

BRB No. 92-2307 BLA

JANICE B. KEENE)
(Widow of DENNIS KEENE))
)
Claimant-Respondent)

v.)

BUCAR COAL COMPANY)
) DATE ISSUED:
Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-In-Interest) DECISION and ORDER

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

William Lawrence Roberts, Pikeville, Kentucky, for claimant.
Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen Chartered),
Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (91-BLA-1729) of Administrative
Law Judge Robert J. Shea awarding 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 miner filed a claim on March 7,
1973 which was denied on January 24, 1980. This claim was not pursued further
prior to the miner's death on June 3, 1989. Claimant, the miner's widow, filed a

survivor's claim on March 1, 1990. The administrative law judge considered the claim pursuant to 20 C.F.R. Part 718 and found that claimant established that the miner had at least thirty years of coal mine employment. The administrative law judge then determined that the miner's death was not due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1). However, the administrative law judge did find that the evidence was sufficient to raise true doubt as to whether pneumoconiosis was a

substantially contributing cause or factor in the miner's death, and thus, he found that claimant established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). The administrative law judge further found that 20 C.F.R. §718.205(c)(3) is not applicable to this claim. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in refusing to admit Dr. Kleiner's medical report, in failing to apply the proper burden of proof on claimant, in weighing the medical opinion evidence, and in misapplying the true doubt rule. Claimant responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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).

Regarding employer's contentions of error, the administrative law judge considered all of the medical opinions of record and permissibly determined that he could not definitively conclude that pneumoconiosis did not hasten the miner's demise. See Decision and Order at 9; *Shuff v. Cedar Coal Co.*, 967 F.2d 977 (4th Cir. 1992); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The record contains seventeen medical opinions that were produced after the miner's death. The death certificate, completed by Dr. Medina on June 3, 1989, lists lung cancer as the cause of death and lists no other contributing causes. See Director's Exhibit 9. Dr. Medina, in a Supplemental Report of Death dated July 26, 1990, stated that an autopsy had been performed and that coal workers' pneumoconiosis was a significant contributing cause of death. See Director's Exhibit 10. The autopsy report, prepared by Dr. Stefanini on June 4, 1989, indicated that pneumoconiosis contributed to claimant's death. See Director's Exhibit 10. Drs. DeLara and Abrenio, in record reviews, also found that pneumoconiosis contributed to claimant's death. See Director's Exhibit 39, Employer's Exhibit 8. Drs. Naeye, Caffrey, Fino, and Chandler, in separate reports, diagnosed pneumoconiosis but stated that the pneumoconiosis did not contribute to claimant's death. See Director's Exhibit 11; Employer's Exhibits 1, 2, 8. Dr. Buddington diagnosed pneumoconiosis but did not state whether it contributed to claimant's death. See Director's Exhibit 39. Dr. Anderson, in several reports, did not diagnose pneumoconiosis. See Director's Exhibits 19, 40; Employer's Exhibit 7. The administrative law judge considered all of these opinions, specifically noting the finding of Dr. Stefanini that pneumoconiosis contributed to the miner's death, and permissibly concluded that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R.

§718.205(c)(2). See *Shuff, supra*; *Lafferty, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). As a result, employer's contentions of error on this issue are rejected, and the administrative law judge's finding that claimant established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) is affirmed as it is supported by substantial evidence.

As to employer's contention regarding the admission of the medical report, the administrative law judge acted within his discretion in denying employer's request for admission of Dr. Kleinerman's report. On December 23, 1991, the administrative law judge granted claimant's motion to have the formal hearing cancelled and for a decision on the record. On December 31, 1991, employer acknowledged receipt of the Order and requested admission of seven medical reports. On January 9, 1992, employer submitted another report for admission to the record. On June 3, 1992, employer filed a motion to permit the filing of Dr. Kleinerman's February 9, 1992 report. On July 23, 1992, the administrative law judge issued his Decision and Order awarding benefits in which he admits the first eight reports submitted by employer. The administrative law judge permissibly found that employer showed no good cause for the untimeliness of the submission of Dr. Kleinerman's report. See Decision and Order at 10; 20 C.F.R. §§725.461; 725.456; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). As a result, the administrative law judge's denial of employer's motion to admit Dr. Kleinerman's report is affirmed as it is within his discretion.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge