

BRB Nos. 05-0427 BLA
and 05-0427 BLA-A

ELLEN LOWE)	
(Widow of ARVIED LOWE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ISLAND CREEK KENTUCKY MINING)	
)	DATE ISSUED: 10/21/2005
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Ellen Lowe, Turkey Creek, Kentucky, *pro se*.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; 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:

Claimant¹ appeals, without the assistance of counsel, and employer cross-appeals, the Decision and Order (03-BLA-5921) of Administrative Law Judge Gerald M. Tierney 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). The administrative law judge noted that the miner worked for at least twenty-nine years in coal mine employment.² The administrative law judge found that claimant did not prove 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 challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. Employer also cross-appeals, challenging the administrative law judge's exclusion of evidence submitted by employer that the administrative law judge found to be in excess of the limitations set forth at 20 C.F.R. §725.414. Employer argues that those limitations are arbitrary and invalid. The Director, Office of Workers' Compensation Programs has declined to file a substantive response to claimant's appeal, but responds to employer's cross-appeal, contending that 20 C.F.R. §725.414 is a valid regulation limiting the evidence that the parties may introduce in black lung claims.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to

¹ Claimant is Ellen Lowe, the widow of Arvied Lowe, the miner, who died on June 6, 1995. Decision and Order at 2; Director's Exhibit 12.

² The record indicates that the miner's last coal mine employment occurred in Kentucky. Director's Exhibits 3, 7-9. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 7, 8.

pneumoconiosis. See 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(4). 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.205(c), the administrative law judge considered a death certificate and three medical reports addressing the cause of the miner's death. The miner's death certificate listed the immediate cause of his death as squamous cell carcinoma of the lung with bone and brain metastasis. Decision and Order at 2; Director's Exhibit 12. No other causes or contributing conditions were listed. The death certificate indicated further that no autopsy was performed. Dr. Myers, who the administrative law judge noted is Board-certified in internal and occupational medicine, reviewed the miner's medical records and opined that although the miner died of cancer, pneumoconiosis "may have contributed to his eventual demise." Decision and Order at 2; Claimant's Exhibit 3. Dr. Myers stated that pneumoconiosis "would therefore be considered an aggravating factor" in the miner's death. *Id.* By contrast, Drs. Jarboe and Dineen, who the administrative law judge noted are Board-certified pulmonary specialists, reviewed the miner's medical records and concluded that the miner died of metastatic lung cancer and that pneumoconiosis did not cause, contribute to, or hasten his death in any way. Decision and Order at 2; Employer's Exhibits 1, 3, 4. Based on all of this evidence, the administrative law judge found that claimant did not establish that the miner's death was due to pneumoconiosis.

Upon review, we conclude that substantial evidence supports the administrative law judge's finding, which is in accordance with law. *McFall*, 12 BLR at 1-177. Specifically, the administrative law judge was within his discretion to find that Dr. Myers based his conclusion that pneumoconiosis was an aggravating factor in the miner's death "on the equivocal premise that pneumoconiosis 'may have' contributed to the miner's death." Decision and Order at 2; see *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). The administrative law judge also permissibly found that Dr. Myers did "not explain how or by what mechanism pneumoconiosis would have acted to have contributed to or hastened the miner's death." Decision and Order at 2, see *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). Substantial evidence supports the administrative law judge's determination. Claimant's Exhibit 3. Because the administrative law judge permissibly discounted the only medical

evidence that could support claimant's burden of proof, we affirm his finding that claimant failed to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c); *see Griffith*, 49 F.3d at 186, 19 BLR 2-116; *Trumbo*, 17 BLR at 1-87-88.

Because claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), a necessary element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits. *See* 20 C.F.R. §718.205(a)(3); *Trumbo*, 17 BLR at 1-87-88. In light of our affirmance of the denial of benefits, we need not address employer's cross-appeal regarding the administrative law judge's evidentiary rulings under Section 725.414.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits in this survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge