder. *See* 20 C.F.R. §718.205(c). Further, in view of this holding, we need not address the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[7]

We now turn to several issues raised by claimant in her letter to the Board. Claimant asserts that "Ms. Arnett was indeed present on Dec. 4, 2001 when the case came in front of the (sic) Judge Phalen." Claimant's Letter at 1. Claimant's assertion

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[6] It was incorrect for the administrative law judge to characterize Dr. Miller's opinion as stating that the miner's death was not in any way due to pneumoconiosis. Decision and Order 19; Director's Exhibits 23, 43.

[7] Likewise, we do not need to address claimant's assertion that the administrative law judge misconstrued Dr. Simpao's opinion, as Dr. Simpao's opinion does not address the cause of the miner's death. Director's Exhibit 44-8.

that she was present at the hearing appears to be a response to the administrative law judge's statement that claimant was unable to attend the hearing, and for that reason his decision would be made on the documentary record. *See* 2002 Decision and Order at 2. Other than noting the presence of the administrative law judge, claimant's lay representative and employer's counsel, the Hearing Transcript does not indicate whether others were present who did not speak on the record. At the hearing, the administrative law judge asked claimant's lay representative "Do you have a witness to call?" to which claimant's lay representative stated "No, sir, I do not." Hearing Transcript at 15. Since the determination of the cause of death must be based on medical evidence, *see* 20 C.F.R. §718.205, claimant's testimony alone would not assist her in establishing that the miner's death was due to pneumoconiosis. Therefore, we hold that any error by the administrative law judge in stating that claimant did not attend the hearing, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant also states that in the miner's case, only nine years of coal mine employment were established, while in the survivor's claim the miner was credited with over twelve years of coal mine employment. We decline to address claimant's implied challenge to Judge Murty's finding of nine years of coal mine employment in the 1983 Decision and Order. The Board may review only the Decision and Order which is being appealed, *see* 20 C.F.R. §§ 802.301(a), 802.404(a), in this case, the 2002 Decision and Order.

Claimant maintains that the administrative law judge relied solely on the evidence developed by employer and claimant contends that she is disadvantaged in this proceeding by employer's greater resources. This assertion lacks merit. It is claimant's burden to establish the elements of entitlement, and in this case, the only evidence offered by claimant which supports her claim is the death certificate, which the administrative law judge properly discredited. Consequently, there is no evidence to carry claimant's burden of proof.

Finally, claimant asserts that her "original [survivor's] claim had not been heard, and her due process rights to the law have been diminished. Additionally too much time was allowed to lapse before she was given proper treatment to a court of law." Claimant's Letter Brief at 1. Claimant has not alleged any prejudice resulting from the delay in considering her claim that would constitute a violation of her right to due process, nor is any prejudice evident from the record, *see generally Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183, 21 BLR 2-545, 2-560 (4th Cir. 1999)("It is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay."). We, therefore, hold that claimant's assertion lacks merit.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits, is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge