

BRB No. 03-0242 BLA

DORIS E. McWORTHY	)	
(Widow of MORRIS McWORTHY)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, INCORPORATED	)	DATE ISSUED: 11/21/2003
	)	
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 – Denial of Benefits of Daniel J. Roketenetz,  
Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for  
claimant.

Stanley S. Dawson (Fulton & Devlin), Louisville, Kentucky, for employer.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals  
Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order – Denial of Benefits of Administrative Law Judge Daniel J. Roketenetz on her 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).<sup>2</sup> The administrative law judge credited the miner with twenty-two years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(4), however, the administrative law judge determined 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, benefits were denied.

On appeal, claimant asserts that Dr. Lineberry’s opinion “takes on added significance because he had the opportunity to examine and treat Mr. McWorthy,” unlike the other physicians whose opinions are in the record. Claimant's Brief at 3. Claimant argues that, “Contrary to the finding of the Administrative Law Judge, Dr. Lineberry has provided medical evidence that the pneumoconiosis which the Administrative Law Judge found to exist contributed to the death of [the miner].” Claimant's Brief at 4. Claimant also contends that the reports of Drs. Westerfield, Fino, Kleinerman and Perper do not adequately address the issues involved, or explain their opinions that the miner’s death was not due to pneumoconiosis.

Employer responds, urging affirmance of the administrative law judge’s Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.<sup>3</sup>

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<sup>1</sup> Claimant is Doris E. McWorthy, the widow of Morris McWorthy, the miner, who died on October 30, 1993. Decision and Order at 3; Director's Exhibit 3. The miner filed applications for benefits on March 9, 1981 and April 13, 1983, both of which were finally denied. Director's Exhibits 30, 31.

<sup>2</sup> 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> We affirm the administrative law judge’s finding of twenty-two years of coal mine employment and his finding that claimant has established the existence of

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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death.<sup>4</sup> 20 C.F.R. §718.205(c). See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *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 it hastens the miner's death. See 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).

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pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(4), as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>4</sup> 20 C.F.R. §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:

- (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)(1)-(3), (5).

In evaluating the medical evidence<sup>5</sup> pursuant to 20 C.F.R. §718.205(c), the administrative law judge stated:

I find that the Claimant has failed to establish that the Miner's death was due, in any way, to coal mine dust exposure. No physician finds that the disease was a substantially contributing cause or factor leading to the Miner's death, nor does any physician find that death was caused by complications of pneumoconiosis. Thus, there is no evidence that pneumoconiosis hastened the Miner's death in any way.

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<sup>5</sup> The death certificate, signed by Dr. Lineberry, lists the immediate cause of death as advanced cerebrovascular disease - bilateral strokes, due to advanced coronary artery disease, due to hypertension, due to dementia. Director's Exhibit 3. In a letter dated February 26, 1998, Dr. Lineberry states "The pathology report indicated that [the miner] died with black lung." Director's Exhibit 20. The word "with" is the only handwritten word in this letter, and is written over a typed word. Director's Exhibit 20. Dr. Kawas, who is certified by the American Board of Anatomic and Clinical Pathology, Director's Exhibit 19, performed the autopsy and in his evaluation of the miner's respiratory system he noted acute bronchopneumonia, bilateral and "coal miner's (sic) pneumoconiosis, mild, bilateral." Director's Exhibit 20. Dr. Kawas opined that the cause of death was acute bronchopneumonia, bilateral and multi-infarct dementia. Director's Exhibit 20. Dr. Crouch, who is Board-certified in Anatomic Pathology, Director's Exhibit 23, provided a pulmonary pathology consultation and opined that occupational coal dust exposure could not have caused, contributed to, or hastened the miner's "death secondary to acute bronchopneumonia in the setting of cerebrovascular and atherosclerotic cardiovascular disease." Director's Exhibit 22. Dr. Westerfield, who is Board-certified in Internal Medicine and Pulmonary Diseases, opined that coal workers' pneumoconiosis did not cause or contribute to the miner's death in any way. Director's Exhibit 24. Dr. Fino, who is Board Certified in Internal Medicine and Pulmonary Diseases, opined that the miner's death was not caused, contributed to, or hastened by the miner's inhalation of coal dust. Director's Exhibit 26. Dr. Kleinerman, who is Board-certified in Pathologic Anatomy and Clinical Pathology, opined that the miner died as a result of severe and extensive acute bronchopneumonia with organizing pneumonitis, which was not caused or contributed to by his coal workers' pneumoconiosis. He concluded that coal workers' pneumoconiosis did not cause, contribute to or hasten the miner's death. Director's Exhibit 46. Dr. Perper stated that the miner's death was caused by "severe acute bronchopneumonia on the background of his organic brain disease," Director's Exhibit 73, and he explained that there is no evidence to support the conclusion that coal workers' pneumoconiosis caused or hastened the miner's death. Director's Exhibit 73.

Decision and Order at 11. The administrative law judge, therefore, found that claimant failed to carry her burden of establishing that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Claimant asserts that the administrative law judge mischaracterized Dr. Lineberry's opinion. Claimant describes Dr. Lineberry's letter opinion as reporting that the miner died of black lung disease, noting that Dr. Perper summarized Dr. Lineberry's opinion in this manner. Claimant's Brief at 3. In considering Dr. Lineberry's opinion, the administrative law judge stated:

Dr. Lineberry stated that the Miner had been a patient at the Providence Trover Clinic since July 13, 1988, and then followed at the Clinic Convalescent Center until his death in 1993. Dr. Lineberry stated that the pathology report indicated that the Miner died with black lung. The word "with" is the only handwritten word, being written over a typed word in the letter.

Decision and Order at 9 (citations omitted).

A review of the record reveals that Dr. Lineberry's letter of February 26, 1998 states "The pathology report indicated that Mr. McWorthy died with black lung." The word "with" is handwritten over a typed word. Director's Exhibit 20. In the section of the necropsy report for describing the respiratory system, Dr. Kawas identifies acute bronchopneumonia, bilateral; and "coal miner's (sic) pneumoconiosis, mild, bilateral." Dr. Kawas opines that the cause of death was acute bronchopneumonia, bilateral and multi-infarct dementia. Director's Exhibit 20. In summarizing Dr. Lineberry's February 1998 letter, Dr. Fino states "Dr. Lineberry stated that the pathology report noted pneumoconiosis," Director's Exhibit 26, and Dr. Perper states "Dr. Lineberry observed (incorrectly) that the 'pathology report indicated that [claimant] died of black lung,'" Director's Exhibit 73. Drs. Westerfield and Kleinerman do not specifically address the opinion of Dr. Lineberry. Director's Exhibits 24, 73.

We hold that the administrative law judge permissibly interpreted Dr. Lineberry's statement that the miner "died with black lung" as insufficient to support a finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Therefore, we reject claimant's assertion that the administrative law judge mischaracterized Dr. Lineberry's opinion. We also reject claimant's assertion that Dr. Lineberry's opinion must be accorded "added significance" because he treated the miner. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, recently held that "a simple principle is evident: in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, --- BLR ---, --- (6th Cir. 2003). We,

therefore, affirm the administrative law judge's finding that claimant has not established that the miner's death was due to pneumoconiosis by a preponderance of the evidence, as this finding is supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

In addition, we reject claimant's suggestion that the opinions of the physicians who opine that the miner's death is not due to pneumoconiosis, are not well reasoned. Inasmuch as the administrative law judge reasonably found that the only medical evidence that could arguably support claimant's burden does not do so, claimant has failed to carry her burden of establishing that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.205(c); *Ondecko*, 512 U.S. 267, 18 BLR 2A-1, regardless of the adequacy of the contrary medical opinions.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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PETER A. GABAUER, JR.  
Administrative Appeals Judge