

BRB No. 04-0834 BLA

HILDA MARIE COSNER)
(Widow of CHARLES C. COSNER))

Claimant-Petitioner)

v.)

DATE ISSUED: 03/23/2005

BUFFALO COAL COMPANY)

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 Gerald M. Tierney, Administrative Law
Judge, United States Department of Labor.

Hilda Marie Cosner, Mt. Storm, West Virginia, *pro se*.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund),
Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, the miner's widow and without the assistance of counsel, appeals the
Decision and Order (2001-BLA-591) of Administrative Law Judge Gerald M. Tierney

denying benefits on the miner's claim and the 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 found, and the parties stipulated to, at least thirty-one years of qualifying coal mine employment and that employer was the proper responsible operator. Decision and Order at 2; Director's Exhibits 4, 26. Based on the date of filing, the administrative law judge considered entitlement in both the miner's and survivor's claims pursuant to 20 C.F.R. Part 718.¹ After noting that the miner's claim was a subsequent claim, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) but insufficient to establish that the pneumoconiosis arose out of coal mine employment or that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.203 and 718.204. Decision and Order at 3-8. The administrative law judge further found that although the existence of pneumoconiosis was established, entitlement in the survivor's claim was precluded as the evidence was insufficient to establish that the pneumoconiosis arose out of coal mine employment or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.203 and 718.205. Decision and Order at 8-9. Accordingly, benefits were denied in both the miner's and survivor's claims.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence and generally asserts that the administrative law judge erred in finding the existence of pneumoconiosis established. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to the instant appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by

¹ Claimant is Hilda Marie Cosner, the miner's widow. The miner, Charles C. Cosner, filed his initial claim for benefits on January 5, 1983, which was denied on July 14, 1983 as the miner failed to establish the existence of pneumoconiosis. Director's Exhibit 27. The miner took no further action until he filed a second claim on July 24, 1996, in which benefits were awarded by the district director. Director's Exhibit 26. Employer subsequently requested a hearing before the Office of Administrative Law Judges. *Id.* The miner died on October 3, 1998. Director's Exhibit 7. A hearing was held before Administrative Law Judge Thomas M. Burke on October 22, 1999, and the administrative law judge remanded the case to the district director to consolidate the miner's claim with the soon to be filed survivor's claim. Director's Exhibit 26. Claimant filed a survivor's claim on December 27, 1999, which was denied on November 16, 2000. Director's Exhibits 1, 11, 24. Claimant subsequently requested a hearing on both claims. Director's Exhibit 25.

substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in the miner’s claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to prove any one of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, 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. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *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. *See* 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).²

After consideration of the administrative law judge’s Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge properly concluded that claimant was entitled to the rebuttable presumption that the miner’s pneumoconiosis arose out of coal mine employment as she had proven the existence of the disease and established over ten years of coal mine employment.³ *See* Section 411(c)(1) of the Act, 30 U.S.C. §921(c)(1); 20 C.F.R.

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the State of West Virginia. *See* Director’s Exhibits 3, 26, 27; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³ Employer generally asserts that the administrative law judge erred in finding that the miner suffered from pneumoconiosis. Employer’s Brief at 1. Employer does not assert any specific error by the administrative law judge in his consideration of the evidence or

§718.203(b); *Trumbo*, 17 BLR 1-85; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; Decision and Order at 5; *see also Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge further, however, in addressing the miner's and survivor's claims, rationally found that the evidence of record was sufficient to establish rebuttal of the presumption contained in Section 718.203(b). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge, in the instant case, considered the x-ray, CT scan and medical opinion evidence of record and properly noted that this evidence did not indicate that the miner suffered from coal workers' pneumoconiosis. Decision and Order at 5-6; Director's Exhibits 23, 26, 27. The administrative law judge correctly noted that Dr. Shipley's comment on his x-ray interpretation of "no findings consistent with coal workers' pneumoconiosis...; irregular opacity suggest the presence of interstitial lung disease" did not undermine the 1/1 diagnosis of pneumoconiosis, which is the relevant issue at Section 718.202(a)(1), but rather, addressed the source of the diagnosed pneumoconiosis, considered at 20 C.F.R. §718.203. *See* Decision and Order at 3; Director's Exhibit 26; *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(on recon. *en banc*). The administrative law judge considered the medical reports of record and noted that Drs. Abrons, Sagin, Renn and Fino did not attribute any of the miner's abnormalities to coal mine dust exposure and Dr. Johnson responded with "Unknown" when asked if the diagnosed condition was related to coal dust exposure. Director's Exhibits 26, 27; Decision and Order at 4-6.

Additionally, the administrative law judge properly found that the decision in which the West Virginia Occupational Pneumoconiosis Board (WVOPB) found the miner to have occupational pneumoconiosis due to coal mine employment with a 50% impairment, is not binding in this case. *See Schegan v. Waste Management & Processors, Inc.*, 18 BLR 1-41 (1994). Moreover, the administrative law judge determined that the WVOPB decision was not a reasoned and documented opinion because it did not address the miner's smoking history and was not supported by sufficient documentation to indicate the medical criteria upon which WVOPB relied. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Compton v. Director, OWCP*, 7 BLR 1-644 (1985); *Kuchwara*, 7 BLR 1-167; Director's Exhibit 26. Based on our review, we conclude that the administrative law judge's finding that the evidence establishes rebuttal of the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 718.203(b) is supported by substantial evidence and is in accordance with law.

application of law and thus the Board has no basis to review these findings. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See* 20 C.F.R. §718.205(d); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge rationally found that the evidence of record in the miner's and survivor's claims was sufficient to establish rebuttal of the presumption that the miner's pneumoconiosis arose out of coal mine employment, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Trent*, 11 BLR 1-26. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's findings that the evidence of record is sufficient to establish rebuttal of the presumption contained in Section 718.203(b) in the miner's and survivor's claims as they are supported by substantial evidence and are in accordance with law. *See Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Trent*, 11 BLR 1-26.

Because claimant has failed to establish that the pneumoconiosis arose out of coal mine employment, a requisite element of entitlement in the instant claims pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd*, 11 BLR 1-39; *Trent*, 11 BLR 1-26; *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge