

BRB No. 99-1233 BLA

MABEL ACKELL)
(Widow of JOSEPH ACKELL))
)
Claimant-Petitioner)
)
v.)
)
READING ANTHRACITE COMPANY) DATE ISSUED:
)
and)
)
CONSTITUTION STATE SERVICE CO.)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,¹ the miner's widow, appeals the Decision and Order (98-BLA-01200) of Administrative Law Judge Ainsworth H. Brown denying benefits on a survivor's claim filed

¹Claimant is Mabel Ackell, the miner's widow. The miner, Joseph Ackell, died on

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, and the parties stipulated to, twenty-one and one-half years of qualifying coal mine employment and the existence of coal workers' pneumoconiosis. Decision and Order at 2; Claimant's Brief at 1; Employer's Brief at 1. 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 that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 2-6. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in weighing the evidence of record pursuant to Section 718.205. Employer responds, asserting that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.²

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).

November 15, 1995, and claimant filed her survivor's claim, the subject of the instant appeal, on February 12, 1998. Director's Exhibits 1, 8.

²The administrative law judge's length of coal mine employment determination as well as his finding that the miner suffered from coal workers' pneumoconiosis are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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; *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.³ *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

³This 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*).

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. Claimant contends that the administrative law judge erred in according greater weight to the opinions of Drs. Levinson and Dittman, who did not examine the miner, over the opinion of Dr. Setlock, the miner's treating physician. Claimant's Brief at 2-3. We disagree. Claimant's contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). 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); *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). Additionally, a reviewing physician's opinion may be substantial evidence in support of an administrative law judge's findings. *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). The administrative law judge properly considered the entirety of the medical opinion evidence of record and permissibly accorded greater weight to the opinions of Drs. Levinson and Dittman, opining that the miner's death was not due to pneumoconiosis, than to the contrary opinion of Dr. Setlock, in light of the superior qualifications of the physicians.⁴ Decision and Order at 2-6; *Clark, supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel, supra*. The administrative law judge further acted within his discretion, as fact-finder, in according less weight to the opinion of Dr. Setlock as his opinion is not supported by any objective evidence, the factual foundation that he relied upon was historical information that the miner had been diagnosed with black lung and the physician did not describe any other

⁴Dr. Setlock, who is the miner's treating physician, is Board-certified in family medicine and opined that coal workers' pneumoconiosis contributed to the miner's demise. Claimant's Exhibit 2; Employer's Exhibit 9. Dr. Levinson is Board-certified in internal and pulmonary medicine and opined that the miner's death was due to arteriosclerotic cardiovascular disease with cerebral vascular disease. Employer's Exhibits 1, 2. Dr. Dittman is Board-certified in internal medicine and is Board-eligible in pulmonary medicine and opined that the miner's death was not due to pneumoconiosis but to cerebral vascular disease. Employer's Exhibits 5, 6.

signs that would be indicative of a pulmonary impairment. Decision and Order at 5; Claimant's Exhibit 2; Employer's Exhibit 9; *Clark, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Piccin, supra*. Contrary to claimant's arguments, the administrative law judge permissibly questioned the reliability of the opinion of the treating physician, Dr. Setlock, as he failed to explain with any certainty the basis for his opinion that the miner's death was due to pneumoconiosis. Decision and Order at 3-6; *Lango, supra*.

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 administrative law judge rationally accorded greater weight to the physicians with superior credentials and permissibly questioned the credibility of the only opinion stating that the miner's death was due to pneumoconiosis, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo, supra*; *Haduck, supra*; *Boyd, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). 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 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. *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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge