

BRB No. 03-0794 BLA

LORENE F. PEACE)
(Divorced Surviving Widow of)
HAYS PEACE))

Claimant-Petitioner)

v.)

DATE ISSUED: 04/22/2004

MOUNTAIN CLAY, INCORPORATED)
c/o ACORDIA EMPLOYERS SERVICE)

and)

TRANSCO ENERGY COMPANY)

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 - Denial of Benefits of Daniel J. Roketenetz,
Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird & Paired, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judges, McGRANERY and
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ the surviving divorced spouse of the miner, appeals the Decision and Order (2002-BLA-434) of Administrative Law Judge Daniel J. Roketenetz 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).² The administrative law judge found that claimant established relationship and dependency pursuant to 20 C.F.R. §§725.216, 725.217(a), (c), and determined that this case involved a request for modification pursuant to 20 C.F.R. §725.310 (2000) of Administrative Law Judge Joseph E. Kane's denial of survivor's benefits issued on April 22, 1998.³ After conducting a *de novo* review of the earlier evidence, along with a review of the new evidence submitted since the prior denial, the administrative law judge found that, while the miner suffered from pneumoconiosis arising out of coal mine employment, the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and there was no mistake in Judge Kane's prior findings of fact. Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's findings at Section 718.205(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 by 30 U.S.C. §932(a); *O'Keefe v. Smith*,

¹Claimant is Lorene F. Peace, the surviving divorced spouse of the miner, Hays Peace. The miner was awarded lifetime benefits on February 25, 1993. Director's Exhibit 30. The miner died on November 30, 1996, Director's Exhibit 8, and claimant filed a survivor's claim on December 10, 1996, Director's Exhibit 3.

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The Board affirmed the denial of benefits on May 30, 2000, Director's Exhibit 51, and denied claimant's motion for reconsideration on September 26, 2000, Director's Exhibit 54. Claimant then sought modification, and a hearing on claimant's request was held on January 9, 2002 before Administrative Law Judge Robert L. Hillyard. Director's Exhibit 69. Judge Hillyard remanded the case to the district director for further development of medical evidence and an informal conference. Director's Exhibit 70. Claimant subsequently requested a formal hearing, which was conducted on April 9, 2003.

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastens the miner's death.⁴ 20 C.F.R. §718.205(c)(5); *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Claimant contends that the administrative law judge erred in finding that pneumoconiosis did not hasten the miner's death pursuant to Section 718.205(c). Specifically, claimant maintains that the record contains extensive medical documentation that the miner was totally disabled due to pneumoconiosis at the time of his death, and that Dr. Manoviwala concluded that pneumoconiosis may have contributed to the miner's death. Claimant asserts that Dr. Manoviwala's opinion is adequately documented and reasoned, and that the administrative law judge selectively analyzed the evidence in discounting this opinion. Claimant's arguments are without merit and are tantamount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge determined that the only new medical opinion of record was that of a pulmonary specialist, Dr. Rosenberg, who opined that the miner's death was related in part to severe chronic obstructive pulmonary disease caused entirely by smoking, and that the miner's death would have occurred when it did whether or not he had worked in the coal mines. Decision and Order at 9; Employer's Exhibits 1, 2. The administrative law judge noted that Judge Kane had previously found that although the record indicated that chronic pulmonary disease was a significant condition contributing to the miner's death, this condition was distinct from the miner's pneumoconiosis and was unrelated to coal mine employment. Decision and Order at 10; Director's Exhibit 42 at 14. The administrative law judge accurately reviewed the relevant medical opinions submitted by Drs. Harrison, Dineen and Manoviwala in the record before

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 30-472; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Judge Kane, and permissibly found that there was no mistake of fact in Judge Kane's determination that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c). In so finding, the administrative law judge acted within his discretion as trier-of-fact in concluding that the opinion of Dr. Manoviwala was equivocal and thus was entitled to less weight than the contrary opinions of Drs. Rosenberg, Harrison and Dineen, that the miner's death was unrelated to pneumoconiosis and/or dust exposure in coal mine employment.⁵ Decision and Order at 10; Director's Exhibits 19, 27, 34; Employer's Exhibits 1, 2; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge's findings and inferences pursuant to Section 718.205(c) are supported by substantial evidence and are affirmed. Consequently, we affirm the administrative law judge's denial of benefits. *See Griffith*, 49 F.3d 184, 19 BLR 2-111; *Brown*, 996 F.2d 812, 17 BLR 2-135.

⁵Dr. Manoviwala testified that it would be very difficult to answer the question of whether or to what extent coal dust exposure played a role in causing or hastening the miner's death; that in light of the x-rays and the severity of the miner's smoking history, the physician thought that smoking contributed more to the miner's lung disease than coal dust exposure did, although it would be impossible to distinguish how much either contributed; and that the smoking history, in and of itself, would be sufficient to account for the miner's pulmonary disease. Decision and Order at 10; Director's Exhibit 34 at 10.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge