

BRB No. 02-0600 BLA

ANNA HERKO)	
(Widow of MICHAEL HERKO))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:_____
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits (Upon Remand by the U.S. Circuit Court of Appeals) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, 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:

Claimant¹ appeals the Decision and Order Denying Benefits (Upon

¹Claimant is the surviving spouse of the deceased miner, who died on March 15, 1998. Director's Exhibit 3. The miner's death certificate, signed by Dr. Makary, indicates that "acute myelogenous leukemia" was the cause of the miner's death. *Id.*

Remand by the U.S. Circuit Court of Appeals) (99-BLA-0072) of Administrative Law Judge Robert D. Kaplan 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).² This case involves a survivor's claim filed on April 30, 1998, which is before the Board for the second time.³ In a Decision and Order dated August 2, 1999, the administrative law judge found that the Director, Office of Workers' Compensation Programs (the Director), conceded the existence of pneumoconiosis arising out of coal mine employment and that, therefore, the sole issue for resolution in this case was whether claimant could establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). The administrative law judge concluded that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(1)-(3) (2000) and, consequently, denied benefits. Claimant appealed. The Board affirmed the administrative law judge's findings under Section 718.205(c)(1)-(3) (2000) and the consequent denial of benefits. *Herko v. Director, OWCP*, BRB No. 99-1213 BLA (Aug. 30, 2000)(unpublished). Subsequently, claimant filed an appeal with the United States Court of Appeals for the Third Circuit, challenging the administrative law judge's finding that the evidence was insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2) (2000). The court affirmed the administrative law judge's decision to discount the opinions of Drs. Kraynak and Khoudeir thereunder, but vacated the administrative law judge's rejection of Dr. Simelaro's medical opinion because the administrative law judge mischaracterized it. *Herko v. Director, OWCP*, No. 00-3591 (3d Cir. Sept. 24, 2001)(unpublished). The court thus vacated the Board's affirmance of the administrative law judge's denial of benefits, and ordered that the case be remanded to the administrative law judge for him to reconsider Dr. Simelaro's opinion and to weigh it against the contrary opinion of Dr. Perper, in

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 miner filed a living miner's claim on April 18, 1979, which the district director denied on August 18, 1980. Director's Exhibit 11. The miner filed a duplicate claim on December 17, 1984. *Id.* Administrative Law Judge Paul H. Teitler awarded benefits on the miner's claim in a Decision and Order dated June 2, 1988. *Id.*

considering whether claimant established that pneumoconiosis hastened the miner's death and was, therefore, a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2), (c)(5). *Id.* By Order dated December 13, 2001, the Board remanded the case to the administrative law judge for reconsideration consistent with the court's decision. *Herko v. Director, OWCP*, BRB No. 99-1213 BLA (Dec. 13, 2001)(unpublished Order).

Subsequently, claimant filed a motion with the administrative law judge, requesting permission to obtain and submit depositions from Drs. Simelaro and Koudeir. In an Order dated December 21, 2001, the administrative law judge denied claimant's motion. In his Decision and Order on Remand, dated May 16, 2002, the administrative law judge found that Dr. Simelaro's medical opinion was insufficient to establish that the pneumoconiosis hastened, and was therefore a substantially contributing cause of, the miner's death pursuant to Section 718.205(c)(2), (c)(5), discounting the opinion as unreasoned. Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge improperly rejected Dr. Simelaro's opinion as unreasoned in considering whether the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2), (c)(5). Claimant also maintains her contention from the prior appeal that the administrative law judge improperly discounted the opinions of Drs. Kraynak and Koudeir under Section 718.205(c)(2), (c)(5). Finally, claimant argues that the administrative law judge should have permitted her to obtain and submit on remand, deposition testimony from Drs. Simelaro and Koudeir in order to allow them to clarify their opinions. The Director responds, urging affirmance of the administrative law judge's Decision and Order on Remand. Claimant has filed a reply brief reiterating contentions raised in her Petition for Review and brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁴ See 20 C.F.R. §§718.1, 718.202,

⁴Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish 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 the disease hastens his death. 20 C.F.R. §718.205(c)(5); see *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

The United States Court of Appeals for the Third Circuit remanded this case to the administrative law judge for reconsideration of whether Dr. Simelaro's opinion is sufficient to establish that pneumoconiosis hastened the miner's death and was, therefore, a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2), (c)(5). *Herko v. Director, OWCP*, No. 00-3591 (3d Cir. Sept. 24, 2001)(unpublished). In challenging the administrative law judge's rejection of Dr. Simelaro's opinion on remand, claimant argues that the administrative law judge mischaracterized and misinterpreted Dr. Simelaro's initial opinion set forth in his March 18, 1999 report. The administrative law judge found that Dr. Simelaro opined in this report that pneumoconiosis hastened the miner's death because the disease decreased his oxygen level. Decision and Order on Remand at 4-5; Claimant's Exhibit 6. The administrative law judge discounted this opinion on the ground that Dr. Simelaro referred to no evidence establishing that the miner had a low blood oxygen level. *Id.* The administrative law judge further discounted Simelaro's opinion upon concluding that a blood gas study administered in January 1998, interpreted as normal by Dr. Perper, indicated that the miner had an adequate oxygen level. Decision and Order on Remand at 4-5; Director's Exhibit 13.

Claimant argues that, contrary to the administrative law judge's finding, Dr. Simelaro never stated that a low blood oxygen level contributed to the miner's death. Claimant contends that it was thus improper for the administrative law judge to discount Dr. Simelaro's opinion as unreasoned

(1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at §718.304 is applicable.

...

(5) 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).

and undocumented on the ground that the doctor referred to no evidence that the miner actually had a low blood oxygen level, and on the ground that the miner had a normal arterial blood gas study indicating that the miner's oxygenation was normal. We disagree. Contrary to claimant's contention, the administrative law judge properly construed Dr. Simelaro's March 18, 1999 report. Although Dr. Simelaro did not explicitly state that pneumoconiosis hastened the miner's death because the condition causes a lowered blood oxygen level, Dr. Simelaro stated in his March 18, 1999 report:

[The miner exhibited] a blood count show[ing] pancytopenia which means low red cells and low white cell. [sic] The red cells are the oxygen carrying cells of the body. They bring vital oxygen to all of the organs, as long as the lung provides the oxygen. In patient's [sic] with anthracosilicosis this is impaired due to obstruction in the airways and also fibrosis. This is trouble enough with good red cells. But [the miner] had a decreased amount of red cells [from] his leukemia process.

Claimant's Exhibit 6. We also reject claimant's contention that the administrative law judge impermissibly arrived at his own medical conclusion in referencing the normal blood gas study results to discount Dr. Simelaro's opinion. Contrary to claimant's contention, the administrative law judge did not interpret the 1998 blood gas study as normal, but simply noted that Dr. Perper's report indicated that the study was normal. Decision and Order on Remand at 4-5; Director's Exhibit 13. Thus, we hold that the administrative law judge properly discounted Dr. Simelaro's March 18, 1999 opinion, that pneumoconiosis hastened the miner's death because the disease decreased his oxygen level, as unreasoned and undocumented on the ground that the doctor referred to no evidence that the miner actually had a low blood oxygen level, and on the ground that the miner had an arterial blood gas study indicating that his oxygenation was normal.⁵ See *Clark v. Karst-Robbins Coal*

⁵In support of her contention that the administrative law judge improperly discounted Dr. Simelaro's opinion, claimant relies on the decision of the United States Court of Appeals for the Third Circuit in *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002), where the court reversed a denial of benefits after holding that the administrative law judge improperly discredited claimant's doctors' opinions by focusing on "peripheral quibbles." *Balsavage, supra* at 397, 2-396. In *Balsavage*, the court held that the administrative law judge "simply failed to address [the opinions]." *Id.* The administrative law judge in *Balsavage* had not, as the administrative law judge did in the instant case, fully considered whether the opinions were

Co., 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order on Remand at 4-5; Director's Exhibit 13; Claimant's Exhibit 6.

Claimant also contends that the administrative law judge mischaracterized Dr. Simelaro's supplemental report, dated June 14, 1999. The administrative law judge found that, in his supplemental report, Dr. Simelaro abandoned his initial opinion that pneumoconiosis hastened the miner's death by lowering his oxygen level. Decision and Order on Remand at 5; Claimant's Exhibit 9. The administrative law judge interpreted Dr. Simelaro's supplemental opinion as indicating that the miner's death was caused by an increased rate of respiration. The administrative law judge discounted this opinion because Dr. Simelaro did not explain how the increased respiration rate hastened the miner's death. Decision and Order on Remand at 5; Claimant's Exhibit 9. Claimant asserts that Dr. Simelaro's reference to an increased rate of respiration was not an explanation as to the cause of death, but merely an attempt to explain the symptoms of the miner's failing respiratory system. Claimant's Brief at 19. Claimant contends it was thus improper for the administrative law judge to reject Dr. Simelaro's supplemental report on the ground that Dr. Simelaro did not explain how the miner's increased respiratory rate hastened his death. We disagree. In remanding this case for the administrative law judge to reconsider Dr. Simelaro's opinion, the United States Court of Appeals for the Third Circuit held that, as far as the doctor's *supplemental report* was concerned, it is "insufficient to support the claimant's entitlement" pursuant to Section 718.205(c)(2), (c)(5). *Herko v. Director, OWCP*, No. 00-3591 (3d Cir. Sept. 24, 2001)(unpublished), slip op. at 13. Specifically, the court held that Dr. Simelaro opined in the supplemental report that the miner's increased rate of respiration hastened his death, but that Dr. Simelaro did not explain how this occurred. *Id.* Because the administrative law judge properly determined that both Dr. Simelaro's supplemental report, and his March 18, 1999 report, discussed *supra*, are insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death, we affirm the administrative law judge's determination on remand that Dr. Simelaro's opinion is insufficient to establish that pneumoconiosis substantially contributed to, or hastened, the miner's death pursuant to Section 718.205(c)(2), (c)(5). See 20 C.F.R. §718.205(c); *Lukosevicz, supra*.

Claimant also renews her arguments made in the previous appeal that the administrative law judge erred in failing to credit the opinions of Drs. Kraynak and Khoudeir as supportive of her burden under Section 718.205(c)(2). The United States Court of Appeals for the Third Circuit

documented and reasoned. Thus, contrary to claimant's suggestion, the administrative law judge's rejection of Dr. Simelaro's opinion did not run afoul of the court's decision in *Balsavage*.

affirmed the administrative law judge's finding that the opinions of Drs. Kraynak and Khoudeir were insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death. *Herko v. Director, OWCP*, No. 00-3591 (Sept. 24, 2001)(unpublished), slip op. at 10-12. The court stated: "we have approved the ALJ's conclusion discounting the medical opinions of Drs. Kraynak and Khoudeir and we see no reason to require the ALJ to reconsider their [sic] evidence." *Id.*, slip op. at 14, n.4. We thus reject claimant's arguments.

In addition, we reject claimant's contention that her evidence stands un rebutted because the administrative law judge never credited Dr. Perper's opinion that the miner's death was in no way related to pneumoconiosis. Contrary to claimant's assertion, because the administrative law judge properly discounted the opinions of claimant's experts, claimant has not carried her burden of proof to establish death due to pneumoconiosis irrespective of the administrative law judge's treatment of Dr. Perper's opinion. See *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

Finally, claimant contends that the administrative law judge deprived her of her fundamental right to due process in denying her motion on remand, to obtain and submit depositions from Drs. Simelaro and Khoudeir, in order to allow the doctors to clarify their opinions. In support of her contention, claimant argues that she "could not possibly have anticipated that the Administrative Law Judge would have rejected the opinions of Drs. Khoudeir and Simelaro as 'conclusory' and/or lacking adequate explanation." Claimant's Brief at 29. We disagree. It is claimant's responsibility to introduce evidence into the record and to establish entitlement, see *White, supra*, and she bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element of entitlement. See *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Moreover, as the trier-of-fact, the administrative law judge has broad discretion to assess the evidence and determine whether a party has met its burden of proof. See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The decision as to whether to reopen the record on remand is within the province of the administrative law judge. See 20 C.F.R. §725.456(e); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-149 (1989). In denying claimant's motion, the administrative law judge correctly stated that nothing in the opinion of the United States Court of Appeals for the Third Circuit required or supported the reopening of the evidentiary record. December 21, 2001 Order. The administrative law judge

further properly found that claimant failed to present any argument that warranted giving her a second opportunity to present evidence in this case. Accordingly, we affirm the administrative law judge's denial of claimant's motion to reopen the record for the submission of additional evidence. See *Lynn, supra*; December 21, 2001 Order.

Because the administrative law judge on remand properly found that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis under Section 718.205(c)(2), (c)(5), the administrative law judge properly denied benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits (Upon Remand by the U.S. Circuit Court of Appeals) is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge