

BRB No. 99-1115 BLA

BETTY POTTER	)	
(Widow of VIRGIL POTTER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufield, Schiller & Holmes), Pittsburgh, Pennsylvania, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love, PLLC), Fairmont, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order - Denial of Benefits (98-BLA-0399) of Administrative Law Judge Robert L. Hillyard 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 found that claimant established thirty years and ten months of coal mine employment and, based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis

arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), but failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>1</sup> Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing to find that pneumoconiosis hastened the miner's death. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a survivor's claim filed 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 or that pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. §§718.202, 718.203, 718.205(c); *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). Death due to pneumoconiosis may be established by showing that the miner's death was hastened by pneumoconiosis. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4<sup>th</sup> Cir. 1992); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant contends that the administrative law judge erred in failing to find that the miner's pneumoconiosis hastened his death by compromising the ability of his left lung to fight off disease following surgery for the removal of his right lung. Of the numerous medical opinions of record, only four addressed the cause of the miner's death. The death certificate, signed by Dr. Schowengerdt on December 21, 1996, listed the cause of death as

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<sup>1</sup> We affirm the administrative law judge's finding that claimant established thirty years and ten months of coal mine employment and that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

emphysema right chest, due to right bronchopleural fistula, due to carcinoma of the lung. Director's Exhibit 7. Dr. Schowengerdt's hospital discharge summary on the same day described the procedures taken on the days leading up to the miner's death, but does not mention that pneumoconiosis played any role in hastening or contributing to the miner's death. Director's Exhibit 11; Employer's Exhibit 15. In addition, Dr. Long found that death was due to emphysema and bronchopleural fistula, and that coal workers' pneumoconiosis did not cause, contribute to or hasten the miner's death. Director's Exhibit 13. Drs. Kleinerman and Fino both stated, in their depositions, that the miner died as a result of complications resulting from the removal of his right lung due to carcinoma of the lung. They concluded that, once the right lung was removed, the cavity became infected and the remaining left lung developed pneumonia. They further stated that pneumoconiosis did not hasten or contribute to death. Employer's Exhibits 14, 16.

The administrative law judge permissibly accorded greater weight to the opinions of Drs. Kleinerman and Fino based on their superior credentials, in the fields of pathology and pulmonology, respectively, and because their opinions were well reasoned and supported by other evidence. Decision and Order at 17; *see Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, the administrative law judge properly found that "there is no medical evidence linking the Miner's death from complications of surgery, that is, removal of the right lung due to lung cancer, and resulting terminal infection, to pneumoconiosis in any way." Decision and Order at 17.<sup>2</sup> As the record

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<sup>2</sup> Claimant contends that the biopsy evidence of Drs. Brabb and Kahn showed the existence of anthracosis and coal workers' pneumoconiosis in the miner's removed right lung and that both the miner's lungs were therefore severely compromised by coal workers' pneumoconiosis and support a finding that the disease hastened the miner's death. The administrative law judge relied, in part, on this evidence in finding the existence of pneumoconiosis established, Decision and Order at 14. In considering evidence on the cause of death, however, the administrative law judge found that it did not establish death due to pneumoconiosis. This was rational. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

is devoid of evidence which establishes claimant's burden, we affirm the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis at Section 718.205(c). *See Griffith, supra; Brown, supra.*

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge