

BRB No. 98-1303 BLA

ELIZABETH SCHWALM	)	
(Widow of CHARLES SCHWALM)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
C.L.S. COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1561) of Administrative Law Judge Paul H. Teitler awarding survivor's benefits 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 deceased miner originally applied for benefits on December 31, 1993. Director's Exhibit 1. The miner died prior to a hearing on the claim. Director's Exhibit 55. Thereafter, the miner's widow filed a claim for survivor's benefits. On May 8, 1997, an administrative hearing was held on both the miner's and the survivor's claims. The administrative law judge issued a Decision and Order on May 21, 1998, denying benefits on the miner's claim but

awarding benefits on the survivor's claim.<sup>1</sup> The administrative law judge found that the presence of simple coal workers' pneumoconiosis was established by x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) and by autopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 4-5. He found that none of the presumptions under 20 C.F.R. §718.202(a)(3) is applicable in the instant case. Decision and Order at 5. Given that pneumoconiosis was established under other regulatory provisions, the administrative law judge declined to discuss the medical reports under 20 C.F.R. §718.202(a)(4). Decision and Order at 6. The administrative law judge also found that the record contains no evidence rebutting the presumption that the miner's pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §718.203(b).<sup>2</sup> Decision and Order at 6. The administrative law judge ultimately found that claimant established "total disability due to pneumoconiosis at the time of death with the medical evidence of cor pulmonale, with right-sided congestive heart failure pursuant to [20 C.F.R.] §718.204(c)(3)." Decision and Order at 20. On the basis of this finding, the administrative law judge awarded survivor's benefits to the widow.

On appeal, employer asserts that the administrative law judge erred in failing to apply the proper legal standard in assessing the evidence at 20 C.F.R. §718.205(c). Claimant has not responded to the appeal. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not participate in this appeal.

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<sup>1</sup> Inasmuch as claimant has not filed a cross-appeal to contest the administrative law judge's denial of benefits in the miner's claim, the administrative law judge's findings as to the miner's claim are not before us on appeal. Therefore, we address only those findings pertinent to the survivor's claim.

<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings of the presence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1),(a)(2) and 718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a). 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 on the Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits in a claim filed on or 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 substantially 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.<sup>3</sup> 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). Moreover, evidence that establishes that pneumoconiosis hastened the miner's death satisfies the portion of 20 C.F.R. §718.205(c)(2) which requires proof that pneumoconiosis was a substantially contributing cause or factor in the miner's death. See *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).<sup>4</sup>

Employer asserts that the administrative law judge erred in awarding survivor's benefits because he failed to apply the legal standard of proof enunciated in *Lukosevicz*, namely, whether pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Employer maintains that the administrative law judge improperly awarded survivor's benefits on the basis of his finding that claimant established total disability under 20 C.F.R. §718.204(c)(3). Employer does not contest the administrative law judge's finding that claimant was totally disabled due to cor pulmonale with right-sided congestive heart failure

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<sup>3</sup> Inasmuch as there is no evidence that the miner's death was directly due to pneumoconiosis, claimant is precluded from establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1). Further, inasmuch as there is no evidence of complicated pneumoconiosis, claimant is precluded from establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3).

<sup>4</sup> Inasmuch as the miner's last coal mine employment occurred in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. See Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pursuant to 20 C.F.R. §718.204(c)(3), but maintains that the administrative law judge erred in concluding that this determination supports an award of survivor's benefits. We agree.

Although the administrative law judge correctly cited *Lukosevicz* as the controlling case law, and properly stated the standard for establishing death due to pneumoconiosis set by the case, he failed to properly apply this standard. The administrative law judge failed to make a determination as to whether pneumoconiosis was at least a substantially contributing cause or factor leading to the miner's death, including whether pneumoconiosis hastened the miner's death. In analyzing the medical evidence in the survivor's claim, the administrative law judge first declined to credit what he termed "the conclusory opinions of Drs. Cable, Simelaro and Tobash" that pneumoconiosis substantially contributed to the death of the miner. Decision and Order at 18; Director's Exhibit 71; Claimant's Exhibits 1, 4. The administrative law judge instead credited the opinions of Drs. Bindie<sup>5</sup> and Bush<sup>6</sup>, noting that both physicians found that "at death [the miner] had right-side congestive heart failure." Decision and Order at 20. The administrative law judge made no determination as to the probative value of the death certificate, which listed the miner's cause of death as "Pneumonia (Post Obstructive)"; "Bronchogenic Carcinoma," and noted "Other Significant Conditions" leading to death as "Pneumoconiosis" and "Cerebral Metastases." Director's Exhibit 55. The administrative law judge thus failed to assess whether pneumoconiosis was a

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<sup>5</sup> Dr. Bindie was the autopsy prosector. He concluded that the immediate cause of death was respiratory, noting that the miner had pneumoconiosis prior to having lung cancer. Dr. Bindie's Deposition at 12. Dr. Bindie stated unequivocally that pneumoconiosis was a contributory cause of death and explained that he could not "separate one contributory cause from the other." *Id.* at 14. Dr. Bindie noted that the miner had various respiratory impairments, one being pneumoconiosis, and stated that they all contributed "one way or another in their own mechanism" to the miner's death. *Id.* The administrative law judge gleaned from Dr. Bindie's findings of "pulmonary congestion and adema" that prior to death the miner suffered from cor pulmonale with right-sided congestive heart failure. *Id.* at 9-10; Director's Exhibit 67 at 1, 9. On that basis, the administrative law judge found that the doctor's report supported a finding of entitlement to survivor's benefits.

<sup>6</sup>Dr. Bush stated at deposition that in his opinion, pneumoconiosis neither contributed to, nor hastened, the miner's death. Dr. Bush's Deposition at 19. The administrative law judge appears to have relied on Dr. Bush's opinion in awarding survivor's benefits because the doctor testified that the miner had "evidence of some degree of cor pulmonale at the time of death." *Id.* at 25.

causative factor in the miner's death. Having found that the miner established the presence of pneumoconiosis arising out of coal mine employment, and that the miner suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge concluded that the miner was totally disabled pursuant to 20 C.F.R. §718.204(c)(3) at the time of death, and that therefore, claimant was entitled to survivor's benefits. By so doing, the administrative law judge impermissibly equated total disability at the time of death pursuant to 20 C.F.R. §718.204(c) with death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Inasmuch as the administrative law judge failed to determine whether pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, we vacate his award of survivor's benefits and remand this case for further consideration of the evidence at 20 C.F.R. §718.205(c)(2). On remand, the administrative law judge must determine whether pneumoconiosis substantially contributed to, or hastened, the miner's death pursuant to *Lukosevicz*.

Accordingly, the Decision and Order of the administrative law judge awarding survivor's benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge