

BRB No. 97-0616 BLA

IRENE L. SHOLLEY)
(Widow of CLYDE E. SHOLLEY))

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)

Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Lynn G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for
claimant.

Gary K. Stearman (Marvin Krislov, Deputy Solicitor for National Operations; Donald
S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;
Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN,
Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow,¹ appeals the Decision and Order - Denying Benefits

¹ In April 1988, the administrative law judge issued a Decision and Order Awarding
Benefits in the living miner's claim, filed in September 1984. Director's Exhibit 24. The
miner died on October 15, 1994. The death certificate listed the immediate cause of death
as "metastatic transitimal [sic] cell carcinoma of bladder." Director's Exhibit 4.

Claimant, in the present appeal, avers that the administrative law judge failed to
address the fact that it had been established previously that the miner had coal worker's
pneumoconiosis from his work in the anthracite coal field and that he was totally disabled
from that disease. Claimant's Brief at 5-8. Claimant's contention is without merit. The

(96-BLA-0917) of Administrative Law Judge Robert D. Kaplan on a 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). Claimant filed a survivor's claim for benefits in November 1994. Director's Exhibit 1. The administrative law judge accepted the parties' stipulations that the miner had pneumoconiosis resulting from his coal mine employment, and that claimant was dependent on the miner at the pertinent time, and had not remarried. The administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis within the meaning of 20 C.F.R. §718.205(c)(2). Accordingly, benefits were denied. Claimant appeals, arguing that the administrative law judge erred in failing to find that the miner's death was significantly contributed to, or hastened by, his pneumoconiosis under Section 718.205(c)(2). The Director, Office of Workers' Compensation Programs, has submitted a response brief supporting the administrative law judge's Decision and Order.

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 the 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).

In order to establish entitlement to survivor's benefits in a claim filed on or after

administrative law judge, for the survivor's claim, accepted a stipulation that the miner had pneumoconiosis resulting from his coal mine employment. 1996 Decision and Order at 2. The fact that, in the miner's claim, the miner was adjudicated totally disabled by pneumoconiosis and was receiving benefits at the time of his death, is not dispositive of this survivor's claim, since neither claim was filed prior to January 1, 1982, and thus claimant is not entitled to derivative benefits. See *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); 20 C.F.R. §718.1(a); Director's Exhibits 1, 4, 24(1). In addition, since the date of filing is not prior to January 1, 1982, in the instant case, claimant cannot establish entitlement by showing that the miner was totally disabled due to pneumoconiosis. *Id.*

January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantial contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis.² 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as the miner's coal mine employment occurred in Pennsylvania. See Director's Exhibits 2, 24(2), 24(4); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Thus, as the administrative law judge noted, evidence that establishes that pneumoconiosis hastened the miner's death satisfies the portion of Section 718.205(c)(2) which requires proof that pneumoconiosis was a substantially contributing cause or factor in the miner's death. See *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); 1996 Decision and Order at 2.

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 administrative law judge's finding that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c)(2) is supported by substantial evidence. Contrary to claimant's contention, the administrative law judge permissibly found that Dr. Nair's opinion was highly equivocal in light of Dr. Nair's conclusion that "it is well possible" that pneumoconiosis was an aggravating factor in the miner's death. Director's Exhibit 9; see *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); see also *Plesh v. Director, OWCP*, 71 F.3d 103, 114, 20 BLR 2-30, 2-51 (3d Cir. 1995). Moreover, contrary to claimant's suggestion, the administrative law judge was not required to accord greater weight to Dr. Nair's opinion based solely on the physician's status as the claimant's treating physician. Rather, this is one factor which may be taken into consideration in the administrative law judge's weighing of the medical evidence of record. *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); see also *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

² In the instant case, the record does not contain any evidence of complicated pneumoconiosis, and the parties do not raise this issue on appeal. See 20 C.F.R. §§718.205(c)(3); 718.304.

In challenging the administrative law judge's decision to credit Dr. Michos' opinion,³ claimant argues that the administrative law judge erred in finding that Dr. Michos' opinion was corroborated by the Geisinger Medical Center records. Any error in the administrative law judge's finding that the Geisinger Medical Center records, which offered no opinion as to the cause of the miner's death, supported Dr. Michos' opinion that pneumoconiosis did not hasten the miner's death is harmless inasmuch as the administrative law judge otherwise permissibly accorded greater weight to Dr. Michos' opinion on the basis of his superior qualifications, as discussed *infra*. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Director's Exhibit 8.

³ Dr. Michos stated that coal worker's pneumoconiosis and chronic obstructive pulmonary disease did not play a contributing role in claimant's death and his death was not hastened or caused by his past coal mine employment. Director's Exhibit 12.

Further, claimant maintains that the administrative law judge did not comply with the Administrative Procedure Act, see 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), inasmuch as the sole basis for the administrative law judge's finding that pneumoconiosis did not hasten the miner's death was that Dr. Michos had superior qualifications to Dr. Kraynak. Claimant's Brief at 4; see also Claimant's Brief at 9. Claimant's contention lacks merit. The administrative law judge permissibly credited the opinion of Dr. Michos over the opinion of Dr. Kraynak on the basis that Dr. Michos had superior qualifications.⁴ 1996 Decision and Order at 4; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Further, the administrative law judge reasonably found Dr. Michos' opinion to be supported by the miner's death certificate.⁵

Next, claimant avers that the administrative law judge erred in crediting the opinion of Dr. Michos because Dr. Michos' opinion was inconsistent with the findings in the administrative law judge's Decision and Order awarding benefits in the miner's claim. Claimant's Brief at 6. Contrary to claimant's suggestion, the administrative law judge was not required to discredit Dr. Michos' opinion on the basis that the doctor's failure to find that the miner was totally disabled due to pneumoconiosis was inconsistent with the award of benefits in the miner's claim. See generally *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). In addition, we reject claimant's argument that Dr. Michos' opinion is flawed because the physician did not acknowledge that pneumoconiosis is a progressive disease. Claimant's Brief at 6-7; Director's Exhibit 21; see generally *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Finally, we note that the remainder of claimant's allegations amount to a request to reweigh the evidence, which is beyond the scope of the Board's review. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Since there is no evidence of record

⁴ The administrative law judge correctly found that the record showed that Dr. Michos was Board-certified in internal medicine, Board-eligible in pulmonary disease, and certified by the National Board of Medical Examiners. 1996 Decision and Order at 3; Director's Exhibit 6 at 49; Director's Exhibit 14. The administrative law judge also correctly found that the record showed that Dr. Kraynak was Board-eligible in family practice. 1996 Decision and Order at 3; Claimant's Exhibit 1; Director's Exhibit 8; Director's Exhibit 24(Claimant's Exhibit 11).

⁵ In light of Dr. Michos' superior qualifications, and the fact that the administrative law judge reasonably found Dr. Michos' opinion to be supported by the miner's death certificate, 1996 Decision and Order at 3, 5; Director's Exhibit 4; Director's Exhibit 6 at 51-59; Director's Exhibit 8, the administrative law judge did not err in crediting the opinion of Dr. Michos even though he was a non-examining physician. See generally *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1027-1028, 9 BLR 2-10, 2-20-21 (3d Cir. 1986); *Shupink v. LTV Steel Co.*, 17 BLR 1-24, 1-29 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); see also *Mancia v. Director, OWCP*, 130 F.3d 579, 591, BLR (3d Cir. 1997).

indicating that the miner's death was due to pneumoconiosis under Section 718.205(c)(1) or that the miner suffered from complicated pneumoconiosis under Section 718.205(c)(3) and because the administrative law judge properly found the evidence insufficient to establish that pneumoconiosis hastened the miner's death under Section 718.205(c)(2), we affirm the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c). 20 C.F.R. §718.205(c)(1)-(3).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge