

BRB No. 98-0313 BLA

ARLENE J. FETZER)	
(Widow of CLAUDE FETZER))	
)	
Claimant-Respondent)	
)	
v.)	
)	
FLORENCE MINING COMPANY)	DATE ISSUED:
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

Anne M. Coholan (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (96-BLA-1170) of Administrative Law Judge Thomas M. Burke 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). Initially, the miner filed, in June, 1980, a claim for benefits that was denied by the district director in March, 1981. Director's Exhibit 34. In December, 1991, the miner filed a second claim that was denied by the district director in May, 1992. Director's Exhibit 35. The miner died on September 1, 1995. Director's Exhibits 7, 9. Claimant, the miner's widow, filed a survivor's claim in November, 1995. Director's Exhibit 1. The administrative law judge found that employer conceded the existence of pneumoconiosis which arose out of the decedent's coal mine employment, and that the

parties stipulated to twenty years of coal mine employment. Decision and Order at 9-10. Considering the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that coal worker's pneumoconiosis was a substantially contributing cause of the miner's death. See 20 C.F.R. §718.205(c)(2). Accordingly, benefits were awarded, commencing September 1, 1995, pursuant to 20 C.F.R. §725.503. Employer, on appeal, contends that the administrative law judge erred in awarding benefits. Claimant has submitted a response brief supporting affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the appeal unless specifically requested to do so by the Board.¹

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 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 substantially 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. 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). The United States Court of Appeals for the Third Circuit, under whose jurisdiction the instant case arises, has held that 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 *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

¹ Inasmuch as the administrative law judge's findings that the parties stipulated to twenty years of coal mine employment, that claimant established the existence of pneumoconiosis arising out of the miner's coal mine employment, and that entitlement commences as of September 1, 1995, are not contested on appeal, we affirm these findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we affirm the administrative law judge's finding that claimant met her burden under Section 718.205(c)(2) as it is rational and supported by substantial evidence.² Employer, on appeal, argues that the

² The medical evidence pertinent to the miner's death in the instant case includes a death certificate, signed by deputy coroner Todd Litzinger, which lists the immediate cause of death as probable cardiac arrhythmia, due to atherosclerotic heart disease, and past myocardial infarction. Coal worker's pneumoconiosis is listed as a significant condition contributing to death. Director's Exhibit 7. An autopsy, performed by Drs. Rizkalla and Yousef, attributed the immediate cause of death to atherosclerotic coronary heart disease with myocardial infarction. Dr. Rizkalla found that coal worker's pneumoconiosis and asbestos bodies were a substantial contributing factor in the miner's death. Director's Exhibit 9.

Drs. Oesterling, Sinnenberg and Perper reviewed the autopsy slides and other medical records. Dr. Oesterling attributed the miner's death to extensive arteriosclerotic cardiovascular disease with severe ischemic cardiomyopathy, cardiac arrhythmias and cardiac arrest. Employer's Exhibits 1, 6. Dr. Sinnenberg found that the cause of death was severe atherosclerotic coronary artery disease. Employer's Exhibits 3, 7. Dr. Perper indicated that the primary cause of death was coronary arteriosclerotic heart disease. Dr. Perper concluded that coal worker's pneumoconiosis with complicating chronic emphysema and pulmonary fibrosis was a substantial contributory cause of death. Claimant's Exhibit 1. Dr. Pickerill reviewed medical records and concluded that the miner died of acute myocardial infarction and coronary artery disease. Employer's Exhibit 2.

administrative law judge erred by relying upon the opinions of Drs. Rizkalla and Perper, and by ignoring and/or discounting all of the medical evidence concerning the severity of the miner's coronary artery disease. Employer's arguments are without merit.

The administrative law judge noted that three Board-certified pathologists, Drs. Perper, Sinnenberg, and Oesterling, agreed that the principle cause of the miner's death was severe atherosclerotic heart disease and agreed that the autopsy slides showed evidence of simple coal worker's pneumoconiosis as well as chronic obstructive pulmonary disease and pulmonary emphysema. Decision and Order at 10. The administrative law judge further noted that these pathologists disagreed as to whether the miner's pneumoconiosis was a substantial contributor to the miner's death and whether his pulmonary emphysema was related to his coal mine dust exposure. *Id.* The administrative law judge stated that Dr. Rizkalla, the autopsy prosector, explained at his deposition that the miner's pneumoconiosis and associated emphysema-induced hypoxemia, or a reduced level of oxygen in the blood, in turn acted in concert with the severely occluded coronary arteries so as to cause the miner's death.³ *Id.* The administrative law judge also stated that Dr. Rizkalla determined during the autopsy that ninety percent of the three major coronary vessels were occluded or blocked. *Id.* The administrative law judge further stated that Dr. Perper's medical opinion supported that of Dr. Rizkalla. The administrative law judge stated that, in a well reasoned and thorough report, Dr. Perper discussed the recent medical literature that supported his position that there is a causal relationship between coal dust exposure and centrilobular emphysema and that Dr. Rizkalla also referred to the same body of medical research during his deposition testimony. *Id.* at 11. The administrative law judge then concluded that after considering all of the medical evidence relevant to the cause of the miner's death, the most persuasive medical opinions were those of Drs. Rizkalla and Perper. *Id.* at 12. The administrative law judge explained that he gave greatest weight to Dr. Rizkalla's opinion because he had the opportunity to actually conduct the autopsy and his opinion was supported by Dr. Perper, who convincingly cited recent medical literature to support the position that there is a causal connection between simple pneumoconiosis and centrilobular emphysema. Noting that the conclusions of Drs. Rizkalla and Perper were consistent with the miner's death certificate, the administrative law judge concluded that pneumoconiosis was a substantially contributing cause of the miner's death. *Id.*

Employer avers that the administrative law judge erred in crediting the opinion of Dr. Rizkalla inasmuch as nothing in the record indicates that Dr. Rizkalla was in a better position to determine the cause of the miner's death than the other Board-certified pathologists who reviewed the miner's lifetime medical file and autopsy slides. Employer's Brief at 7. This contention lacks merit. The administrative law judge permissibly gave great weight to the opinion of Dr. Rizkalla inasmuch as Dr. Rizkalla explained how his observations during the gross examination led him to conclude that the

³ The record indicates that Dr. Rizkalla is Board-certified in pathology, including anatomic and clinical pathology. Claimant's Exhibit 3, Deposition at 3-4.

miner's pneumoconiosis and associated emphysema contributed to the miner's death. Decision and Order at 12; Claimant's Exhibit 3, Deposition at 12-13; Director's Exhibit 9; see *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); see also *United States Steel Corp. v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992).

Moreover, we reject employer's argument that the administrative law judge erred in relying upon Dr. Rizkalla's opinion as the doctor clearly equivocated, during his deposition, about the role of pneumoconiosis in the miner's death. Employer's Brief at 7. Although Dr. Rizkalla acknowledged that he could not quantify how much coal dust exposure and smoking each contributed to the miner's emphysema, Dr. Rizkalla stated that claimant suffered from moderate to severe coal worker's pneumoconiosis and clearly stated that the miner's pneumoconiosis and emphysema-induced hypoxemia acted in concert with the miner's severely occluded arteries to cause the miner's death. Claimant's Exhibit 3.

Employer also argues that the administrative law judge erred in crediting the opinion of Dr. Perper, because Dr. Perper diagnosed lung cancer, which is not corroborated by any other medical evidence of record. Employer's Brief at 5. Although employer has identified a factor that the administrative law judge could have found diminished the credibility of Dr. Perper's opinion, the administrative law judge was not required to so find.⁴ See generally *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Further, employer maintains that the administrative law judge erred in crediting Dr. Perper's opinion inasmuch as Dr. Perper's report does not reflect that Dr. Perper knew any specific information concerning the miner's cigarette smoking history. As employer concedes, however, Dr. Perper acknowledged that the miner was a "heavy smoker." Employer's Brief at 6; Claimant's Exhibit 1. The administrative law judge rationally credited Dr. Perper's opinion as support for Dr. Rizkalla's opinion as he found that Dr. Perper convincingly discussed recent medical literature supporting the position that there is a causal connection between simple coal worker's pneumoconiosis and centrilobular emphysema and provided a well-reasoned and thorough report. Decision and Order at 12; Claimant's Exhibit 1; see generally *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Finally, employer argues that the administrative law judge ignored relevant evidence in that he did not include a detailed discussion of the reports of Drs. Pickerill, Oesterling

⁴ Dr. Perper explained in detail in his report his finding that coal worker's pneumoconiosis with complicating chronic emphysema and pulmonary fibrosis was a substantially contributing cause of death. Claimant's Exhibit 1. In addressing whether the miner's coal worker's pneumoconiosis and related complications were associated with the miner's occupational dust exposure, Dr. Perper stated that the miner had more than twenty years of occupational exposure to coal mine dust which resulted in coal worker's pneumoconiosis and complicating emphysema and lung cancer. *Id.* The reference to lung cancer does not appear elsewhere in Dr. Perper's report. *Id.*

and Sinnenberg, and that the administrative law judge did not include a discussion of the substance of the deposition testimony provided by Drs. Oesterling and Sinnenberg. Employer concludes that the administrative law judge conducted a selective review of the medical evidence of record. Employer's Brief at 8-9. Employer's argument has no merit, as the administrative law judge discussed adequately the findings of Drs. Pickerill, Oesterling and Sinnenberg. See Decision and Order at 7-8; see generally *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Therefore, we affirm the administrative law judge's finding that coal worker's pneumoconiosis was a substantially contributing cause of the miner's death as supported by substantial evidence.⁵ See 20 C.F.R. §718.205(c)(2).

⁵ We note that the administrative law judge initially cited the hastening death standard enunciated in *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989) and that his consideration of the evidence and findings under 20 C.F.R. §718.205(c)(2) are in accordance with that standard.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge