

BRB No. 00-0665 BLA

JANICE C. MAZER	)		
(Widow of JOSEPH MAZER)	)		
	)		
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.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Barry H. Joyner (Judith E. Kramer, Acting 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,<sup>1</sup> the miner's widow, appeals the Decision and Order (99-BLA-00167) of Administrative Law Judge Ainsworth H. Brown 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).<sup>2</sup> The administrative law judge found

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<sup>1</sup>Claimant is Janice C. Mazer, the miner's widow. The miner died on December 14, 1997, and claimant filed her survivor's claim, the subject of the instant appeal, on August 10, 1998. Director's Exhibits 1, 7.

<sup>2</sup>The Department of Labor has amended the regulations implementing the Federal Coal

eight years of qualifying coal mine employment. Decision and Order at 2. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202, 718.205 (2000). Decision and Order at 2-4. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis and death due to pneumoconiosis established. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which the parties have responded.<sup>3</sup> Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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<sup>3</sup>The Director's brief, dated March 20, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. In a brief dated March 8, 2001, claimant asserted that the regulations at issue in the lawsuit "may have a significant impact" on the outcome of this case. Claimant's Brief at 4. The amendments to the regulations cited by claimant at 20 C.F.R. §718.104(d) apply only to claims filed after January 19, 2001. Consequently, that regulation does not apply to the instant claim. Moreover, contrary to claimant's remaining assertions, however, our review of the pertinent revised regulation with respect to the existence of pneumoconiosis and death due to pneumoconiosis pursuant to 20 C.F.R. §§718.202 and 718.205, and our review of the evidence of record on these issues reveal that the ultimate disposition of this case would not be affected by the revised regulation.

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(2000); *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). The United States Court of Appeals for the Third Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death.<sup>4</sup> *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After considering 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. Claimant contends that the administrative law judge erred in failing to find that the miner's death was due to pneumoconiosis based upon the opinion of Dr. O'Connell, the miner's treating oncologist. Claimant's Brief at 5-6. We disagree. 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). Contrary to claimant's contention, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Moreover, the administrative law judge, taking into account all of the evidence, including the certificate of death, rationally determined that coal mine exposure was not

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<sup>4</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

implicated in the terminal process. Decision and Order at 4. The relevant evidence of record concerning the cause of death consists of two medical opinions and the death certificate. Dr. Cander, who reviewed the evidence of record, opined that there was no evidence that coal dust exposure contributed to the miner's death and that death was caused by lung cancer due to smoking and radon exposure. Director's Exhibits 15, 18. Dr. O'Connell opined that the miner's prior coal mining/radon exposure is likely to have played a role in his malignancy and the underlying interstitial lung disease; whether other occupational exposures over the ensuing years also played a role is unclear. Director's Exhibit 8. The physician further opined that it is quite possible that the miner's lung cancer was precipitated by occupational exposure. Claimant's Exhibit 1. The death certificate, signed by Dr. LaSala, lists the cause of death to be metastatic squamous cell lung with no other contributing causes noted. Director's Exhibit 7. As the Director correctly asserts, the statements by Dr. O'Connell are clearly equivocal and thus are insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205 (2000). *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); Director's Exhibit 8; Claimant's Exhibit 1.

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 Trumbo, supra; Haduck, supra; Boyd, supra; Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the only evidence of record supportive of a finding that the miner's death was due to pneumoconiosis is equivocal, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo, supra; Haduck, supra; Boyd, supra*. 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 (2000) as it is supported by substantial evidence and is in accordance with law. *Lukosevicz, supra*.

Inasmuch as 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 and we need not address claimant's remaining contentions on appeal. *See Lukosevicz, supra; Trumbo, supra; 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.

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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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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge