

BRB No. 03-0172 BLA

ERMA JEAN THOMAS)	
(Widow of ANDREW THOMAS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	DATE ISSUED: 02/27/2004
CORPORATION)	
)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (97-BLA-0776) of Administrative Law Judge Michael P. Lesniak denying benefits on a claim filed pursuant to the provisions of

¹ Claimant is the surviving spouse of the deceased miner who died on October 9, 1994. Director's Exhibit 14.

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² This case involves a survivor's claim filed on May 6, 1996³ and is before the Board for the third time. In the initial Decision and Order, the administrative law judge, after crediting the miner with over forty years of coal mine employment, found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). The administrative law judge further found that claimant was entitled to a presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). The administrative law judge, however, found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits. By Decision and Order dated October 28, 1999, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2) (2000), 718.203(b) (2000) and 718.205(c)(1) (2000), as unchallenged on appeal. *Thomas v. Eastern Associated Coal Corp.*, BRB No. 98-0961 BLA (Oct. 28, 1999) (unpublished) (McGranery, J., concurring and dissenting). The Board also affirmed the administrative law judge's finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis. *Id.* In light of this holding, the Board also affirmed the administrative

² The Department of Labor has amended the regulations implementing the Federal 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.

³ The miner filed a claim for benefits on January 22, 1980. Director's Exhibit 39. The district director denied the claim on July 22, 1980. *Id.* There is no indication that the miner took any further action in regard to his 1980 claim.

The miner filed a second claim on August 20, 1985. Director's Exhibit 39. In a Decision and Order dated April 25, 1989, Administrative Law Judge James W. Kerr, Jr. credited the miner with forty-two years of coal mine employment. *Id.* Applying the true doubt rule, Judge Kerr found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* Judge Kerr also found that the miner was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id.* However, Judge Kerr found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Accordingly, Judge Kerr denied benefits. By Decision and Order dated April 9, 1992, the Board affirmed Judge Kerr's denial of benefits. *Thomas v. Eastern Associated Coal Co.*, BRB No. 89-1684 BLA (Apr. 9, 1992) (unpublished). There is no indication that the miner took any further action in regard to his 1985 claim.

law judge's finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3) (2000). *Id.* The Board, however, vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c)(2) (2000) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). Accordingly, the administrative law judge denied benefits. Claimant subsequently filed a motion for reconsideration. In a Decision on Motion for Reconsideration dated June 9, 2000, the administrative law judge reaffirmed his denial of benefits. By Decision and Order dated June 27, 2001, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c)(2) (2000) and remanded the case for further consideration. *Thomas v. Eastern Associated Coal Corp.*, BRB No. 00-0957 BLA (June 27, 2001) (unpublished). On January 23, 2002, the Board summarily denied employer's motion for reconsideration. *Thomas v. Eastern Associated Coal Corp.*, BRB No. 00-0957 BLA (Jan. 23, 2002) (Order) (unpublished).

On remand for the second time, the administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Employer responds in support of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁴ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

⁴Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

After consideration of the administrative law judge's 2002 Decision and Order on Remand, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits on the survivor's claim under 20 C.F.R. Part 718.

The only issue before the administrative law judge, in the most recent remand, was whether the evidence was sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to 20 C.F.R. §718.205(c)(2). See 20 C.F.R. §718.205(c)(5). Dr. Goldblatt's opinion is the only evidence of record that, if credited, would assist claimant in satisfying her burden under Section 718.205(c)(2). Based upon a review of the miner's autopsy slides and medical evidence, Dr. Goldblatt opined that the miner's coal workers' pneumoconiosis and focal dust emphysema were among numerous conditions which contributed to the miner's hypoxia, resulting in a fatal myocardial infarction. Director's Exhibits 27, 29. The administrative law judge, however, found that Dr. Goldblatt's premise, that the miner's death was attributable to an hypoxia-induced myocardial infarction, was not supported by the record. 2002 Decision and Order on Remand at 17.

The administrative law judge found that Dr. Goldblatt's reliance upon 1980 and 1993 arterial blood gas studies to support a finding of pneumoconiosis-related hypoxia

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- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
 - (3) Where the presumption set forth at §718.304 is applicable.
 - (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
 - (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

was misplaced. The administrative law judge questioned the reliability of the miner's 1980 arterial blood gas study in light of the fact that the miner's subsequent 1985 arterial produced higher values.⁵ See *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984); 2002 Decision and Order on Remand at 18; Director's Exhibit 28. The administrative law judge also reasonably questioned Dr. Goldblatt's reliance upon the miner's low PO2 value from a 1993 arterial blood gas study to support a finding of hypoxia. The administrative law judge noted that Dr. Kleinerman testified that because the miner's 1993 PO2 value was obtained during a time when the miner was being admitted to the hospital with "tarry stools" representing gastrointestinal bleeding, see Director's Exhibit 28, the "great likelihood" was that the low PO2 value was the result of "a loss of blood and a shocklike state that occurred at that time."⁶ 2002 Decision and Order on Remand at 18; Employer's Exhibit 4 at 38. Based upon Dr. Kleinerman's expert opinion, the administrative law judge acted within his discretion in questioning the reliability of the miner's 1993 arterial blood gas study results. See *Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1984).

The administrative law judge also found that that Dr. Goldblatt's conclusion that the miner's death was due to an acute myocardial infarction was inconsistent with the preponderance of the medical evidence, including the death certificate, the autopsy report, and the reports of the treating and consulting physicians. 2002 Decision and Order on Remand at 18.

Dr. Tsai, the miner's treating physician, completed the miner's death certificate. Dr. Tsai attributed the miner's death to widespread adenocarcinoma of the abdomen and liver. Director's Exhibit 14. Dr. Tsai listed chronic obstructive lung disease and diabetes mellitus as other significant conditions. *Id.* The administrative law judge accurately noted that the miner's death certificate does not mention a cardiac condition. 2002 Decision and Order on Remand at 12.

The autopsy prosectors, Drs. Patel and Rizkalla, opined that the miner died from "anaplastic small cell carcinoma of the lungs with metastases into the liver and gall bladder." Director's Exhibit 15. Although Drs. Patel and Rizkalla noted the miner's coronary arteries showed mild to moderate atherosclerotic narrowing, ranging up to eighty percent of vessel diameter, they did not diagnose the existence of a myocardial

⁵ The miner's 1980 arterial blood gas study revealed a PO2 value of 68.8, while the miner's subsequent 1985 arterial blood gas study revealed a resting PO2 value of 87.6 and an after exercise PO2 value of 87.3. Director's Exhibit 28.

⁶ Dr. Naeye also testified that the "disease processes" that brought the miner to the hospital in 1993 could have accounted for his low PO2 value. Employer's Exhibit 4 at 33-34.

infarction. *Id.* After reviewing the miner's autopsy slides and medical evidence, Dr. Kleinerman also found no evidence to support a diagnosis of an acute myocardial infarction. Employer's Exhibit 4 at 23.

The administrative law judge permissibly accorded less weight to Dr. Weiss's statement that the miner's "terminal event may...have been an acute myocardial infarction" based upon its equivocal nature. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); 2002 Decision and Order on Remand at 16; Employer's Exhibit 3. Finally, although Dr. Naeye opined that the miner died from complications of an acute myocardial infarction, the administrative law judge properly found that Dr. Naeye provided little, if any, analysis for his conclusion. 2002 Decision and Order on Remand at 13; Employer's Exhibits 1, 4. The administrative law judge, therefore, found that this aspect of Dr. Naeye's opinion was not sufficiently reasoned. *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).

Thus, we hold that the administrative law judge properly discredited Dr. Goldblatt's opinion regarding the cause of the miner's death because it was based upon a premise not supported by the medical evidence, *i.e.*, that the miner's death was due to an hypoxia-related myocardial infarction. *Clark*, 12 BLR at 1-155.

Because the administrative law judge properly discredited Dr. Goldblatt's opinion, the only medical opinion of record supportive of a finding that the miner's death was due to pneumoconiosis,⁷ we affirm the administrative law judge's finding that the evidence is

⁷ Dr. Tsai attributed the miner's death to widespread adenocarcinoma of the abdomen and liver. Director's Exhibit 14.

Drs. Patel and Rizkalla, the autopsy prosectors, attributed the miner's death to anaplastic small cell carcinoma of the lungs with metastases into the liver and gall bladder. Director's Exhibit 15.

Dr. Weiss opined that the miner died from extensive-stage small cell carcinoma of the lung related to his long-term cigarette smoking. Employer's Exhibit 3.

Dr. Naeye opined that even if the miner had coal workers' pneumoconiosis, it did not contribute to, or hasten, his death in any way. Employer's Exhibit 4 at 36, 44-45.

Dr. Kleinerman opined that coal workers pneumoconiosis did not hasten the miner's death. Employer's Exhibit 2. Dr. Kleinerman attributed the miner's death to wide spread carcinoma of the abdomen and liver. Employer's Exhibit 4 at 20.

insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

Drs. Naeye and Kleinerman, like Dr. Goldblatt, are Board-certified in Anatomic and Clinical Pathology. Director's Exhibit 29 at 8; Employer's Exhibits 1, 2. Dr. Weiss is Board-certified in Internal Medicine and Oncology. Employer's Exhibit 3.