

BRB No. 00-0780 BLA

LOUISE WHITMAN	)		
(Widow of RONALD W. WHITMAN)	)		
	)		
Claimant-Petitioner	)		
	)		
v.	)		
	)		
DIXIE FUEL COMPANY	)	DATE	ISSUED:
	)		
and	)		
	)		
BITUMINOUS CASUALTY CORPORATION	)		
	)		
Employer/Carrier-Respondent	)		
	)		
DIRECTOR, OFFICE OF WORKERS'	)		
COMPENSATION PROGRAMS, UNITED	)		
STATES DEPARTMENT OF LABOR	)		
	)		
Party-in-Interest	)	DECISION and ORDER	

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Daren E. Pogoda and Laura Metcoff Klaus (Arter & Hadden, LLP) Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order - Denying Benefits (99-BLA-1324) of

<sup>1</sup> Claimant is the widow of the miner, Ronald W. Whitman, who died on December 15, 1998. Director's Exhibit 4.

Administrative Law Judge Donald W. Mosser rendered 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).<sup>2</sup> In this survivor's claim, after crediting claimant with nineteen years of coal mine employment and accepting the parties' stipulation that claimant established the existence of pneumoconiosis, the administrative law judge found the evidence of record insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in not finding that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence, and asserting that claimant failed to raise any basis for review. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not respond in this appeal.<sup>3</sup>

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 employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the

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

<sup>3</sup> We affirm the findings of the administrative law judge on the length of coal mine employment and the existence of pneumoconiosis as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

outcome of this case. Based on the responses from the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations and will proceed to adjudicate the merits of this appeal.

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 benefits 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, 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 death was caused by complications of pneumoconiosis or that death was hastened by pneumoconiosis.<sup>4</sup> See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *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 States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has also held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death. See *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir.).

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 of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Contrary to claimant's argument, the administrative law judge permissibly found Dr. Miller's opinion equivocal because Dr. Miller stated that there was no way to determine, within a reasonable degree of medical certainty, whether, absent the miner's pneumoconiosis, surgery could have been successfully performed to repair the miner's perforated viscus, which was the immediate cause of his death. Decision and Order at 8; Employer's Exhibit 3.<sup>5</sup> The administrative law judge, therefore, permissibly

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<sup>4</sup> Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>5</sup> Dr. Miller testified on deposition that the miner had bowel cancer which had metastasized and that the miner's death was due to this cancer which had resulted in a perforation into the abdominal area spreading infection throughout the abdominal area.

accorded less weight to Dr. Miller's opinion which he found to be equivocal. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justus v. Director, OWCP*, 6 BLR 1-1127 (1984). As the administrative law judge reasonably found Dr. Miller's opinion was insufficient to establish claimant's burden of proof, and there is no other evidence which could assist claimant in establishing that the miner's death was due to pneumoconiosis, we affirm the administrative law judge's denial of benefits.<sup>6</sup>

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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Employer's Exhibits 3 at 4-8.

<sup>6</sup> The administrative law judge further noted that even, "[a]ssuming arguendo, that Dr. Miller's statement could be accepted as supportive of the fact that pneumoconiosis contributed to or hastened [the miner's] death," he would accord greater weight to the preponderance of the opinions by Drs. Caffrey, Hansbarger, Fino and Branscomb that pneumoconiosis did not cause or hasten the miner's death in any way. Decision and Order at 8.

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REGINA C. McGRANERY  
Administrative Appeals Judge