

BRB No. 98-1364 BLA

VIOLA M. HIGNITE)
(Widow of SEBERT HIGNITE))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 8/26/99
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)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and of Order Thomas Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Helen H. Cox (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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1928) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a survivor's claim¹ filed

¹The miner died on June 22, 1996. Director's Exhibit 4. Claimant filed this survivor's claim on October 28, 1996. Director's Exhibit 1. The miner filed three claims. The miner's first claim, filed on November 13, 1979, was denied by the district director on June 29, 1981. Director's Exhibit 29. The miner's second claim, filed on March 11, 1987, was denied by the district director on August 17, 1988 and on August 17, 1989. Director's

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 preponderance of the evidence does not establish that the miner's death was due to, or hastened by, pneumoconiosis pursuant to 20 C.F.R. §718.205(c).² Accordingly, the administrative law judge denied benefits. On appeal, claimant alleges that the administrative law judge erred in not finding that the miner's death was due to pneumoconiosis under Section 718.205(c). The Director, Office of Workers' Compensation Programs, responds, urging the Board to affirm the denial of survivor's benefits.

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 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

Exhibit 28. The miner's third claim, filed on April 21, 1992, Director's Exhibit 16, was denied by Administrative Law Judge Bernard J. Gilday, Jr.. The Board affirmed the denial of benefits. *Hignite v. Director, OWCP*, BRB No. 94-3909 BLA (April 28, 1995)(unpub.). The record does not indicate that the miner took any further action with regard to this claim.

²The administrative law judge accepted the parties' stipulation to four years of coal mine employment and to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 2; Hearing Transcript at 6-7.

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 present case arises, has held that, for the purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death where pneumoconiosis actually hastens death. See *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

On appeal, claimant argues that the administrative law judge erred in interpreting medical tests and substituting his own conclusions for those of Dr. Pannocchia. Claimant notes that Dr. Pannocchia's opinion is well reasoned and well documented, and entitled to more weight based upon Dr. Pannocchia's status as the miner's treating physician. We disagree. The administrative law judge noted Dr. Pannocchia's treating physician status. Decision and Order at 4. However, the administrative law judge properly noted that Dr. Pannocchia, without further explanation, stated: "I believe that his infarction was (*sic*) his lungs had contributed greatly to his health which also contributed to his acute myocardial infarction." Director's Exhibit 12. The administrative law judge, within a proper exercise of his discretion, found this statement undocumented and unexplained and as such, not a reasoned, reliable basis for concluding that pneumoconiosis caused or hastened the miner's death. Decision and Order at 5; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Moreover, the administrative law judge found Dr. Pannocchia's opinion less persuasive than the contrary opinions of Drs. Burki and McGinley based upon their superior qualifications³ and the fact that they provided detailed, objectively based reasons for their conclusions. Decision and Order at 5; Director's Exhibits 5, 12, 18. The administrative law judge also noted that the death certificate lists cardiac arrest due to probable ventricular rupture due to myocardial infarction as the cause of death and did not mention pneumoconiosis. Decision and Order at 3; Director's Exhibit 4. The administrative law judge's findings in this regard are rational and supported by substantial evidence.

The administrative law judge properly found that Dr. McGinley is a Board-

³The administrative law judge took judicial notice that Dr. McGinley is Board-certified in anatomic and clinical pathology, and that Dr. Pannocchia is Board-certified in family practice, and properly found that the record shows that Dr. Burki is Board-certified in internal medicine and pulmonary disease. Decision and Order at 3-4, n.2-3; Director's Exhibit 18. We affirm the administrative law judge's findings as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

certified pathologist, who performed an autopsy of the miner's lungs, diagnosing simple pneumoconiosis and ruling out progressive massive fibrosis or complicated pneumoconiosis. Decision and Order at 3; Director's Exhibit 5. The administrative law judge indicated that Dr. McGinley summarized the miner's employment and medical histories and noted that the miner's final hospital admission was the result of an acute myocardial infarction, a conclusion which was supported by an electrocardiogram and serum enzyme data. *Id.* The administrative law judge found that Dr. McGinley opined that the miner's death was cardiac related, and that pneumoconiosis was not mentioned as a contributing or hastening cause of the miner's death. *Id.*

The administrative law judge properly determined that Dr. Burki is Board-certified in internal medicine and pulmonary diseases. Decision and Order at 4; Director's Exhibit 18. The administrative law judge rationally found Dr. Burki's opinion, that pneumoconiosis did not cause or hasten the miner's death, supported by the miner's medical records, including x-ray reports, pulmonary function studies, blood gas studies and the autopsy report. *Id.*; see *Clark, supra*. Therefore, we affirm the administrative law judge's finding that the preponderance of the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), as it is supported by substantial evidence, including the death certificate and the opinions of Drs. McGinley and Burki. See *Brown, supra*; Decision and Order at 5.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge