

BRB No. 97-0930 BLA

SYTHA E. SNEED )  
(Widow of DELBERT SNEED) )  
) )  
Respondent Claimant- )  
) )  
v. )  
) )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT OF )  
LABOR )  
) )

DATE ISSUED:

DECISION AND ORDER

Petitioner

Appeal of the Decision and Order Awarding Benefits of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Jennifer U. Toth (Marvin Krislov, Deputy Solicitor for National Operations; 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, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits (95-BLA-0320) of Administrative Law Judge Samuel J. Smith regarding 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). As an initial matter, the administrative law judge indicated that he received a telephone call from the Director's counsel advising him that claimant requested that her case be decided on the record.<sup>1</sup> The administrative law judge stated that he advised counsel that the motion of the

<sup>1</sup>Claimant is the surviving spouse of the miner, Delbert Sneed, who died on April 14, 1993. Dr. Porterfield prepared the death certificate and identified respiratory arrest as the immediate cause of death. Director's Exhibit 11. Dr. Porterfield identified congestive heart failure, coal workers' pneumoconiosis, and renal failure as conditions related to the immediate cause of death. *Id.* Dr. Porterfield also indicated that an acute myocardial

parties would be granted. The administrative law judge credited the miner with thirty-two and one-half years of coal mine employment and considered the claim under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge accepted the Director's stipulation that the evidence of record supported a finding of pneumoconiosis and further determined that the autopsy report prepared by Dr. Dy clearly substantiated the Director's concession that the miner was suffering from pneumoconiosis at the time of his death. The administrative law judge also found that Dr. Dy's report and the death certificate prepared by Dr. Porterfield established that pneumoconiosis was a substantially contributing cause of, or served to hasten, the miner's death pursuant to 20 C.F.R. §718.205(c)(2) in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).<sup>2</sup> Accordingly, benefits were awarded. The Director argues on appeal that the administrative law judge did not properly weigh the opinions of Drs. Porterfield, Dy, and Spagnolo regarding the cause of the miner's death. The Director asks that the Board reverse the award of benefits, as the record does not contain reliable evidence that pneumoconiosis contributed to the miner's death in any way. Claimant has not responded to the Director's appeal.<sup>3</sup>

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 applicable 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).

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infarction was a significant condition contributing to the miner's death. *Id.* Claimant filed her claim for survivor's benefits on July 1, 1993. Director's Exhibit 1.

<sup>2</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in West Virginia. Director's Exhibit 2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup>The administrative law judge's finding that the miner worked in coal mine employment for thirty-two and one-half years is affirmed, as it has not been challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1984).

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 substantial 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 *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 Fourth Circuit, under whose jurisdiction the present 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 *Shuff, supra*.

In discussing the evidence relevant to Section 718.205(c)(2), the administrative law judge credited the opinion, expressed by Dr. Porterfield on the death certificate, that pneumoconiosis was an underlying cause of the miner's death. Decision and Order Awarding Benefits at 7; Director's Exhibit 11. The administrative law judge further found that the autopsy report, in which Dr. Dy diagnosed the presence of anthracosis, supported, "at least in part," Dr. Porterfield's conclusion. Decision and Order Awarding Benefits at 7; Director's Exhibit 12. The administrative law judge stated specifically that inasmuch as the death certificate was executed on the same day that Dr. Dy performed the autopsy, Dr. Porterfield "presumably" had access to the autopsy report. Decision and Order Awarding Benefits at 7. The administrative law judge determined that the report in which Dr. Spagnolo indicated that pneumoconiosis did not contribute to or hasten the miner's death was entitled to less weight than the reports of Drs. Dy and Porterfield on the grounds that Dr. Spagnolo did not examine any autopsy slides and was merely a reviewing physician. Decision and Order Awarding Benefits at 7; Director's Exhibit 21. Based upon these findings, the administrative law judge determined that the reports of Drs. Dy and Porterfield established that pneumoconiosis was a "substantially contributing cause and/or served to hasten the miner's death." Decision and Order Awarding Benefits at 8.

The Director maintains that the administrative law judge's findings under Section 718.205(c)(2) must be vacated, as the administrative law judge erred in presuming that Dr. Porterfield reviewed Dr. Dy's autopsy report and in determining that Dr. Dy's conclusions support Dr. Porterfield's identification of pneumoconiosis as an underlying factor in the miner's demise. The Director also contends that the administrative law judge did not provide a valid reason for according diminished weight to Dr. Spagnolo's opinion, particularly in light of the fact that both Dr. Spagnolo and Dr. Dy found that the miner died as the result of an acute myocardial infarction.

These contentions have merit. As the Director has noted, Dr. Porterfield indicated on the death certificate that no autopsy had been performed on the miner as of the time of the preparation of the certificate. Director's Exhibit 11. It is apparent, therefore, that contrary to the administrative law judge's presumption, Dr. Porterfield did not have access to the

autopsy report. Moreover, absent reference to this document, the bases of Dr. Porterfield's conclusions are not clear. Because the administrative law judge relied upon an incorrect assumption in treating the death certificate as a reasoned and documented medical opinion, we vacate the administrative law judge's determination that the death certificate supports claimant's burden under Section 718.205(c)(2). See *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

In addition, the administrative law judge's finding that Dr. Dy's diagnosis of anthracosis corroborates Dr. Porterfield's identification of pneumoconiosis as an underlying cause of the miner's demise is not rational, inasmuch as Dr. Dy did not suggest that there was any link whatsoever between the miner's anthracosis and his heart attack. See *Reigh v. Director, OWCP*, 19 BLR 1-64, 1-69, n.5 (1995); Director's Exhibit 12. The administrative law judge also did not adequately set forth his rationale for preferring the opinions of Drs. Porterfield and Dy over the opinion of Dr. Spagnolo, particularly in light of the fact that Dr. Spagnolo's conclusion that the miner's death was caused by a myocardial infarction is corroborated by the opinion of Dr. Dy, the autopsy prosector. See *Urgolites v. Director, OWCP*, 17 BLR 1-20 (1992); Director's Exhibits 12, 21. Finally, the administrative law judge omitted relevant medical evidence from consideration when he neglected to weigh the medical report in which Dr. Ranavaya concluded, based upon a review of the miner's medical records, that pneumoconiosis was not a contributing cause of death. Director's Exhibit 16; see *Tackett, supra*.

Inasmuch as the administrative law judge did not properly weigh the medical opinions relevant to Section 718.205(c)(2), his finding that claimant established that pneumoconiosis contributed to or hastened the miner's death is vacated. We deny the Director's request that the award of benefits be reversed, however, and we remand this case to the administrative law judge to permit him to exercise his duty as fact-finder by determining whether Dr. Porterfield's opinion, as expressed on the death certificate, is reasoned and documented. 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); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). If the administrative law judge credits Dr. Porterfield's opinion on remand, he must reconsider whether it is sufficient to satisfy claimant's burden of proof under Section 718.205(c)(2), in accordance with the standard set forth in *Shuff*, when weighed against the opinions of Drs. Porterfield, Dy, Spagnolo, and Ranavaya.<sup>4</sup>

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<sup>4</sup>The administrative law judge did not address specifically whether claimant established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (c)(3), and (c)(4). The administrative law judge need not consider these subsections on remand, however, as there is no evidence indicating that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(1), nor is there evidence that the miner suffered from complicated pneumoconiosis such that the presumption referenced in Section 718.205(c)(2) and set forth in 20 C.F.R. §718.304 is available in this case. Section 718.205(c)(4) is also not applicable, as the miner's death was not due to a traumatic injury.

Finally, remand to the administrative law judge is required in this case in order to allow the administrative law judge to reconsider claimant's waiver of her right to a hearing. The applicable regulation, set forth in 20 C.F.R. §725.461(a), provides that a waiver "shall be in writing." 20 C.F.R. §725.461(a). Although the administrative law judge described, in the Decision and Order Awarding Benefits, his conversation with the Director's counsel in which counsel related claimant's desire that the case be decided on the record, there is no indication that claimant's request was reduced to writing. The administrative law judge should ascertain on remand, therefore, whether claimant effectively waived her right to a hearing pursuant to Section 725.461(a). See generally *Churpak v. Director, OWCP*, 9 BLR 1-71 (1986).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge