

BRB No. 99-1103 BLA

MARY ANN CHAVANIC)
(Widow of JOHN CHAVANIC))
)
 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 Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (98-BLA-1352) of Administrative Law Judge Ainsworth H. Brown 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).¹ The administrative law judge credited the miner with 3.2 years of qualifying coal mine employment, and found that the weight of 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, benefits were denied.

¹ The miner died on January 3, 1998, Director's Exhibit 3, and claimant filed a survivor's claim on February 17, 1998. Director's Exhibit 1.

On appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.205(c). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

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 where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established, and the evidence establishes the existence of pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.1, 718.202(a), 718.203, 718.205(c)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that, for purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death "where pneumoconiosis actually hastens death." *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989); see *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Claimant challenges the administrative law judge's finding that the weight of the evidence was insufficient to establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2). Specifically, claimant maintains that the opinion of Dr. Menio, the miner's treating physician, is entitled to determinative weight because it is based on direct knowledge of the miner's health during the last years of his life, whereas the contrary opinions of the Director's reviewing experts are either hostile to the Act or based on the faulty premise that the miner did not have coal workers' pneumoconiosis, which is contrary to the Director's concession of the issue. Claimant's arguments are without merit. The administrative law judge accurately reviewed the conflicting evidence of record and the qualifications of the physicians, and determined that Dr. Menio signed the miner's death certificate and listed the causes of death as cardiopulmonary arrest, anthracosilicosis, pulmonary tuberculosis and lung cancer. Decision and Order at 2; Director's Exhibit 3. In a letter dated May 10, 1999, Dr. Menio explained that although the miner expired secondary to pulmonary tuberculosis and advancement of his carcinoma, pneumoconiosis hastened his death because, in view of the degree of the miner's pulmonary involvement, his ability to tolerate aggressive chemotherapy or other medical therapies was decreased due to

generalized weakness and shortness of breath caused by underlying pneumoconiosis. Dr. Menio noted that the miner gave a long standing history of Black Lung, and that during the two years following his diagnosis of lung cancer, the miner had shortness of breath related to pneumoconiosis; additionally, as his health deteriorated from his cancer, the miner became unable to maintain his body weight and general performance status, and the slight increased difficulty in breathing contributed drastically to the miner's weight loss and weakness. Decision and Order at 2-3; Claimant's Exhibit 1. Dr. Cander reviewed the medical record and disagreed with Dr. Menio's conclusions, finding that any pneumoconiosis present arose out of the miner's twenty-two years of exposure to silica in non-covered employment and not dust exposure in coal mine employment, and that the miner's death was unrelated to any pneumoconiosis but was caused solely by lung cancer and its complications. Decision and Order at 3-4; Director's Exhibit 17. The opinion of Dr. Cander was buttressed by the opinion of Dr. Michos that simple coal workers' pneumoconiosis did not cause or hasten the miner's death from metastatic small cell carcinoma. Decision and Order at 4; Director's Exhibit 15.

In evaluating the conflicting opinions, the administrative law judge acknowledged Dr. Menio's status as treating physician from December 26, 1995 until the miner's death on January 3, 1998, and the consideration due to an attending physician's opinion, Decision and Order at 2, 4, *see Mancina v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997), but determined that Dr. Menio's letter of May 10, 1999, his certification of death, and his hospital records were available for Dr. Cander to review, and that Drs. Cander and Michos possessed superior pulmonary qualifications to those of Dr. Menio. Decision and Order at 4; *see generally Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge reasonably gave less weight to Dr. Menio's opinion because the physician did not address the relevant occupational exposures but merely reported a history of Black Lung, and failed to take into account other diagnosed conditions that could produce the miner's symptoms. Decision and Order at 4; *see generally Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984); *Shepherd v. Director, OWCP*, 6 BLR 1-485 (1983); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge then found that the opinion of Dr. Cander persuasively explained in detail that coal workers' pneumoconiosis was not a factor in the miner's death "due to the lack of documented symptoms, signs, and objective test data to demonstrate that there was significant pulmonary pathology other than the primary tumor and its devastating effects," and acted within his discretion in according the opinion determinative weight. Decision and Order at 4; *Wetzel, supra*; *Lucostic, supra*. Contrary to claimant's arguments, Dr. Michos's opinion is not hostile to the Act,² and Dr. Cander's

²Claimant maintains that Dr. Michos's opinion is contrary to the Act based on the physician's statement that "simple [coal workers' pneumoconiosis] of the type described by prior B readers is typically not associated with clinically significant impairments in [pulmonary function tests] (PFT's), whereas a past history of tobacco abuse is well known to cause the abnormalities seen on PFT's as well as the ultimate demise from lung cancer."

opinion is not based on a faulty premise that is contrary to the Director's concession. The Director correctly maintains that while the issue of pneumoconiosis was conceded, the Director contested the issue of the etiology of the disease pursuant to 20 C.F.R. §718.203(c).

See Director's Exhibit 14. Additionally, Dr. Cander ruled out any pneumoconiosis as a contributing cause of death, not merely pneumoconiosis arising out of coal mine employment. Director's Exhibit 17. The administrative law judge's findings and inferences pursuant to Section 718.205(c) are supported by substantial evidence and in accordance with law, and thus are affirmed. Consequently, we affirm the denial of benefits.

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

REGINA C. McGRANERY
Administrative Appeals Judge

Director's Exhibit 15. Inasmuch as the opinion does not indicate that simple pneumoconiosis is never disabling, the opinion is not hostile to the Act. *See generally Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988).