

BRB No. 02-0554 BLA

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| GERALDINE R. WENTZ            | ) |                    |
| (Widow of HERBERT WENTZ)      | ) |                    |
|                               | ) |                    |
| Claimant-Petitioner           | ) |                    |
|                               | ) |                    |
| v.                            | ) |                    |
|                               | ) |                    |
| ISLAND CREEK COAL COMPANY     | ) | DATE ISSUED:       |
|                               | ) |                    |
| Employer-Respondent           | ) |                    |
|                               | ) |                    |
| DIRECTOR, OFFICE OF WORKERS'  | ) |                    |
| COMPENSATION PROGRAMS, UNITED | ) |                    |
| STATES DEPARTMENT OF LABOR    | ) |                    |
|                               | ) |                    |
| Party-in-Interest             | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order on Remand - Denying Benefits (95-BLA-0081) of Administrative Law Judge Michael P. Lesniak on a survivor's 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>2</sup> This survivor's claim is before the Board for a

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<sup>1</sup> Claimant, Geraldine Wentz, is the widow of the miner, Herbert Wentz. The miner died on December 9, 1992.

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal

fifth time. Pursuant to the most recent appeal in this case, the Board held that the administrative law judge did not provide a rationale for crediting the opinions of Drs. Benschoff and Perper over the contrary opinions of Drs. Naeye, Kleinerman, and Fino and, therefore, vacated the administrative law judge's findings and remanded the case for the administrative law judge to reevaluate the medical opinions and to render an analysis which comports with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). *Wentz v. Island Creek Coal Co.*, BRB No. 00-0764 BLA (Apr. 10, 2000). On remand, the administrative law judge reconsidered the medical opinions and found that they failed to establish that the miner's death was due to pneumoconiosis. Accordingly survivor's benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to conclude that the evidence of record establishes that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits.<sup>3</sup> The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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Coal Mine Health and Safety Act of 1969, as amended. These regulations 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>3</sup> Employer initially filed a cross-appeal in this case, BRB No. 00-0764 BLA-A. That appeal, however, was dismissed pursuant to employer's request. *Wentz v. Island Creek Coal Co.*, BRB No. 02-0554 BLA-A (Order)(Jul. 30, 2002)(unpub.).

To establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's 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); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, was a substantially contributing cause or factor leading to the 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)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); see *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant contends that the administrative law judge erred in concluding that the miner did not suffer from hypoxia until his final hospitalization. Specifically, claimant argues that, contrary to the administrative law judge's findings, the blood gas study evidence of record clearly established the presence of hypoxia prior to the miner's final hospitalization, and that the administrative law judge, as a result of his mischaracterization of the evidence, improperly discredited the opinion of Dr. Perper, who had presumed that the miner had hypoxemia long before his final hospitalization. Claimant also contends that the administrative law judge erred in crediting Dr. Benschhoff's more recent opinion over his earlier opinion because the administrative law judge provided no compelling reason for rejecting Dr. Benschhoff's initial opinion that moderate pneumoconiosis contributed to the miner's death in favor of his subsequent opinion that simple pneumoconiosis played no role in the miner's death. Director's Exhibit 61.

In finding that claimant failed to establish that the miner's death was due to pneumoconiosis, the administrative law judge, following the Board's remand instructions, again considered the opinions of Drs. Benschhoff and Perper, that pneumoconiosis contributed to death, as well as the opinions of Drs. Naeye, Kleinerman and Fino, that pneumoconiosis played no role in the miner's death. Director's Exhibits 47, 73, 74, 85, 93; Employer's Exhibits 1, 2; Decision and Order on Remand at 3-6.<sup>4</sup> The administrative law judge found that the opinions of Drs. Fino, Naeye and Kleinerman to be the most credible as to whether the miner's death was due to pneumoconiosis because they were best supported by

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<sup>4</sup> The death certificate lists cardiopulmonary arrest due to an acute myocardial infarction as the immediate cause of death with end stage cirrhosis as an other significant condition contributing to the miner's death but not resulting in the underlying cause. Director's Exhibit 45.

underlying documentation showing that the miner did not experience any pulmonary disability until just before his death and because their conclusions that the miner suffered from no pulmonary impairment were “consistent with the unanimous opinion that the extent of [the miner’s pneumoconiosis] was very mild.” Decision and Order on Remand at 6. This was rational. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Thus, contrary to claimant’s assertion, the administrative law judge, in a permissible exercise of discretion, credited the opinions of Drs. Fino, Naeye and Kleinerman that claimant did not have hypoxia until the miner’s final hospitalization, at the time of his death, over the opinion of Dr. Perper. Decision and Order on Remand at 6; *see Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984). Moreover, contrary to claimant’s assertion that the administrative law judge provided no reason for rejecting the first opinion of Dr. Benshoff, the administrative law judge found that Dr. Benshoff’s subsequent opinion, that pneumoconiosis was incidental and played no role in the miner’s death, Director’s Exhibit 61, was entitled to greater weight because it was more consistent with the underlying documentation of record. This was rational. *See Clark, supra*; *Peskie, supra*; *Lucostic, supra*. We hold, therefore, that the administrative law judge has complied with the Board’s remand instructions and has provided affirmable bases for concluding that claimant has failed to establish that the miner’s death was due to pneumoconiosis. 20 C.F.R. §718.205(c); *see Lukosevicz, supra*.

Accordingly, the administrative law judge’s Decision and Order On Remand-Denying Benefits is affirmed.

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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BETTY JEAN HALL  
Administrative Appeals Judge