

BRB No. 03-0295 BLA

HELEN TERRELL)	
(Widow of WILLIAM TERRELL))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 09/26/2003
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

I. John Rossi, West Des Moines, Iowa, for claimant.

Barry H. Joyner (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: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ the miner's widow, appeals the Decision and Order (2001-BLA-87) of Administrative Law Judge Gerald M. Tierney denying benefits on a survivor's claim filed

¹Claimant is Helen Terrell, the miner's widow. The miner, William Terrell, filed a claim for benefits on December 26, 1990 and was subsequently awarded benefits on October 3, 1995. Director's Exhibit 13. The miner died on March 1, 1998. Director's Exhibit 2. Claimant filed her survivor's claim, the subject of the instant appeal, on May 21, 1998. Director's Exhibit 1.

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 The administrative law judge found, and the parties stipulated to, at least ten years of coal mine employment and to the existence of pneumoconiosis. Decision and Order at 3; Hearing Transcript at 8-9; Director's Exhibits 9, 13, 14. Considering entitlement in this survivor's claim pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the miner's pneumoconiosis arose out of coal mine employment and that the only remaining issue to be resolved was whether the miner's death was due to pneumoconiosis. Decision and Order at 3. The administrative law judge, after reviewing all of the relevant evidence of record, concluded that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 3-5. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to properly review all the evidence of record which would establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence.³

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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); *see*

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 administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.304 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

also *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996).⁴

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge rationally found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205. See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant argues that the administrative law judge erred in failing to find that the evidence of record was sufficient to establish that the miner's death was due to pneumoconiosis. Claimant's Brief at 2-8. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. See *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Claimant initially contends that the death certificate, as well as the subsequent medical opinions by Dr. Randall, establish that pneumoconiosis contributed to the miner's death. Claimant's Brief at 3-6. Claimant's contention lacks merit. The relevant evidence of record concerning the cause of death consists of the death certificate, two follow-up letters from Dr. Randall and the opinion of Dr. Rose. The death certificate, signed by Dr. Randall, who was the miner's treating physician, listed the cause of death as renal failure due to sepsis due to gangrene of left lower leg and foot due to diabetes mellitus with other conditions contributing to death identified as dementia, edema and coronary artery disease. Director's Exhibit 2. Dr. Randall, in a letter dated August 24, 1998, stated that the miner had a long history of lung problems which she failed to list on the death certificate and that the records indicate that the miner had been having respiratory problems for several years. Director's Exhibit 7; Claimant's Exhibit 2. Dr. Randall submitted a second letter dated April 29, 2002, stating that the miner had chronic obstructive pulmonary disease (COPD) and exacerbations of his COPD intermittently for years and that the miner died due to renal failure secondary to gangrene of the left lower extremity. The physician further opined that the miner had many medical problems, all of which contributed to his death including his poor lung function and COPD. Director's Exhibit 7; Claimant's Exhibit 1. Dr. Rose, in an opinion dated July 8, 2002, opined that while the miner had pneumoconiosis, the disease did not contribute to the

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit as the miner was employed in the coal mine industry in the State of Kansas. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 12, 13.

miner's death as the medical records indicate that death was due to sepsis associated with a gangrenous lower extremity, a complication of chronic diabetes, lower extremity edema and obesity. Director's Exhibit 15.

In finding that the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205, the administrative law judge permissibly found that pneumoconiosis did not play a role in the miner's death since he rationally concluded that the diagnosis of COPD in the subsequent letters submitted by Dr. Randall was insufficient to establish that pneumoconiosis was a contributing cause of the miner's death inasmuch as Dr. Randall did not relate the condition to the miner's coal mine employment.⁵ See 20 C.F.R. §718.201; *Boyd*, 11 BLR 1-39; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); Decision and Order at 4; Director's Exhibit 7; Claimant's Exhibits 1, 2. Moreover, a diagnosis of pneumoconiosis or the determination by Dr. Randall that claimant suffers from COPD do not automatically result in the conclusion that the miner's death was due to pneumoconiosis pursuant to Section 718.205. See *Pickup*, 100 F.3d 871; *Trumbo*, 17 BLR 1-85; *Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986) (Brown, J., concurring and dissenting); *Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985); *Webb v. Armco Steel Corp.*, 6 BLR 1-1120 (1984); Claimant's Brief at 6-7; Director's Exhibit 7; Claimant's Exhibits 1, 2. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with respect to the weighing of the medical opinion evidence, we affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis as it is supported by substantial evidence and is in accordance with law. See *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant further contends that the administrative law judge erred by failing to consider the lay testimony of record at Section 718.205. Claimant's Brief at 3. We disagree. The administrative law judge considered all the relevant evidence with respect to the cause of the miner's death and properly concluded that claimant failed to carry her burden of proof. Decision and Order at 4-5. Contrary to claimant's contention, the regulations clearly state

⁵Moreover, based upon the circumstances of the instant case, the administrative law judge further permissibly concluded that the opinion of Dr. Randall is insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205 as this opinion is unreasoned since the physician did not explain the basis for her conclusion. See *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 5; Director's Exhibits 2, 7; Claimant's Exhibits 1, 2.

that as the cause of the miner=s death is a medical determination, “competent medical evidence” is required to establish that the miner=s death was due to pneumoconiosis at Section 718.205. See 20 C.F.R. §718.205(c), (d). We reject, therefore, claimant=s contention that the administrative law judge erred in failing to consider the lay testimony of record.

Finally, claimant contends that the Director failed to develop evidence which meets the requirements of Section 718.205. Claimant’s Brief at 6. Contrary to claimant’s contention, the Director does not have an affirmative burden to prove the elements of entitlement. Rather, claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. See 20 C.F.R. §718.205(d); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *affg. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found that the evidence submitted in the survivor’s claim failed to indicate that the miner’s death was due to pneumoconiosis, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge’s finding that the evidence of record is insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205 as it is supported by substantial evidence and is in accordance with law. See *Pickup*, 100 F.3d 871; *Trumbo*, 17 BLR 1-85.

Because claimant has failed to establish that the miner’s death was due to pneumoconiosis, a requisite element of entitlement in a survivor’s claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. See *Pickup*, 100 F.3d 871; *Trumbo*, 17 BLR 1-85; *Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge