

BRB No. 98-0222 BLA

BELVIA G. BECKNER)
(Widow of ROBERT A. BECKNER))
)
 Claimant-Petitioner)
)
 v.)
)
 HAWLEY COAL MINING,) DATE ISSUED:
 CORPORATION)
)
 and)
)
 WEST VIRGINIA COAL-WORKERS')
 PNEUMOCONIOSIS FUND)
)
 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 of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Sparkle Bonds (The Virginia Black Lung Association), Richlands, Virginia, for claimant.¹

K. Keian Weld (Senior Assistant Attorney General, Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

¹Claimant is represented on appeal by a lay representative.

PER CURIAM:

Claimant² appeals the Decision and Order (96-BLA-1278) of Administrative Law Judge John C. Holmes 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 adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718.³ The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2) and 718.203(b). The administrative law judge also found the evidence 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. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death

²Claimant is the widow of the deceased miner, Robert A. Beckner, who died on October 16, 1994. Director's Exhibits 1, 11. The miner filed a claim on October 22, 1981. On June 7, 1995, the administrative law judge issued a Decision and Order on Remand denying benefits, which the Board affirmed. *Beckner v. Director, OWCP*, BRB No. 95-1820 BLA (May 9, 1996)(unpub.). Inasmuch as the miner's claim was not pursued any further, the denial became final. Claimant filed her survivor's claim on March 2, 1995. Director's Exhibit 1.

³The administrative law judge stated that "Employer conceded that the miner had engaged in coal mine employment for at least 24 years." Decision and Order at 3.

was due to pneumoconiosis at 20 C.F.R. §718.205(c). Carrier responds by letter, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.⁴

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

⁴Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2) and 718.203(b) are not challenged on appeal, we affirm these findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Inasmuch as the instant 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).⁵ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case arises, adopted the standard whereby pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Claimant contends 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). Specifically, claimant asserts that the opinion of Dr. Dy is sufficient to establish that the miner's death was due to pneumoconiosis. The administrative law judge considered the opinions of Drs. Dy and Naeye, and the death certificate signed by Dr. Whitley. Dr. Dy opined that the miner suffered from mild micromacular and focal nodular anthracotic pneumoconiosis. Director's Exhibit 12. Dr. Naeye opined that the miner's coal workers' pneumoconiosis was far too

⁵Section 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 established that the miner's death was due to pneumoconiosis, 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.

20 C.F.R. §718.205(c).

mild to have hastened his death. Director's Exhibit 13. The death certificate lists cardiac arrest, arteriosclerotic heart disease, diabetes mellitus and emphysema/COPD as causes of the miner's death. Director's Exhibit 11. Since Dr. Dy did not render an opinion with regard to the cause of the miner's death, we reject claimant's assertion that the opinion of Dr. Dy is sufficient to establish that the miner's death was due to pneumoconiosis, a holding in accord with the administrative law judge's finding. Moreover, since none of the physicians of record opined that the miner's death was caused, contributed to, or hastened by pneumoconiosis, substantial evidence supports 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 *Shuff, supra*.

In addition, claimant asserts that the administrative law judge erred in finding the evidence insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304 because Dr. Dy's autopsy report establishes that the miner suffered from complicated pneumoconiosis. The administrative law judge stated that "there is no evidence that the miner suffered from complicated pneumoconiosis." Decision and Order at 7. The pertinent regulation provides that "There is an irrebuttable presumption...that a miner's death was due to pneumoconiosis...if such miner is suffering or suffered from a chronic dust disease of the lung which...[w]hen diagnosed by biopsy or autopsy, yields **massive lesions** in the lung." 20 C.F.R. §718.304(b) (emphasis added). Dr. Dy opined that the "[f]ull-thickness longitudinal sections of the parenchyma of both lungs show the consistent mild micromacular anthracosis with foci of subpleural nodular anthracosis with the largest measuring 1 cm in greatest dimension." Director's Exhibit 12. Claimant offered no evidence that this statement was equivalent to a diagnosis of "massive lesions."⁶ Thus, since the administrative law judge, within his discretion as trier of fact, implicitly determined that Dr. Dy, as autopsy prosector, did not adequately describe the condition comprehended by the regulatory term "massive lesions," we reject claimant's assertion that Dr. Dy's autopsy report is sufficient to establish that the miner suffered from complicated pneumoconiosis. Furthermore, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304(b). See *generally Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991).

⁶Although when pneumoconiosis is diagnosed by x-ray, a finding of an opacity greater than one centimeter would satisfy the irrebuttable presumption, see 20 C.F.R. §718.304(a), the regulation is clear that when pneumoconiosis is diagnosed by autopsy, a finding of "massive lesions" is necessary to satisfy the irrebuttable presumption, see 20 C.F.R. §718.304(b), (c).

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 pursuant to 20 C.F.R. §718.205(c), an essential element of a survivor's entitlement under 20 C.F.R. Part 718, see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986), we hold that the administrative law judge properly denied benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge