

BRB No. 99-0766 BLA

VICTORIA L. MALAGARA	)	
(Widow of DOMINICK MALAGARA)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

John A. Bednarz (Bednarz Law Offices), Wilkes-Barre, Pennsylvania, for claimant.

Rita A. Roppolo (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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand (96-BLA-1118) of Administrative Law Judge Ralph A. Romano awarding 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). Claimant, the surviving spouse of the miner, filed the instant claim in October 1994. Director's Exhibit 1. This case is

before the Board for the second time.<sup>1</sup> On remand, the administrative law judge

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<sup>1</sup>In the previous decision in this case, the Board affirmed as unchallenged on appeal the administrative law judge's findings regarding the miner's years of coal mine employment, Section 718.203(c), and the date of onset of benefits. The Board rejected the Director's arguments that the administrative law judge improperly weighed the evidence at Section 718.202(a)(4). Specifically, the Board rejected the Director's contention that the administrative law judge erred in according greater weight to Dr. Aquilina's opinion since the physician had not examined the miner since 1983. The Board held that the administrative law judge permissibly discounted the opinions of Drs. Sahillioglu and James on the basis that they were twenty-one and seventeen years old and further held that the administrative law judge permissibly credited Dr. Aquilina's opinion over the opinion of Dr. Spagnolo, a reviewing physician, because Dr. Aquilina had examined the miner on multiple occasions in addition to reviewing the miner's records. The Board vacated the administrative law judge's finding of pneumoconiosis, however, in light of *Penn Allegheny Coal Co. v. Williams*, 114 F.2d 22, 21 BLR 2-104 (3d Cir. 1997), and remanded the case to the administrative law judge to consider all relevant evidence

considered the x-ray and medical opinion evidence together and determined that the preponderance of the evidence establishes that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, since the Board had previously affirmed the administrative law judge's weighing of the evidence pursuant to 20 C.F.R. §718.205(c)(2), survivor's benefits were awarded. On appeal, the Director contends that the administrative law judge erred in according determinative weight to Dr. Aquilina's opinion that the miner had pneumoconiosis and that pneumoconiosis was a contributing cause of the miner's death. Claimant responds, urging affirmance.

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 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 survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United

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together to determine whether pneumoconiosis has been established pursuant to Section 718.202(a). Lastly, the Board affirmed the administrative law judge's weighing of the evidence at Section 718.205(c)(2). *Malagara v. Director, OWCP*, BRB No. 97-1729 BLA (Sep. 4, 1998)(unpub.).

States Court of Appeals for the Third Circuit, under whose jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). See *Lukosevicz, supra*.

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 on Remand of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The Director contends that the administrative law judge erred in crediting Dr. Aquilina's 1997 opinion over the 1995 opinion of Dr. Spagnolo, and thus, erred in finding that claimant established that the miner suffered from pneumoconiosis which substantially contributed to the miner's death pursuant to Sections 718.202(a) and 718.205(c)(2). The Director asserts that had the administrative law judge properly considered the evidence, Dr. Aquilina's 1983 opinion would have been considered flawed as it was arguably based on an inaccurate smoking history, when considered against Dr. Sahillioglu's 1976 and Dr. James' 1980 opinions that the miner did not have pneumoconiosis. Director's Brief at 7; Director's Exhibits 16, 26. The Director further states that the administrative law judge then would have considered Dr. Spagnolo's 1995 opinion, that pneumoconiosis did not contribute to the miner's death, was entitled to greater weight over Dr. Aquilina's 1997 opinion because Dr. Spagnolo possessed better credentials. The Director contends that a "mechanical application of the 'examining doctor' rule" does not make sense in the instant case where fourteen years has lapsed since Dr. Aquilina last saw the miner.

We reject the Director's contentions based on our prior holding that the administrative law judge properly weighed the medical opinion evidence. The administrative law judge acted within his discretion in discounting the examining opinions of Drs. Sahillioglu and James based on their remoteness in time, and then permissibly accorded greater weight to Dr. Aquilina's most recent opinion that the miner had suffered from pneumoconiosis which contributed to his death, over the contrary opinion of Dr. Spagnolo, based on the fact that Dr. Aquilina had not only reviewed the miner's records but also examined the miner several times. See *Bowman v. Clinchfield Coal Co.*, 15 BLR 1-22, 1-27 n.7 (1991); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). On remand, the administrative law judge complied with the Board's remand instructions and considered the x-ray evidence in conjunction with his findings at Section 718.202(a)(4), pursuant to *Penn Allegheny Coal Co. v. Williams*, 114 F.2d 22, 21 BLR 2-104 (3d Cir. 1997). The administrative law judge permissibly determined that since the January 11, 1993 x-ray diagnosing third stage anthracosilicosis bolsters Dr. Aquilina's well-reasoned and

documented report, the evidence as a whole establishes that the miner suffered from pneumoconiosis pursuant to Section 718.202(a).<sup>2</sup> Decision and Order on Remand at 3. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We affirm the administrative law judge's finding that the evidence establishes that the miner had pneumoconiosis as supported by substantial evidence. See *Williams, supra*; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Claimant has established that the miner suffered from pneumoconiosis, and we have previously affirmed the administrative law judge's consideration of the evidence at Section 718.205(c)(2); therefore, we affirm the administrative law judge's finding that claimant has established that pneumoconiosis hastened the miner's death. See *Lukosevicz, supra*.

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<sup>2</sup>Contrary to the Director's argument, the administrative law judge did not accord greater weight to Dr. Aquilina's opinion merely because he was an examining physician. The administrative law judge considered many factors in his weighing of Dr. Aquilina's conclusions which we affirmed as supported by substantial evidence in our prior Decision and Order. *Malagara v. Director, OWCP*, BRB No. 97-1729 BLA (Sept. 4, 1998)(unpub.); see Administrative Law Judge's 1997 Decision and Order at 8.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge