

BRB No. 03-0374 BLA

SHIRLEY M. KLONOWSKI )  
(Widow of ROBERT T. KLONOWSKI) )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 TJS, INCORPORATED ) DATE ISSUED: 12/15/2003  
 )  
 and )  
 )  
 ROCKWOOD CASUALTY INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Daniel L. Leland,  
Administrative Law Judge, United States Department of Labor.

Raymond F. Keisling (Carpenter, McCadden & Lane, LLP), Wexford,  
Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania,  
for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and  
GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (02-BLA-5106) of  
Administrative Law Judge Daniel L. Leland 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>1</sup> The administrative law judge found, and the parties stipulated to, twenty-six years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on the date of filing.<sup>2</sup> Employer also stipulated that the miner had pneumoconiosis which arose out of coal mine employment pursuant to Sections 718.202(a) and 718.203. Although the administrative law judge found that the evidence was insufficient to establish entitlement to the irrebuttable presumption of death due to pneumoconiosis at Section 718.304, he nonetheless found the evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of death pursuant to Section 718.205(c). Accordingly, benefits were awarded. The administrative law judge further found that claimant was entitled to benefits beginning October 1, 2000.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death, urging reversal or remand of the case for a reweighing of the evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), is not participating in 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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see 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). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the

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<sup>1</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amendments became effective on January 19, 2001 and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup> The miner died on October 9, 2000. Director's Exhibit 2. Claimant filed her survivor's claim for benefits on March 2, 2001. Benefits were awarded on December 31, 2001. Director's Exhibits 21, 27.

miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Employer contends that the administrative law judge erred in his weighing of Dr. Bush's opinion. Specifically, employer contends that the administrative law judge erred when he found that Dr. Bush did not fully address "what role pneumoconiosis played in the miner's death," Decision and Order at 7, when a review of Dr. Bush's opinion and testimony clearly establish he did address the role that pneumoconiosis played and provided a detailed explanation as to why he believed that pneumoconiosis did not play any role in bringing about the miner's death. Employer also contends that the administrative law judge erred in crediting Dr. Perper's opinion on the cause of death because Dr. Perper never found that the miner's simple coal workers' pneumoconiosis caused the miner's death. Instead, employer contends that the administrative law judge erred in relying on Dr. Perper's opinion to find that the miner's death was due to pneumoconiosis by relying on a finding of complicated pneumoconiosis when the administrative law judge had found that the miner did not have complicated pneumoconiosis based on the evidence of record. Thus, employer contends that the administrative law judge erred in finding Dr. Perper's opinion to be reasoned.

In finding that the medical evidence established that claimant's pneumoconiosis contributed to his death, the administrative law judge credited Dr. Perper's opinion that coal workers' pneumoconiosis contributed to the miner's death because Dr. Perper provided a reasoned explanation for so finding. Specifically, the administrative law judge noted that Dr. Perper opined that the miner's emphysema contributed to death, and that the miner's emphysema was caused by cigarette smoking and coal dust exposure. The administrative law judge also found that the opinions of the prosecutors supported Dr. Perper's finding.<sup>3</sup> The administrative law judge noted that although Dr. Bush stated that coal worker's pneumoconiosis did not cause the miner's lung cancer and did not therefore contribute to his death, Dr. Bush did not explain whether or not coal worker's pneumoconiosis hastened the miner's death. The administrative law judge concluded therefore that Dr. Bush's opinion was entitled to less weight as he "did not fully address what role pneumoconiosis played in the miner's death." Decision and Order at 7.

Contrary to employer's argument, the administrative law judge did not base his finding of death due to pneumoconiosis on Dr. Perper's diagnosis of complicated pneumoconiosis. Rather, the administrative law judge found that Dr. Perper's finding

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<sup>3</sup> Drs. Goldblatt and Mermari, the autopsy prosecutors, found that pneumoconiosis contributed to death. Director's Exhibit 9.

that the miner's emphysema, which was due to cigarette smoking and coal mine employment, was a contributory cause of death was sufficient to establish that pneumoconiosis contributed to the miner's death. This was proper. See 20 C.F.R. §718.201; *Lukosevicz*, 888 F.2d 1001, 13 BLR 2-100, see also *Zeigler Coal Co. v. Director, OWCP [Villain]*, F.3d , 2002 WL 31730826 (7th Cir. 2002).

A review of the record, however, shows that Dr. Bush testified that there was no evidence that pneumoconiosis played a role in the miner's death. Employer's Exhibit 1. Thus, as employer contends, the administrative law judge erred in finding that Dr. Bush did not fully address the role that pneumoconiosis played in the miner's death. See *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Accordingly, because of the administrative law judge's mischaracterization of the evidence, the administrative law judge's Decision and Order awarding benefits must be vacated and the case remanded for reconsideration.

Accordingly, the administrative law judge's Decision and Order- Awarding Benefits is affirmed in part, vacated in part, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge