

BRB No. 99-1213 BLA

ANNA HERKO	)	
(Widow of MICHAEL HERKO)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sarah M. Hurley (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, BROWN, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (99-BLA-0072) of

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<sup>1</sup> Claimant, Anna Herko, is the widow of the miner, Michael Herko, who died on March 15, 1998. The death certificate lists the immediate causes of death as acute myelogenous leukemia, with no other causes or contributing factors indicated. Director's Exhibit 3. The miner had previously been awarded benefits under a claim filed on December 17, 1984. Director's Exhibit 11. Claimant is not eligible for benefits on a derivative basis based on the filing date of the miner's claim. *See Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf. Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Administrative Law Judge Robert D. Kaplan 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). The administrative law judge found that the Director, Office of Workers' Compensation Programs (the Director), conceded the existence of pneumoconiosis arising out of coal mine employment and that, therefore, the sole issue for resolution in this case was whether claimant could establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 2. After reviewing the evidence of record, the administrative law judge concluded that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in concluding that claimant failed to establish that the miner's death was due to pneumoconiosis since he improperly discredited the opinions of Drs. Khoudeir, Simelaro and Kraynak. The Director responds and urges affirmance of the administrative law judge's denial of benefits.<sup>2</sup>

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

In addition to establishing the existence of pneumoconiosis arising out of coal mine employment, in order to establish entitlement to benefits on a survivor's claim pursuant to Section 718.205 a claimant must establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing factor leading to the miner's death. 20 C.F.R. §§718.202(a), 718.203, 718.205(c)(1), (2). *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); *Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this claim arises, has held that a substantially contributing factor is any condition which hastens the

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<sup>2</sup> The administrative law judge's determination that claimant was unable to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(3) is affirmed as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); see *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Claimant contends that the administrative law judge improperly relied upon the opinion of Dr. Perper, a consulting physician, who concluded that coal workers' pneumoconiosis' played no role in the miner's death, Director's Exhibit 13. Claimant asserts that the administrative law judge failed to specifically determine whether Dr. Perper's medical opinion was well-reasoned and well-documented. Claimant further asserts that the administrative law judge erroneously rejected the opinions of Dr. Khoudeir, Claimant's Exhibits 3, 4, Dr. Kraynak, Claimant's Exhibits 1, 8, and Dr. Simelaro, Claimant's Exhibits 6, 9, all of whom concluded that the miner's coal workers' pneumoconiosis played a role in his death. Claimant asserts that these physicians provided well-supported, well-documented opinions and that the administrative law judge's rejection of these opinions constituted an impermissible substitution of his opinion for those of the physicians.

In considering Dr. Khoudeir's opinions, the administrative law judge properly rejected Dr. Khoudeir's opinion that anthracosilicosis was a significant contributing factor to the miner's death, since Dr. Khoudeir provided no support for this conclusion. Director's Exhibit 13; Decision and Order at 5; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Furthermore, contrary to claimant's assertion, the mere status of Dr. Khoudeir as the miner's treating physician during his lifetime does not automatically entitle the opinion to greater weight. See *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); see also *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Accordingly, we conclude that the administrative law judge properly rejected the medical opinion of Dr. Khoudeir.

In considering the opinions of Dr. Kraynak, the administrative law judge found that Dr. Kraynak provided no basis or underlying documentation for his conclusion that, while the miner's death was due to leukemia, the miner had a "severely impaired respiratory system" due to pneumoconiosis which in turn led to his "inability to oxygenate his blood properly and weakened all of the body systems." Claimant's Exhibit 1. In a permissible exercise of his discretion, the administrative law judge concluded that this statement by Dr. Kraynak, without any underlying documentation, was not based on more than "...the thesis that where an individual was totally disabled due to pneumoconiosis, the death of that person must have been caused, at least in part, by pneumoconiosis[.]" Decision and Order at 5, and was not sufficient to establish death due to pneumoconiosis under Section 718.205(c). See *Clark, supra*; *Peskie, supra*; *Lucostic, supra*. As with Dr. Khoudeir, the mere fact that Dr. Kraynak

treated the miner during his lifetime does not ameliorate the deficiencies presented in his conclusions regarding the miner's death. *See Lango, supra; Onderko, supra; Tedesco, supra.* Accordingly, we affirm the administrative law judge's rejection of Dr. Kraynak's opinions on the cause of the miner's death.

In considering the opinions of Dr. Simelaro, the administrative law judge found that although Dr. Simelaro initially "speculated that pneumoconiosis hastened the miner's death because [it] causes a lowered blood oxygen level. He referred to no evidence that the miner actually had a low blood oxygen level (as opposed to a low red blood count)." Decision and Order at 5. Rather, the administrative law judge found that Dr. Simelaro, although he "referred to the January 13, 1999 laboratory tests, ... failed to consider the arterial blood gas test at that time (noted in Dr. Khoudeir's report of March 25, 1999) whose results ... are normal." Decision and Order at 5. The administrative law judge further noted that this blood gas test "revealed that the miner had an oxygen saturation of 98 percent." Decision and Order at 5. Likewise, the administrative law judge noted that in responding to a report from Dr. Perper criticizing his opinion, Dr. Simelaro admitted that while he was unaware of this blood gas test, he accepted Dr. Perper's statement that the study was normal. In attempting to discount the results of the test, however, the administrative law judge found that Dr. Simelaro "jettisoned his prior assumption that the miner had low blood oxygen caused by pneumoconiosis and substituted the symptom of an increased rate of respiration and resulting alkalosis to establish that pneumoconiosis contributed to death," Decision and Order 5-6, but that Dr. Simelaro "failed to state whether the miner was actually shown to have alkalosis, or, if so, how alkalosis hastens death where the blood gas levels are normal." Decision and Order at 6. Claimant's Exhibit 6. Thus, contrary to claimant's assertion, the administrative law judge, in a permissible exercise of his discretion, concluded that Dr. Simelaro's ultimate conclusion, that pneumoconiosis was a contributing factor to the miner's death, was based on inconsistent theories and entitled to little weight. *See Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Accordingly, the administrative law judge properly rejected the opinions of Dr. Simelaro as to the cause of the miner's death. *See Clark, supra; Puelo v. Florence Mining Co.*, 8 BLR 1-198 (1984); *Peskie, supra; Lucostic, supra.* Further, contrary to claimant's assertion, the holding of the United States Court of Appeals for Third Circuit, within whose jurisdiction this claim arises, in *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997), is inapposite in the instant case. While claimant correctly notes that pulmonary function studies and blood gas studies are not relevant in assessing whether pneumoconiosis was a contributing cause of the miner's death, *Mancia*, the administrative law judge, in the instant case did not rely upon such evidence in determining that the miner's death was not caused by pneumoconiosis. Rather, in assessing the credibility of the medical opinions, the administrative law judge properly determined that Dr. Simelaro's opinion was not credible as it was not supported by underlying documentation, *e.g.* the blood gas study evidence. Decision and Order at 5-6; *see Clark, supra; Peskie, supra; Lucostic, supra.* Accordingly, the administrative law judge

properly rejected the opinion of Dr. Simelaro.

Under Section 718.205(c), the burden rests with claimant to affirmatively establish that pneumoconiosis played a role in the miner's death. *See Lango, supra; Lukosevicz, supra; see also Neely, supra; Foreman, supra.* Inasmuch as claimant has failed to produce any credible medical evidence which satisfies his burden, *see discussion, supra*, we must affirm the administrative law judge's conclusion that claimant is unable to establish entitlement to survivor's benefits pursuant to Section 718.205(c). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 19 BLR 2A-1 (1994) *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 997 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).<sup>3</sup>

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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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge

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<sup>3</sup> We thus need not address claimant's assertions regarding the administrative law judge's crediting of Dr. Perper's opinion. *See generally Coen v. Director, OWCP*, 7 BLR 1-30 (1984).