

BRB No 00-0586 BLA

EUNICE J. BLANKENSHIP)	
(Widow of VERNER M. BLANKENSHIP))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
BEATRICE POCAHONTAS COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Washington, D.C., for employer.

Barry H. Joyner (Judith E. Kramer, 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, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1027) of Administrative Law Judge Daniel A. Sarno 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).¹ The administrative law judge accepted the parties' stipulation to "at least" thirty-one years of coal mine employment, Decision and Order at 3, and found that the weight of the credible medical evidence did not establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge made several errors in his analysis of the medical evidence. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which all parties have responded. The Director states that none of the regulations at issue in the lawsuit affects the outcome of this case. However, both claimant and employer contend that three challenged regulations, 20 C.F.R. §718.104(d)(governing the weighing of a treating physician's opinion), 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease), and 20 C.F.R. §718.204(a)(specifying that a nonrespiratory disability is irrelevant to whether a miner is totally disabled due to pneumoconiosis), affect the outcome of this case. Claimant additionally asserts that 20 C.F.R. §718.201(a)(2)(defining legal pneumoconiosis) and 20 C.F.R. §718.205(c)(5)(specifying that pneumoconiosis is a substantially contributing cause of death if it hastens death), affect the outcome of this case.

Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Revised 20 C.F.R. §718.104(d) is inapplicable because the treating physician evidence in this record was developed prior to January 19, 2001. See 20 C.F.R. §718.101(a). Additionally, 20 C.F.R. §718.204(a) is inapplicable because the issues of disability and disability causation are not elements of a survivor's claim. See 20 C.F.R. §718.205(a)(1)-(3). Further, the principle that pneumoconiosis is progressive is the

¹ The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

same under both the existing law recognizing the progressive nature of pneumoconiosis, see *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-379 (4th Cir. 1996), and 20 C.F.R. §718.201(c), which codifies existing law. 65 Fed. Reg. 79937, 79971-72. Similarly, 20 C.F.R. §§718.201(a)(2) and 718.205(c)(5) merely codify existing law recognizing “legal pneumoconiosis”, see *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, BLR (4th Cir. 2000), and setting forth the “hasten death” standard. See *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); 65 Fed. Reg. 79937-38, 79949-50. Additionally, based on our review, we conclude that none of the other challenged regulations affects the outcome of this case. Therefore, we will proceed with the adjudication of this appeal.

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 establish entitlement to survivor’s benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor’s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, BLR (4th Cir. 2000); *Shuff, supra*. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge did not give proper weight to the death certificate signed by the miner’s treating physician, Dr. H. C. Scott. On the death certificate prepared by Dr. Scott, the immediate cause of death was listed as “[c]arcinomatosis--liver.” Director’s Exhibit 12. Listed in a blank for other significant conditions contributing to death were “[p]ulmonary embolism; venous thrombosis, legs; coal workers’ pneumoconiosis.” *Id.* In assessing whether pneumoconiosis hastened the miner’s death, the administrative law judge found that Dr. Scott “offered no rationale or basis” for his belief that pneumoconiosis contributed to the miner’s death. Decision and Order at 3. Accordingly, the administrative law judge concluded that “I do not find this a well reasoned medical

opinion based upon documented medical evidence.” *Id.* Contrary to claimant’s contention, substantial evidence supports the administrative law judge’s finding, which is in accordance with law. See *Sparks*, 213 F.3d at 192, BLR at . (reference on a death certificate to pneumoconiosis as a condition contributing to death, without further explanation, does not constitute a reasoned medical opinion).

Additionally, contrary to claimant’s contention that the autopsy prosector’s report and the consulting report of Dr. Jeffrey Kahn “detail[ed] the role of cwp in hastening the miner’s death,” Claimant’s Brief at 3, the administrative law judge correctly found that neither the autopsy prosector nor Dr. Kahn addressed whether pneumoconiosis hastened the miner’s death.² Director's Exhibit 13; Claimant's Exhibit 1. Because the administrative law judge properly found that the death certificate, autopsy report, and Dr. Kahn’s report did not support a finding that pneumoconiosis hastened the miner’s death, we reject claimant’s allegations of error.

Claimant next contends that the administrative law judge failed to explain his reasoning for according less weight to the consulting opinion of Dr. Miles Jones, when Dr. Jones “went into detail of the workings of cwp and how it contributed to the death of the miner.” Claimant’s Brief at 4. Contrary to claimant’s contention, however, the administrative law judge explained that he accorded “negligible weight” to Dr. Jones’s autopsy review opinion because it was poorly documented and reasoned. Decision and Order at 5, 9; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Specifically, the administrative law judge found that the record contained no medical evidence to support Dr. Jones’s assertion that the miner had chest x-ray and autopsy diagnoses of complicated pneumoconiosis and cor pulmonale, which hastened his death by interfering with his lung function. Director's Exhibit 16. Substantial evidence supports the administrative law judge’s finding that the record contains no x-ray, autopsy, or other medical diagnosis of either condition. Additionally, the administrative law judge permissibly found that the contrary opinions by the remaining pathologists and pulmonologists stating that the miner’s simple pneumoconiosis did not hasten his death due to a massive pulmonary embolism and liver cancer, were “consistent, well reasoned and based upon the objective medical

² In an autopsy limited to the chest, Dr. Jose Abrenio diagnosed a massive pulmonary embolism, metastatic adenocarcinoma, moderate to severe simple coal workers' pneumoconiosis, acute and chronic bronchitis, cardiomegaly, and coronary artery disease. Director's Exhibit 13. Dr. Abrenio identified the immediate cause of death as a massive pulmonary embolism. *Id.* Based on a review of the autopsy report and tissue slides, Dr. Kahn diagnosed pulmonary embolus, metastatic adenocarcinoma, emphysema, simple coal workers' pneumoconiosis, mild, and moderately severe pulmonary silicosis. Claimant's Exhibit 1. Dr. Kahn did not address the cause of death. *Id.*

evidence of record.”³ Decision and Order at 9; see *Hicks, supra, Akers, supra*.

³ In so finding, the administrative law judge noted that several of those physicians had reviewed Dr. Jones’s report and “expressed their dismay” with Dr. Jones’s inaccurate analysis of the medical data. Decision and Order at 9; see *Hicks, supra; Akers, supra*.

In sum, the administrative law judge provided valid reasons for the weight accorded to the medical evidence, see *Hicks, supra*; *Akers, supra*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993), and substantial evidence supports his findings. Therefore, we affirm the administrative law judge's finding that the weight of the credible medical evidence did not establish that pneumoconiosis "caused, contributed to[,] or hastened the miner's death."⁴ Decision and Order at 9; 20 C.F.R. §718.205(c)(5); see *Sparks, supra*; *Shuff, supra*.

Because claimant has failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits. See 20 C.F.R. §718.205(a)(1)-(3); *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

⁴ Because we affirm the administrative law judge's conclusion that claimant did not submit credible evidence that pneumoconiosis hastened the miner's death, we do not address claimant's contention that employer's expert opinions should have been discounted because of alleged flaws.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge