

BRB No. 97-0286 BLA

NELL T. ELSWICK)
(Widow of EDGAR R. ELSWICK))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Nell T. Ellswick, Elkhorn City, Kentucky, *pro se*.

Sarah M. Hurley (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (95-BLA-2562) of Administrative Law Judge Daniel L. Leland denying benefits on a 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 the stipulation by the Director, Office of Workers' Compensation Programs (the Director), to thirty-seven years of coal mine employment, but denied benefits based on his findings that

¹ Claimant is Nell T. Elswick, widow of Edgar R. Elswick, the miner. Claimant filed her application for survivor's benefits on December 10, 1993. Director's Exhibit 1. Although claimant is *pro se* before the Board, she was represented by counsel below. Hearing Transcript at 4.

the record contained no evidence that the miner had pneumoconiosis or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205(c).

On appeal, claimant generally challenges the denial of benefits. The Director responds, urging affirmance. 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 (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 supported by substantial evidence, is rational, and is in accordance with law. 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).

To be entitled to benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner's death was due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.205(c)(1) and (c)(2), the administrative law judge found that the record was devoid of any evidence that "the miner's death was caused by pneumoconiosis or that pneumoconiosis played any role whatsoever in his death." Decision and Order at 3. For survivor's claims filed 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), (2), (4). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

The death certificate indicates that the miner died from an intracranial hemorrhage due to a stroke, which was due in turn to hypertension. Director's Exhibit 5. The same form also indicates that no autopsy was performed. *Id.* A discharge summary relating to the miner's final hospitalization at the University of Kentucky Hospital contains the same diagnosis of death due to intracranial hemorrhage. Director's Exhibit 8. The summary does not address whether pneumoconiosis contributed to the miner's death. Review of the record reveals no other evidence regarding the cause of the miner's death, nor any evidence relevant to the Section 718.304 presumption of death due to pneumoconiosis. See 20 C.F.R. §718.205(c)(3).

Because claimant has the burden to establish that the miner's death was due to or hastened by pneumoconiosis and 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 20 C.F.R. §718.205(c). Because claimant has failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we affirm the denial of benefits. See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge