

BRB No. 06-0693 BLA

PATRICIA ANN GARNEY)	
(Widow of RAYMOND GARNEY))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 08/16/2007
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Emily Goldberg-Kraft (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-6252) of Administrative Law Judge Robert D. Kaplan 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). The administrative law judge adjudicated the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), that the miner had pneumoconiosis arising out of coal mine employment. However, the administrative law judge found that the evidence

did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The Director responds, urging affirmance of the administrative law judge's denial of benefits.

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 applicable 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, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A miner's death will be considered to be 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). 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

At Section 718.205(c), the administrative law judge considered medical records, a death certificate signed by Dr. Wolanin, and the reports of Drs. Levinson and Sherman. The medical records from August 31, 2001 to November 8, 2004 indicated that the miner was treated for a pulmonary condition. Director's Exhibit 5. In the death certificate, Dr. Wolanin opined that lung carcinoma and chronic post traumatic stress syndrome were the causes of the miner's death. Director's Exhibit 4. Dr. Levinson opined that coal workers' pneumoconiosis was a contributing cause that hastened the miner's death. Claimant's Exhibits 1, 2. By contrast, Dr. Sherman opined that pneumoconiosis did not cause, contribute to, or hasten the miner's death. Director's Exhibit 18. Dr. Sherman opined that the miner's death was secondary to complications of his lung cancer. *Id.*

The administrative law judge found that the medical records from August 31, 2001 to November 8, 2004 and the death certificate did not support a finding that pneumoconiosis caused the miner's death.¹ Decision and Order at 18. Further, whereas

¹ Claimant does not challenge the administrative law judge's weighing of the death certificate.

the administrative law judge gave little weight to Dr. Levinson's opinion on the grounds that it was not reasoned or well-documented, he credited Dr. Sherman's opinion on the grounds that it was well-reasoned and well-documented. *Id.* The administrative law judge therefore concluded that the evidence did not establish that the miner's death was due to pneumoconiosis. *Id.*

Claimant asserts that "[t]he [administrative law judge] ignored the substantial, competent medical history detailing [the miner's] deteriorating lung capacity." Claimant's Brief at 5. Contrary to claimant's assertion, the administrative law judge considered "[the] medical records [that] show[ed] that the miner was admitted to Mercy Hospital on numerous occasions from August 31, 2001 to November 8, 2004. (DX 5)." Decision and Order at 3. The administrative law judge stated that "the medical treatment records show that the miner was treated extensively for lung cancer and related shortness of breath."² *Id.* at 18. In addition, the administrative law judge stated that "these records do not show that the miner was treated specifically for pneumoconiosis shortly before his death." *Id.* The administrative law judge therefore determined that the medical records did not support a finding that the miner's death was due to pneumoconiosis. *Id.* Claimant does not point to a specific medical record that the administrative law judge ignored. Thus, because the administrative law judge considered the medical records from August 31, 2001 to November 8, 2004, we reject claimant's assertion that the administrative law judge ignored medical evidence detailing the history of the miner's lung condition.

Claimant also asserts that the administrative law judge placed an unfair burden on claimant. Claimant's Brief at 7, 8. Contrary to claimant's assertion, the administrative law judge properly determined that claimant must show that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c), as the survivor's claim was filed after January 1, 1982. Decision and Order at 15. In considering claimant's burden of proof with regard to the issue of death due to pneumoconiosis, the administrative law judge correctly stated that "Section 718.205(c) provides that pneumoconiosis is a 'substantially contributing cause' of a miner's death if it hastens the miner's death." Decision and Order at 16. Further, citing *Lukosevicz*, the administrative law judge accurately stated that "the [United States Court of Appeals for the Third Circuit] has held that pneumoconiosis constitutes a 'substantially contributing cause' where it shortens life or hastens death, even 'briefly.'"³ *Id.* Therefore, we reject claimant's assertion that the

² The administrative law judge stated that "many of the interpreting radiologists and consulting physicians made reference to [a] radiation injury to the miner's lungs because of the chemotherapy and radiation treatment for his lung cancer." Decision and Order at 18.

³ This case arises within the jurisdiction of the United States Court of Appeals for

administrative law judge placed an unfair burden on claimant. *See* 20 C.F.R. §718.205(c). Furthermore, because Section 718.205(c) requires claimant to prove that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, we reject claimant's assertion that "logic dictates" a finding of death due to pneumoconiosis, based on the fact that the miner had established a totally disabling respiratory impairment in the miner's claim. *Id.*; Claimant's Brief at 8.

Claimant additionally asserts that the administrative law judge erred in discounting Dr. Levinson's opinion. Contrary to claimant's assertion, the administrative law judge permissibly accorded little weight to Dr. Levinson's opinion on the grounds that it was not reasoned or well-documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In considering Dr. Levinson's opinion, the administrative law judge permissibly determined that "the physician seemed to quickly discount the effect of the miner's lung cancer, lung resection, and subsequent radiation and chemotherapy on his pulmonary condition, while the medical treatment records make only brief mention of pneumoconiosis as part of the miner's past medical history." Decision and Order at 18; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). The administrative law judge also permissibly determined that "Dr. Levinson failed to account for the dramatic increase in the miner's pulmonary problems after his lung resection." Decision and Order at 18; *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997). Thus, because the administrative law judge acted within his discretion, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Levinson's opinion.⁴ *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22.

Since the administrative law judge properly discounted the only medical opinion of record that could support a finding that pneumoconiosis hastened the miner's death, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).⁵

the Third Circuit because the miner's coal mine employment occurred in Pennsylvania. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴ Claimant asserts that the administrative law judge is biased against Dr. Levinson. Claimant's Brief at 5. Because claimant has not provided any evidence of bias or prejudice on the part of the administrative law judge, we reject claimant's assertion. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

⁵ Because the administrative law judge properly discounted Dr. Levinson's opinion, we decline to address claimant's assertions with regard to Dr. Sherman's opinion that the miner's death was unrelated to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge