

BRB No. 99-0942 BLA

EVELYN HELBERT)
(Widow of EARL E. HELBERT))

Claimant-Petitioner)

v.)

BULLION HOLLOW COAL COMPANY)

and)

OLD REPUBLIC INSURANCE)
COMPANY)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)

Party-in-Interest)

DATE ISSUED:

DECISION AND ORDER

Appeal of the Corrected Decision and Order – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Evelyn Helbert, Castlewood, Virginia, *pro se*.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Corrected Decision and Order – Rejection of Claim (98-BLA-0462) of Administrative Law Judge Edward Terhune Miller 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).² In weighing the evidence relevant to the survivor’s claim, the administrative law judge found the evidence of record insufficient to establish that claimant was an eligible surviving divorced spouse of the miner pursuant to 20 C.F.R. §725.212, inasmuch as the evidence did not establish claimant’s dependency by the criteria delineated by 20 C.F.R. §725.217(a)(1)-(3). The administrative law judge further found that the medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Additionally, the administrative law judge found the medical evidence insufficient to establish that the miner’s death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner’s death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. In response to claimant’s appeal, employer urges affirmance of

¹ Claimant, Evelyn Helbert, is the divorced widow of the miner, Earl E. Helbert. The record demonstrates that the miner and claimant were divorced in 1985, Director’s Exhibit 6, and that the miner died on June 16, 1994. Director’s Exhibit 8. Claimant’s application for survivor’s benefits filed on January 19, 1995, Director’s Exhibit 1, is the only claim presently before the Board.

² The administrative law judge issued his original Decision and Order -- Rejection of Claim on April 30, 1999. However, subsequent to claimant’s appeal to the Board, the administrative law judge issued his Corrected Decision and Order – Rejection of Claim on June 17, 1999. The two decisions are substantively identical.

the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this 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 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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when claimant meets her burden of establishing that the miner's death was due to pneumoconiosis arising out of coal mine employment, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established. 20 C.F.R. §§718.201, 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). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,³ has held that if pneumoconiosis hastens death in any way, it is a substantially contributing cause of death pursuant to Section 718.205(c)(2). *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *see generally Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

³ The administrative law judge properly found that the miner's last coal mine employment occurred in the Commonwealth of Virginia and, therefore, that this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 2; Director's Exhibit 21.

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that the medical evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The administrative law judge considered all of the medical evidence of record regarding the cause of the miner's death, including the autopsy report and several medical reports which were based on a review of the medical evidence of record, including lung tissue slides from the autopsy and the autopsy report.⁴ Decision and Order at 5-6; Director's Exhibits 9, 14, 21; Employer's Exhibits 1-3. In reviewing this evidence, the administrative law judge properly found that none of the medical reports stated that pneumoconiosis was the cause of the miner's death. Rather, the physicians attributed the miner's death to carcinoma of the lung.⁵

⁴ The record contains the death certificate which lists the cause of the miner's death as cardiac arrest due to lung cancer, but does not list any additional conditions which contributed to the miner's death. Director's Exhibit 8. In addition, the record contains the autopsy report by Dr. Stefanini, who diagnosed, inter alia, carcinoma of the lung, chronic obstructive pulmonary disease with evidence of fibrous adhesions and emphysema, arteriosclerotic heart disease and anthracotic dusting. However, Dr. Stefanini further stated that the anthracotic dusting was found without macule or nodule formation. Dr. Stefanini did not provide an opinion as to which of these conditions caused the miner's death. Director's Exhibit 9.

⁵ In addition, the record contains the opinions of Drs. Hansbarger and Kleinerman, both of whom reviewed the medical evidence, including lung tissue slides from the miner's autopsy and the autopsy report. Dr. Hansbarger opined that the miner's death was due to the debilitating effects of a poorly differentiated carcinoma of the lung. In addition, Dr. Hansbarger stated that there were findings of anthracotic pigmentation of the lung, but not of the degree to warrant a diagnosis of coal workers' pneumoconiosis or any other occupational pneumoconiosis. With respect to the cause of the miner's death, Dr. Hansbarger opined that pneumoconiosis did not contribute to the miner's death and that the miner's death was not hastened in any way, shape or form by his history of coal mine employment. Director's Exhibit 14; Employer's Exhibit 3. Dr. Kleinerman opined that the cause of the miner's death was lung cancer, which was due to the miner's smoking history and that the lung cancer was not caused, related to or stimulated by coal dust exposure. However, in examining the autopsy slides, Dr. Kleinerman stated that there was evidence of black granular pigment as well as evidence of simple nodular silicosis, which he attributed to the miner's work in the rock quarry but stated that he could not rule out contribution from the miner's coal dust exposure. Nonetheless, Dr. Kleinerman opined that the miner's silicosis

Decision and Order at 7; 20 C.F.R. §718.205(c)(1). Moreover, the administrative law judge reasonably found that none of the physicians stated that pneumoconiosis or the silicosis, as noted by Dr. Kleinerman, played any role in the miner's death.⁶ Decision and Order at 7; 20 C.F.R. §718.205(c)(2); see *Shuff, supra*. Inasmuch as claimant has the burden of establishing that the miner's death was due to, or hastened by, pneumoconiosis and claimant submitted no such evidence, we affirm the administrative law judge's finding that claimant failed to prove that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).⁷ 20 C.F.R. §718.205(c); see *Shuff, supra*; *Neeley, supra*; see also *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985).

Accordingly, the administrative law judge's Corrected Decision and Order – Rejection of Claim is affirmed.

SO ORDERED.

neither hastened the miner's death nor affected his pulmonary function. Employer's Exhibit 2.

Lastly, the record contains the medical report of Dr. Castle, who reviewed the medical evidence of record, including the reports of Drs. Stefanini, Hansbarger and Kleinerman, and opined that the miner's death was due to a very aggressive and widespread lung cancer, which he stated was due to the miner's smoking history. In addition, Dr. Castle stated that the miner's coal dust exposure did not in any way contribute to or hasten his death. Employer's Exhibit 1.

⁶ In addition, the administrative law judge properly found that the irrebuttable presumption of death due to pneumoconiosis is inapplicable because the record contains no evidence of complicated pneumoconiosis. Decision and Order at 4; 20 C.F.R. §§718.205(c)(3), 718.304.

⁷ Inasmuch as we affirmed the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis, we need not address the administrative law judge's finding that claimant has failed to establish her dependency upon the miner pursuant to 20 C.F.R. §725.217.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge