

BRB No. 06-0604 BLA

PAULINE H. GREEN )  
(Widow of EARL E. GREEN) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 SLAB FORK COAL COMPANY )  
 )  
 and )  
 )  
 WEST VIRGINIA COAL WORKERS' ) DATE ISSUED: 01/31/2007  
 PNEUMOCOIOSIS FUND )  
 )  
 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 – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, 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 -Denying Benefits (2004-BLA-5642) 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). Based on a stipulation of the parties, the administrative law judge found that the miner suffered from pneumoconiosis arising out of thirty-six years of coal mine employment. Decision and Order at 5. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 4-6. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish entitlement to benefits. Claimant contends that the administrative law judge erred in finding that the opinion of the miner's treating physician, Dr. Salon, that the miner's death was due to pneumoconiosis, was insufficient to carry claimant's burden at Section 718.205(c). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

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<sup>1</sup> Claimant is the widow of the miner who died on January 11, 2002. The death certificate lists the cause of the miner's death as meningeal lymphoma due to relapsing systemic lymphoma. No other causes of death are listed. Director's Exhibit 10. The miner was awarded benefits on a claim filed on December 3, 1986. Director's Exhibit 3. Claimant is not eligible for derivative survivor's benefits based on the filing date of the miner's claim. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf.*, *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86-87 (1988). The miner's claim is not before the Board at this time.

<sup>2</sup> The parties do not challenge the administrative law judge's determination that the evidence of record supports the parties' stipulation that the miner suffered from pneumoconiosis arising out of thirty-six years of coal mine employment. In addition, no challenge has been made to the determination that the evidence does not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order 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). In a survivor's claim 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, if it was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *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 Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that it contains no reversible error. The administrative law judge considered all of the relevant evidence and rationally found that it was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). See *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); see also *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Further, contrary to claimant's contentions, the administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding that the medical opinion of the miner's treating physician, Dr. Salon, was entitled to little weight, as the physician did not offer an explanation as to the manner in which pneumoconiosis contributed to the miner's death. Specifically, the administrative law judge reasonably found that Dr. Salon did not discuss how the x-ray report and post-mortem examination, which demonstrated the presence of pneumoconiosis, also demonstrated that the disease played any role in the miner's death. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Akers*, 131 F.3d 438, 21 BLR 2-269; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucoctic v. United States Steel Corp.*, 8 BLR 1-46 (1985). In addition, contrary to claimant's assertion, Dr. Salon's status as the miner's treating physician does not entitle the physician's opinion to dispositive weight, when, as is the case here, the administrative law judge considered the treating status of the physician, but provided an affirmable basis

for concluding that the physician's opinion was not reasoned.<sup>3</sup> 20 C.F.R. §718.104(d)(5); *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *see also Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269.

Moreover, contrary to claimant's assertion, the mere diagnosis of the presence of pneumoconiosis by the autopsy prosector, Dr. Koh, Director's Exhibit 11, is insufficient to support claimant's burden of establishing that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), absent a statement linking the disease to the miner's death. *See Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Neeley*, 11 BLR 1-85. We, therefore, affirm the administrative law judge's determination that the miner's death was not caused or hastened by his pneumoconiosis, 20 C.F.R. §718.205(c); *Sparks*, 213 F.3d 186, 22 BLR 2-251; *Shuff*, 967 F.2d 977, 16 BLR 2-90.<sup>4</sup>

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<sup>3</sup> 20 C.F.R. §718.104(d) provides, in pertinent part, that the administrative law judge must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record, considering the following factors in weighing the opinion of the treating physician:

- 1) Nature of relationship.
- 2) Duration of relationship.
- 3) Frequency of treatment.
- 4) Extent of treatment.

The regulation also requires the administrative law judge to consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

<sup>4</sup> Because Dr. Crouch's opinion does not link the miner's death to pneumoconiosis, we hold that any error the administrative law judge made in his analysis of the physician's autopsy review opinion, Employer's Exhibit 1, is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985), as the opinion is not supportive of claimant's burden at Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order-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