

BRB No. 02-0546 BLA

ALICE M. MAKEL)	
(Widow of FRANK G. MAKEL))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Gregory C. Hook (Hook and Hook), Waynesburg, Pennsylvania, for claimant.

Helen H. Cox (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (01-BLA-1070) of Administrative Law Judge Michael P. Lesniak denying benefits 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,

¹Claimant is the surviving spouse of the deceased miner who died on April 21, 1993. Director's Exhibit 11.

30 U.S.C. §901 *et seq.* (the Act).² The instant case involves a survivor's claim filed on October 5, 1995.³ Director's Exhibit 11. After crediting the miner with forty-three years and

²The 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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The miner filed a claim on July 27, 1990. Director's Exhibit 10. While the miner's claim was pending, he died on April 21, 1993. Ultimately, in a Decision and Order on Remand dated July 25, 1995, Administrative Law Judge Thomas M. Burke awarded benefits in the miner's claim. *Id.*

Following the adjudication of the miner's claim, claimant filed a survivor's claim on October 5, 1995. *Id.* The district director denied the claim on April 5, 1996. Director's

eleven months of coal mine employment, the administrative law judge noted that it was uncontested that the miner suffered from pneumoconiosis arising out of his coal mine employment. However, 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). 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. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

The Board must affirm the findings of the administrative law judge if they are

Exhibit 11. By letter dated April 26, 1996, claimant requested that the case be scheduled for an informal conference or for a hearing before the Office of Administrative Law Judges. *Id.* Claimant also requested an opportunity to submit additional evidence. *Id.* By letter dated May 15, 1996, the district director informed claimant that if she did not submit additional evidence or request a time extension to submit such evidence by the due date, the Department of Labor would assume that she was no longer interested in pursuing her claim unless she specifically advised the Department that she would not be submitting any evidence and was requesting a hearing. *Id.*

There is no indication that claimant took any further action until she filed a second survivor's claim on August 23, 2000. Director's Exhibit 1. Noting claimant's April 26, 1996 request for a hearing on her 1995 claim, the administrative law judge found that claimant's 1995 claim was still pending. Decision and Order at 5-6. The Director does not now dispute the viability of claimant's 1995 survivor's claim. Director's Brief at 1.

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'Keefe 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, 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 *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant argues 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). The coroner, Mr. Frank Behm, completed the miner's death certificate.⁵ Mr. Behm listed the miner's immediate cause of death as an acute coronary artery occlusion,

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
- (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).

⁵Mr. Behm is also identified on the miner's death certificate as the funeral director. Director's Exhibit 11.

noting that the interval between onset of this condition and death was “sudden.” Director’s Exhibit 11. Mr. Behm did not list any other causes of death on the death certificate. *Id.* Consequently, the miner’s death certificate is insufficient to support a finding that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

However, Mr. Behm amplified his opinion regarding the cause of the miner’s death. In a letter dated March 16, 1993, Mr. Behm stated that:

The primary cause [of death] was listed as an acute coronary artery occlusion, which is a sudden stopping of the heart. In my experience of over 40 years as a coroner I have witnessed hundreds of autopsies on coal miners. The sudden deaths of these miners is the result of overworking the heart due to breathing difficulty caused by pneumoconiosis. I knew [the miner] personally and he had all the symptoms of Black Lung.

Director’s Exhibits 5, 11.

In his consideration of Mr. Behm’s opinion, the administrative law judge noted that there was no evidence that Mr. Behm had examined the miner, conducted any tests or reviewed any evidence. Decision and Order at 7. The administrative law judge, therefore, rationally found that Mr. Behm’s opinion regarding the cause of the miner’s death was not sufficiently documented or reasoned.⁶ *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); Decision and Order at 7.

The only other relevant evidence is an August 17, 2000 letter from Dr. Smith, claimant’s treating physician. The letter, consisting of only two sentences, states:

This letter is in response to the inquiry in the death of [the miner]. I agree with the findings of Frank Behm, Greene County Coroner, and the [B]enefits [R]eview [B]oard, that pneumoconiosis could have been a contributing factor in [the miner’s] death.

Director’s Exhibit 5.

⁶The administrative law judge further found that there was no evidence that Mr. Behm was a physician. Decision and Order at 7.

Claimant contends that Dr. Smith's opinion should have been accorded greater weight based upon his status as the miner's treating physician. While an administrative law judge may accord more weight to the opinion of a treating physician, he is not required to do so. See *Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). An administrative law judge may permissibly require a treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to a miner's death. See *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Although the administrative law judge acknowledged Dr. Smith's status as the miner's treating physician, he noted that Dr. Smith did not mention pneumoconiosis in any of his medical records. Decision and Order at 7. The administrative law judge further noted that Dr. Smith failed to provide any physical examination findings or laboratory results in support of his "speculative conclusion that pneumoconiosis *could have* contributed to the miner's death." *Id.* at 7-8 (emphasis added). Consequently, the administrative law judge rationally found that Dr. Smith's opinion was not sufficiently documented or reasoned.⁷ *Lucostic, supra*; *Hess, supra*; Decision and Order at 7-8. The

⁷Dr. Smith indicated that he agreed with findings of the coroner and the Benefits Review Board that pneumoconiosis could have been a contributing factor in the miner's death. Decision and Order at 7. However, the administrative law judge found that neither the coroner's report nor the findings of the Benefits Review Board provided support for Dr. Smith's opinion. The administrative law judge noted that the coroner's report was not well reasoned or documented. *Id.* at 8. The administrative law judge further noted that the Benefits Review Board did not address the cause of the miner's death in its 1995 review of Judge Burke's 1993 Decision and Order denying benefits in the miner's claim. *Id.*; see Director's Exhibit 10.

administrative law judge also acted within his discretion in finding that Dr. Smith's opinion was too speculative to support a finding that claimant's death was due to pneumoconiosis. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 7-8.

Inasmuch as there is no other evidence of record supportive of a finding that the miner's death was due to pneumoconiosis, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis.⁸ 20 C.F.R. §718.205(c).

⁸Inasmuch as no party challenges the administrative law judge's finding that the evidence is insufficient to establish claimant's entitlement to the Section 718.304 presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); see 20 C.F.R. §718.304; Decision and Order at 7.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge