

BRB No. 00-0774 BLA

BEATRICE SWIM)	
(Widow of MERVIN E. SWIM))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED:
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Beatrice Swim, Kimball, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Michelle S. Gerdano (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,¹ representing herself, appeals the Decision and Order on Remand (97-BLA-

0994) of Administrative Law Judge Daniel F. Sutton 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).² The instant case involving a survivor's claim filed on August 5, 1996 is before the Board for the second time.³ In the initial Decision and Order, the administrative law judge found that the medical evidence was sufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. By Decision and Order dated October 28, 1999, the Board vacated the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis and remanded the case for further consideration. *Swim v. Consolidation Coal Co.*, BRB No. 99-0107 BLA (Oct. 28, 1999) (unpublished).

On remand, the administrative law judge found that the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 Ass'n 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 all the parties have responded.⁴

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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁵ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

OWCP, 11 BLR 1-85 (1988). Pneumoconiosis is a “substantially contributing cause” of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

The record contains several medical opinions relevant to the cause of the miner’s death. Dr. Kistner completed the miner’s death certificate. Dr. Kistner attributed the miner’s death to respiratory failure due to refractory bilateral pneumonitis and septic shock.⁶ Director’s Exhibit 10.

In a report dated September 11, 1996, Drs. Kistner and Schor opined that the miner’s pneumoconiosis, diffuse alveolar damage and focal emphysema contributed to his inability to adequately clear his lung infection. Director’s Exhibit 13. While uncertain as to which of these individual pathologies contributed the most towards the miner’s pulmonary failure, Drs. Kistner and Schor opined that if coal workers’ pneumoconiosis had not been present, the miner “may have been able to clear the pulmonary infection.” *Id.* Drs. Kistner and Schor, therefore, opined that the miner’s pneumoconiosis hastened his death. *Id.*

Drs. Kleinerman, Bush, Crouch, Fino, Castle, and Loudon, however, disagreed with Drs. Kistner and Schor. Each of these physicians opined that the miner’s pneumoconiosis played no role in his death. Employer’s Exhibits 1-8.

Drs. Kleinerman, Bush and Crouch each reviewed the medical evidence and the autopsy slides.⁷ In a report dated April 10, 1997, Dr. Kleinerman opined that although the miner suffered from coal workers’ pneumoconiosis, the coal workers’ pneumoconiosis did not contribute in any way to his death. Employer’s Exhibit 1. Dr. Kleinerman explained that the miner’s “coal workers’ pneumoconiosis was not extensive enough or severe enough to have hastened his death or contributed in any way to his ability to recover from his pneumonia.” *Id.*

In a report dated May 8, 1997, Dr. Bush stated that:

Coalworkers’ pneumoconiosis or coal mine dust exposure played no role in, nor hastened, the death of [the miner]. [The miner] would have died at the same time and in the same manner of the complications of carcinoma of the colon if he had never been exposed to the pulmonary hazards of coal mining employment.

The assertion by Drs. Schor and Kistner that coalworkers’ pneumoconiosis hastened death by impairing clearing of secretions is not borne out by the autopsy findings. Accumulated secretions were not identified at the time of autopsy during lung examination nor do the airways in the 15 histologic slides

show evidence of accumulation of airway secretions. The slides do show masses of bacteria in the region of the abscesses correlating with the observation of neutropenia and inability of the patient to fight infection.

Employer's Exhibit 2.

Dr. Bush reiterated his opinions during an October 23, 1997 deposition. Employer's Exhibit 8.

In a report dated June 17, 1997, Dr. Crouch opined that:

The presence of scattered coal dust macules and micronodules, as well as a few silicotic micronodules establishes the diagnosis of simple pneumoconiosis. However, the changes are relatively mild and could not have caused any clinically significant degree of pulmonary impairment or disability. In addition, they could not have caused or hastened this patient's death from pneumonia and sepsis.

Employer's Exhibit 3.

Drs. Fino, Castle and Loudon each reviewed the medical evidence of record.⁸ In a report dated June 24, 1997, Dr. Fino opined that there was sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 4. Dr. Fino opined that the miner's death was due to respiratory failure due to pneumonia that was due to chemotherapy. *Id.* Dr. Fino further opined that pneumoconiosis did not cause, contribute to, or hasten the miner's death. *Id.* Dr. Fino opined that the miner's death would have occurred as and when it did had the miner never worked in the coal mines. *Id.*

In a report dated June 27, 1997, Dr. Castle opined that the miner suffered from a moderate degree of coal workers' pneumoconiosis. Employer's Exhibit 5. Dr. Castle further opined that it was "absolutely clear" that the miner died as a result of pneumonia and sepsis syndrome due to a germ brought on by a reduction in his white blood cell count due to cancer chemotherapy. *Id.* Dr. Castle further stated that:

I totally disagree with the opinions of Drs. Schor and Kistner when they indicate erroneously that coal workers' pneumoconiosis hastened this man's death. This man, as noted by Dr. Bush, had no accumulation of secretions in his airway. What he actually had was an inability to fight infection because of the cancer chemotherapy that he received. This had no relationship whatsoever to the underlying coal workers' pneumoconiosis. This man clearly would have died the exact same way that he did had he never set foot inside a

coal mine.

Employer's Exhibit 5.

Dr. Castle reiterated his opinions during an October 17, 1997 deposition. Employer's Exhibit 7.

In a report dated September 23, 1997, Dr. Loudon opined that the miner died of respiratory failure caused by overwhelming sepsis, pneumonia and acute lung abscesses. Employer's Exhibit 6. Dr. Loudon opined that these conditions were the result of side effects of the chemotherapy used in the treatment of the miner's colon cancer. *Id.* Dr. Loudon opined that coal workers' pneumoconiosis did not cause or hasten the miner's death. *Id.*

In considering whether the medical opinion evidence was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge acted within his discretion in finding that the opinions of Drs. Kleinerman, Bush, Crouch, Fino, Castle and Loudon that pneumoconiosis did not contribute to the miner's death were better reasoned than the contrary opinions of Drs. Schor and Kistner. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 6-7; Director's Exhibit 13; Employer's Exhibits 1-8. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical evidence is insufficient to establish that the miner's death was due to pneumoconiosis.¹¹ *See* 20 C.F.R. §718.205(c).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge