

BRB No. 98-1250 BLA

THERESA WITKO)	
(Widow of JOHN WITKO))	
)	
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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Ralph P. Carey, Scranton, Pennsylvania, for claimant.

Barry H. Joyner (Henry L. Solano, 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order (97-BLA-0707) of Administrative Law Judge Ainsworth H. Brown denying benefits 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). The instant case involves a survivor's

¹Claimant is the surviving spouse of the deceased miner who died on May 9, 1996. Director's Exhibit 2.

claim filed on May 21, 1996.² The administrative law judge found that claimant failed to 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 contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

²The miner filed a claim for benefits on October 30, 1980. Director's Exhibit 14. The district director denied the claim on May 4, 1981. *Id.*

The miner filed a second claim on March 6, 1985. Director's Exhibit 14. The district director denied the claim on April 30, 1995. *Id.* Pursuant to the miner's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* However, by Order dated June 26, 1987, Administrative Law Judge Thomas W. Murrett dismissed the miner's claim. *Id.*

The miner filed a third claim on May 20, 1994. Director's Exhibit 15. In a Final Memorandum of Informal Conference dated May 4, 1995, the district director awarded benefits. *Id.* The miner was receiving benefits at the time of his death. See Director's Exhibit 1; Transcript at 17.

Inasmuch as 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). Under Section 718.205(c)(2), pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits under 20 C.F.R. Part 718. The administrative law judge permissibly found that Dr. Besen, in completing the miner's death certificate, failed to explain adequately his basis for attributing the miner's death to an acute myocardial infarction due to "anthrasilicosis." See *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985) Decision and Order at 3; Director's Exhibit 2. The administrative law judge also properly found that Dr. Aquilina's finding that claimant's death was hastened by his pneumoconiosis was outweighed by Dr. Spagnolo's contrary opinion based upon Dr. Spagnolo's superior qualifications.³ See *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and

³While Dr. Spagnolo is Board-certified in Internal Medicine and Pulmonary Disease, Director's Exhibit 8, Dr. Aquilina is only Board-certified in Anesthesiology. Director's Exhibit 6.

Claimant contends that Dr. Aquilina's opinion was entitled to greater weight based upon his status as the miner's treating physician. We disagree. While the administrative law judge acknowledged Dr. Aquilina's status as the miner's treating

Order at 3; Director's Exhibits 5, 7, 17; Claimant's Exhibit 1. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁴

physician, the administrative law judge noted that Dr. Aquilina did not treat the miner during his terminal hospitalization. Decision and Order at 3. The administrative law judge, therefore, found that Drs. Aquilina and Spagnolo relied upon the same hospital records in assessing the cause of the miner's death. *Id.*

⁴Because there is no evidence of complicated pneumoconiosis in the record, claimant is precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. See 20 C.F.R. §718.205(c)(3).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge