

BRB Nos. 99-0748 BLA  
and 99-0748 BLA-A

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FELSIE COUCH )  
(Widow of FLOYD D. COUCH) )  
) )  
Claimant-Petitioner ) DATE ISSUED:  
Cross-Respondent )  
) )  
v. )  
) )  
WHITAKER COAL COMPANY, )  
INCORPORATED )  
) )  
Employer-Respondent )  
Cross-Petitioner )  
) )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR ) DECISION and ORDER

Party-in-Interest

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge,  
United States Department of Labor.

Phyllis L. Robinson, London, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for  
employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative  
Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (98-BLA-0651) of  
Administrative Law Judge Joseph E. Kane denying benefits on a 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). The administrative law judge credited the deceased miner with “over 30 years” of coal mine employment, Decision and Order at 5, and noted that an administrative law judge had previously awarded benefits on the miner’s lifetime claim for total disability due to pneumoconiosis. The administrative law judge noted further that employer in the survivor’s claim did not contest the issue of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and found that employer did not rebut the presumption that the miner’s pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge found, however, that claimant did not prove that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical evidence pursuant to Section 718.205(c). Employer responds, urging affirmance. Employer has also filed a cross-appeal arguing that the administrative law judge erred by failing to determine whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a). Claimant responds to employer’s cross-appeal, asserting that employer did not contest the issue of the existence of pneumoconiosis. The Director, Office of Workers’ Compensation Programs (the Director), has declined to participate in the appeal and the cross-appeal.

The Board’s scope of review is defined by statute. The administrative law judge’s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

As the administrative law judge noted, Floyd Couch was awarded black lung benefits by an administrative law judge in 1990. Director’s Exhibit 22. Mr. Couch died on December 10, 1996 and Mrs. Couch filed her claim for survivor=**s benefits on May 23, 1997. Director=s Exhibits 1, 22.**

***To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; Trumbo v. Reading Anthracite Co., 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death in any way. Griffith v. Director, OWCP, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); Brown v. Rock Creek Mining Co., 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).***

**The administrative law judge found that the threshold issue of the existence of pneumoconiosis pursuant to Section 718.202(a) was not contested. Employer contends that the administrative law judge erred by not considering the issue of the existence of pneumoconiosis. Employer's Brief at 14.**

**The issues to be resolved by the administrative law judge are confined to those contested issues identified by the district director or raised in writing before the district director. 20 C.F.R. §725.463(a); Kott v. Director, OWCP, 17 BLR 1-9, 1-13 (1992). The administrative law judge may consider a new issue, but only if it was not reasonably ascertainable by the parties at the time the claim was before the district director. 20 C.F.R. §725.463(b).**

**After the district director's initial award of benefits to claimant, employer's counsel filed with the district director a Form CM-970, Operator Controversion. Director's Exhibit 18. Employer checked the box indicating that it contested the issue of whether the miner's death was due to pneumoconiosis. Id. The remaining boxes were left blank, including the one labeled "The miner did/does not have pneumoconiosis." Id. During the remaining months that the claim was before the district director, employer filed two more controversion forms. Director's Exhibits 19, 20. In the first of these two, employer again contested only whether the miner's death was due to pneumoconiosis. Director's Exhibit 19. In the second, employer contested death due to pneumoconiosis and the issue of whether the miner's pneumoconiosis was caused by his coal mine employment. Director's Exhibit 20.**

**When the district director forwarded the case to the Office of Administrative Law Judges (OALJ) for a formal hearing, a claims examiner identified the contested issues on Form CM-1025. Director's Exhibit 23. The CM-1025 indicates by checkmark that employer contested whether the miner's pneumoconiosis arose out of coal mine employment, whether the miner was totally disabled, and whether the miner's death was due to pneumoconiosis. Id. The form further indicates that "[t]he absence of a checkmark indicates that the fact asserted is not contested." Id. No checkmark appears next to the issue of pneumoconiosis.**

**At the July 14, 1998 hearing, the administrative law judge noted that employer had not contested the existence of pneumoconiosis, and employer's counsel agreed. Hearing Transcript at 6. Employer's counsel stated that employer contested the three issues listed on the CM-1025. Tr. at 15.**

**Thereafter, employer's counsel indicated no disagreement with the administrative law judge's conclusion that "no one contests pneumoconiosis." Tr. at 16.**

**On these facts, the administrative law judge properly found that the issue of the existence of pneumoconiosis was not contested. The issue was not raised before the district director or identified by the district director, nor was it raised at the hearing. See 20 C.F.R. §725.463(a), (b). On appeal, employer does not explain why the issue of the existence of pneumoconiosis, a necessary element of entitlement in a survivor's claim, was not reasonably ascertainable by employer when the case was before the district director. Because employer did not contest the issue of the existence of pneumoconiosis, we hold that employer has conceded that the miner had pneumoconiosis as defined by the Act. See Kott, supra.**

**Pursuant to Section 718.203(b), the record contains no evidence to rebut the presumption that the miner's pneumoconiosis arose out of coal mine employment. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.203(b).**

**Pursuant to Section 718.205(c)(2), claimant challenges the administrative law judge's finding that the evidence does not establish that pneumoconiosis hastened the miner's death. The administrative law judge considered several items of medical evidence in making his finding.**

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<sup>1</sup> Employer asserts that the case was "prematurely forwarded" to the OALJ before employer could develop all of its evidence before the district director. Employer's Brief at 6. Even assuming *arguendo* that ten months before the district director was not long enough, employer does not explain why the threshold issue of pneumoconiosis was not reasonably ascertainable during that time. Claimant had already submitted medical evidence referring to pneumoconiosis. Director's Exhibits 6, 7. Additionally, the fact that employer requested additional time to develop evidence, including a CT Scan reading, suggests that the issue of the existence of pneumoconiosis was reasonably ascertainable. Director's Exhibit 13.

**Because the miner's treating physician, Dr. Krasnopolsky, wrote the report of the miner's final hospitalization and prepared the miner's death certificate, the administrative law judge reviewed Dr. Krasnopolsky's earlier deposition testimony that was submitted in the miner's claim for benefits. Director's Exhibit 22. At that time, Dr. Krasnopolsky testified that he was treating the miner for totally disabling chronic obstructive pulmonary disease (COPD) and asthmatic bronchitis, both of which were in his view related to coal dust inhalation and smoking. Director's Exhibit 22 at 215-19. Dr. Krasnopolsky stated that the miner was on oxygen and was taking steroids to treat the COPD. Dr. Krasnopolsky explained that the miner's use of steroids caused certain complications such as non-insulin dependent diabetes and osteoporosis, and noted that the miner also had a cardiac arrhythmia caused by his pulmonary condition. Director's Exhibit 22 at 12-13. Dr. Krasnopolsky indicated that the miner's prognosis was poor and that based upon the miner's pulmonary function study values, his life expectancy was reduced. Director's Exhibit 22 at 219-20.**

**The administrative law judge also discussed Dr. Krasnopolsky's office treatment notes submitted by employer in the survivor's claim. These notes, which include laboratory test results, record forty-two office visits over a three-year period from September 1994 to October 1996. Employer's Exhibit 3. Dr. Krasnopolsky repeatedly noted that the miner was coughing, was short of breath, and was having trouble bringing up mucus. Id. Dr. Krasnopolsky continued to diagnose COPD and bronchitis and to prescribe medications for these disorders. Id.**

**Additionally, the administrative law judge summarized Dr. Krasnopolsky's report of the miner's final hospitalization. The miner was admitted to the Appalachian Regional Healthcare Hospital on December 10, 1996 in severe respiratory distress. Director's Exhibit 7. This report indicates**

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<sup>2</sup> The administrative law judge in the miner's claim relied in part on Dr. Krasnopolsky's opinion to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4) and accorded greatest weight to his opinion in finding that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Director's Exhibit 22 at 38-43.

**that the miner's arterial blood gases showed severe hypercapnia with marked acidosis secondary to hypercapnia and indicates that the miner agreed to be put on a ventilator with the understanding that "with his respiratory condition worsening he would die shortly if he was not placed on a ventilator." Director's Exhibit 7 at 1. Dr. Krasnopolsky recorded in the hospital discharge summary that the miner was intubated, placed on a ventilator, and admitted to the Intensive Care Unit. Dr. Krasnopolsky reported that approximately an hour and a half later, the miner's heart developed asystole and the miner died. Dr. Krasnopolsky diagnosed hypercapnic respiratory failure, pneumoconiosis, and chronic obstructive pulmonary disease, and stated that the cause of death was asystole.**

**As the administrative law judge also noted, Dr. Krasnopolsky completed the miner's death certificate. The instructions on the Kentucky death certificate direct the person completing the form to list the immediate cause of death first, and then to "[s]equentially list conditions, if any, leading to immediate cause. Enter UNDERLYING CAUSE (Disease or injury that initiated events resulting in death) LAST." Director's Exhibit 6. Dr. Krasnopolsky listed the immediate cause of death as "Asystole" lasting for one minute. He indicated further that the asystole was due to "Hypercapnic respiratory failure" of three hours' duration. Finally, Dr. Krasnopolsky indicated that the respiratory failure was due to pneumoconiosis of fifteen years' duration. Thus, reading the death certificate within the parameters of its instructions, Dr. Krasnopolsky indicated that pneumoconiosis was the underlying cause of death, initiating the hypercapnic respiratory failure resulting in asystole.**

**The record contained no further medical reports addressing the cause of the miner's death. There were, however, negative readings of three x-rays by Drs. Scott and Wheeler, and a negative reading of a CT scan by Dr. Wheeler, all submitted by employer. Employer's Exhibits 1, 2. Drs. Scott and Wheeler stated that there was no "silicosis" or "CWP," but that there was COPD and emphysema. Id. Their readings do not address the etiology of the COPD and emphysema. The administrative law judge considered these readings but**

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<sup>3</sup> Asystole is defined as "cardiac standstill or arrest--absence of a heartbeat." *Dorland's Illustrated Medical Dictionary* 159 (25th ed.1974).

***found them to be of limited relevance in determining the cause of the miner's death.***

***The administrative law judge found pursuant to Section 718.205(c)(2) and Brown that, “[u]nfortunately, there is nothing but the bare assertion of pneumoconiosis on the death certificate and nothing further from Dr. Krasnopolsky.” Decision and Order at 8. The administrative law judge found that the death certificate contained a “mere statement of a conclusion by [Dr Krasnopolsky] without any explanation of the basis for that statement” to “link the causation of death with his earlier determination of pneumoconiosis . . . .” Id. Consequently, he found that claimant did not meet her burden to prove that pneumoconiosis hastened death. Claimant contends that the administrative law judge ignored Dr. Krasnopolsky’s underlying basis for stating that pneumoconiosis hastened death, and argues that substantial evidence does not support the administrative law judge’s finding.***

***Although the administrative law judge exercises broad discretion in assessing the reasoning of a medical opinion, see Fife v. Director, OWCP, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir. 1989); Director, OWCP v. Rowe, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Trumbo v. Reading Anthracite Co., 17 BLR 1-85, 1-88-89 and n.4 (1993), the administrative law judge’s credibility determination must be supported by the record. In weighing a death certificate, the administrative law judge must consider whether the record as a whole indicates that the person signing the death certificate possessed any relevant qualifications or personal knowledge from which to assess the cause of death. Addison v. Director, OWCP, 11 BLR 1-68, 1-70 (1988). Additionally, the opinions of treating physicians merit special consideration. See Tussey v. Island Creek Coal Co., 982 F.2d 1036, 17 BLR 2-16, (6th Cir. 1993).***

***Applying these principles to the facts of this case, we do not believe that substantial evidence in the whole record supports the administrative law judge’s finding that Dr. Krasnopolsky’s notation on the death certificate was a mere assertion. As the administrative law judge noted, Dr. Krasnopolsky***

***testified that he was treating the miner for disabling COPD and bronchitis related to coal dust inhalation. These diagnoses constitute pneumoconiosis under the Act as defined at 20 C.F.R. §718.201, a fact which employer did not contest in the survivor's claim. Dr. Krasnopolsky's subsequent treatment records show, consistent with his testimony, continuing treatment for COPD and bronchitis up to October 24, 1996, less than two months before the miner's death. Employer's Exhibit 3. Dr. Krasnopolsky diagnosed COPD, pneumoconiosis, and respiratory failure in the hospital discharge summary. Director's Exhibit 7. Finally, Dr. Krasnopolsky supplied causal reasoning on the death certificate, that is, that pneumoconiosis caused respiratory failure which caused asystole and death. Director's Exhibit 6. There is no contrary evidence in the record suggesting any other explanation for the miner's death.***

***In light of the foregoing, we must reverse the administrative law judge's finding pursuant to Section 718.205(c)(2). The miner's treating physician of eight years has indicated clearly that pneumoconiosis hastened the miner's death. See Tussey, supra; Brown, supra. The record as a whole demonstrates the underlying basis Dr. Krasnopolsky had for drawing that uncontradicted conclusion. See Addison, supra. The death certificate itself explains how pneumoconiosis hastened death. On the facts of this case, there was not substantial evidence to support the administrative law judge's denial of benefits. To the contrary, the only evidence was that pneumoconiosis hastened death. Therefore, we reverse the administrative law judge's finding pursuant to Section 718.205(c)(2).***



***Accordingly, the administrative law judge's Decision and Order is affirmed in part and reversed in part.***

**SO ORDERED.**

***BETTY JEAN HALL, Chief  
Administrative Appeals Judge***

***ROY P. SMITH  
Administrative Appeals Judge***

***MALCOLM D. NELSON, Acting  
Administrative Appeals Judge***