

BRB No. 04-0373 BLA

DONNA GROHMAN)	
(o/b/o ERMA A. ZIOLKO, Widow of)	
FRANK J. ZIOLKO))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BELTRAMI ENTERPRISES,)	DATE ISSUED: 01/28/2005
INCORPORATED)	
)	
and)	
)	
LACKAWANNA CASUALTY COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (03-BLA-5224) of Administrative Law Judge Janice K. Bullard 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, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the miner with thirty years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence 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 challenges 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). Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in response to claimant's appeal.²

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).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.³ See 20 C.F.R. §§718.1, 718.205(c);

¹Claimant is pursuing this claim on behalf of her deceased mother, Erma Ziolk, the widow of the deceased miner, Frank Ziolk. The miner filed a claim on April 24, 1984. Director's Exhibit 1. On August 7, 1987, the Department of Labor awarded benefits on the miner's claim. *Id.* The miner died on June 24, 2001. Director's Exhibits 3, 5. On July 19, 2001, the miner's widow filed a survivor's claim. Director's Exhibit 3. The miner's widow died on November 10, 2001. Director's Exhibit 14.

²Since the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

Neeley v. Director, OWCP, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §718.203; *Boyd*, 11 BLR at 1-40-41.

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).⁴ The administrative law judge considered the death certificate signed by Dr. Sidari and the medical reports of Drs. Levinson, Prince, Sidari and Simelaro. In a July 7, 2002 report, Dr. Levinson opined that the miner's "final admission" was not caused, related to, hastened, or aggravated by coal workers' pneumoconiosis or any pulmonary condition related to his previous coal mine employment. Director's Exhibit 17. In a subsequent report dated June 1, 2003, Dr. Levinson opined that the miner's coal workers' pneumoconiosis did not cause, contribute to, or hasten his death. Employer's Exhibit 3. In contrast, Drs. Prince, Sidari and Simelaro opined that pneumoconiosis contributed to the miner's death. Director's Exhibits 7, 8; Claimant's Exhibits 1, 3, 5, 6. In the death certificate, Dr. Sidari listed the causes of the miner's death as renal failure and pneumoconiosis. Director's Exhibit 5. The pertinent regulation provides that pneumoconiosis is a "substantially contributing

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- (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.
 - ...
 - (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).

⁴Because there is no medical evidence that pneumoconiosis caused the miner's death, the evidence is insufficient as a matter of law to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1). Further, because there is no evidence of complicated pneumoconiosis, the evidence is insufficient as a matter of law to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(3).

cause” of a miner’s death if it hastens the miner’s death. *See* 20 C.F.R. §718.205(c)(5). In addition, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of a miner’s death under 20 C.F.R. §718.205(c)(2) (2000) in a case in which the disease actually hastens his death. *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *see also* 20 C.F.R. §718.205(c)(2), (c)(5).

Initially, claimant asserts that the administrative law judge should have accorded dispositive weight to Dr. Sidari’s opinion based on his status as the miner’s treating physician. The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for considering a treating physician’s opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations. Section 718.104(d) requires the officer adjudicating the claim to “give consideration to the relationship between the miner and any treating physician whose report is admitted into the record.” 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer’s decision to give that physician’s opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). In this case, although Dr. Sidari was the miner’s treating physician, the administrative law judge fully considered the factors set forth in 20 C.F.R. §718.104(d) and provided a rational reason for finding Dr. Sidari’s opinion insufficient to meet claimant’s burden of proof. *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). The administrative law judge permissibly discredited Dr. Sidari’s opinion because it is not supported by the underlying documentation. *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). The administrative law judge stated that “[i]t is undisputed that the miner had pulmonary impairment during his lifetime, but the medical evidence clearly establishes that his final hospitalization was primarily to treat his renal condition and not his pulmonary problems.” Decision and Order at 9. The administrative law judge also stated that “[t]he treatment records indicate no definitive treatment for pneumoconiosis.” *Id.* In addition, the administrative law judge permissibly discredited Dr. Sidari’s opinion because it is not reasoned. *Clark*, 12 BLR at 1-149 (1989)(*en banc*); *Fields*, 10 BLR at 1-21-22; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Specifically, the administrative law judge stated: “I find Dr. Sidari’s opinion to be conclusory in that it fails to establish a causal

connection between pneumoconiosis and the miner's death on June 24, 2001." Decision and Order at 9. Thus, we reject claimant's assertion that the administrative law judge should have accorded dispositive weight to Dr. Sidari's opinion based on his status as the miner's treating physician.

Next, claimant asserts that the administrative law judge mischaracterized the death certificate. In summarizing the relevant evidence, the administrative law judge stated that "[t]he [death] certificate reports the immediate cause of death as renal failure due to or as a consequence of *pneumonia*." Decision and Order at 4 (emphasis added). However, as previously noted, Dr. Sidari listed renal failure and "pneumoconiosis" as the causes of the miner's death on the death certificate. Director's Exhibit 5. Nonetheless, since the administrative law judge permissibly discredited the death certificate because Dr. Sidari did not provide a basis for his conclusions, we hold that that administrative law judge's error in characterizing the death certificate is harmless.⁵ *Larioni v. Director. OWCP*, 6 BLR 1-1276 (1984).

Claimant also asserts that the administrative law judge mischaracterized the record by finding that the miner was not on any breathing medications for pneumoconiosis. Claimant's assertion is based on the premise that the miner received oxygen treatment. Contrary to claimant's assertion, the administrative law judge properly concluded that "[t]he treatment records indicate no definitive treatment for pneumoconiosis." Decision and Order at 9. The administrative law judge noted that the hospital records indicate that the miner received treatment for several ailments.⁶ *Id.* at 4-5, 9. The administrative law judge also noted that claimant testified that the miner used an inhaler and oxygen for his breathing. *Id.* at 2-3; Hearing Transcript at 18. However, the record does not specifically indicate that the miner received this treatment for pneumoconiosis. Thus, we reject claimant's assertion that the administrative law judge mischaracterized the record by finding that the miner was not on any breathing medications for pneumoconiosis.

Further, claimant asserts that the administrative law judge violated 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) and 30 U.S.C. §932(a), by failing to

⁵Moreover, based upon the context of the administrative law judge's discussion of Dr. Sidari's death certificate, it appears that her characterization of Dr. Sidari's conclusion was a typographical error.

⁶The hospital records indicate that the miner suffered, *inter alia*, from end stage renal disease, diabetes mellitus, chronic obstructive pulmonary disease, severe peripheral vascular disease, coronary artery disease and generalized weakness. Director's Exhibit 6.

provide a basis for discrediting the opinions of Drs. Prince and Simelaro. Contrary to claimant's assertion, the administrative law judge permissibly discredited the opinions of Drs. Prince and Simelaro because they are not reasoned. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. The administrative law judge determined that Dr. Simelaro's discussion of the miner's smoking history is conclusory. Decision and Order at 9. The administrative law judge stated that "[Dr. Simelaro] does not adequately address and incorporate the miner's severe smoking history."⁷ *Id.* at 9. The administrative law judge further stated that "because Dr. Simelaro does not indicate the pack-year history he relied upon in reaching his conclusion regarding the effects of the miner's smoking habit, his opinion is entitled to less weight." *Id.* With regard to Dr. Prince's opinion, the administrative law judge stated that "Dr. Prince referred to the miner's severe hypoxemia during his terminal hospital stay, which he attributed to his death." *Id.* at 10. The administrative law judge additionally stated, however, that "Dr. Prince does not address the effect of the miner's smoking history upon hypoxemia, or explain how hypoxemia contributed to his death." *Id.* Thus, we reject claimant's assertion that the administrative law judge violated the APA by failing to provide a basis for discrediting the opinions of Drs. Prince and Simelaro.

In addition, claimant asserts that the administrative law judge erred in applying an inconsistent standard of review to the opinions of Drs. Prince and Simelaro, as compared to the standard applied to the contrary opinion of Dr. Levinson. Claimant's assertion is based on the premise that the administrative law judge did not address whether Dr. Levinson considered the effects of smoking on the miner's death. However, Dr. Levinson did not opine that a respiratory condition contributed to the miner's death. In the July 7, 2002 report, Dr. Levinson stated:

There is no indication from these hospital records that there was any specific attention or direction made necessary by any form of pulmonary deterioration or impairment or was treatments (sic) extended for any type of chronic obstructive pulmonary disease or any form of pulmonary condition related to his previous coal mine employment. I would feel that his final hospital admission to the Hazelton General Hospital had no relation to any condition related to his previous coal mine employment. I find that his final admission was strictly related to advanced end stage renal disease with diabetes mellitus and peripheral vascular disease with complications of amputation and C difficile colitis.

⁷The administrative law judge stated that "the miner was noted to have a smoking history of 1 ½ packs per day for 50 years." Decision and Order at 9.

Director's Exhibit 17. Similarly, in the June 1, 2003 report, Dr. Levinson opined that the treatments that the miner received were purely related to advanced endstage renal disease with vascular complications of diabetes mellitus and peripheral vascular disease. Employer's Exhibit 3. Since Dr. Levinson did not opine that a respiratory condition contributed to the miner's death, the administrative law judge did not err in failing to consider whether Dr. Levinson opinion addressed the effects of the miner's smoking history on the cause of the miner's death.⁸ Since the administrative law judge permissibly discredited the opinions of Drs. Prince and Simelaro, the only opinions of record that could support a finding that pneumoconiosis contributed to the miner's death, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2).

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *Trumbo*, 17 BLR at 1-87; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

⁸Claimant additionally asserts that the administrative law judge erred in relying on Dr. Levinson's July 7, 2002 opinion because it is based on evidence from 1996 and 1997, which is not in the record in this case. Claimant also asserts that the administrative law judge erred in relying on Dr. Levinson's July 7, 2002 opinion because it is actually not probative of the issue of whether pneumoconiosis contributed to the miner's death. Lastly, claimant asserts that the administrative law judge erred in admitting Dr. Levinson's untimely June 1, 2003 report into the record at the hearing. In view of our disposition of the case at 20 C.F.R. §718.205(c)(2), we decline to address these contentions.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge