

BRB Nos. 00-0984 BLA
and 00-0984 BLA-A

VONDA G. KENDRICK)		
(Widow of JAMES C. KENDRICK))		
)		
Claimant-Petitioner)		
)		
v.)		
)		
BETHENERGY MINES, INCORPORATED)	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 Daniel J. Roketenetz,
Administrative Law Judge, United States Department of Labor.

Vonda G. Kendrick, McDowell, Kentucky, *pro se*.

Natalie D. Brown (Jackson & Kelly, PLLC), Lexington, Kentucky, for
employer.

Barry H. Joyner (Howard M. Radzely, Acting 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: SMITH and DOLDER, Administrative Appeals Judges, and
NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals and employer cross-appeals the

Decision and Order-Denial of Benefits (99-BLA-0571) of Administrative Law Judge Daniel J. Roketenetz 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).² The administrative law judge found that the evidence of record supported a finding of fourteen years of coal mine employment. Decision and Order at 4. The administrative law judge further found that the evidence of record established the existence of pneumoconiosis but that the weight of the credible medical evidence did not establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. On appeal claimant generally contends that she is entitled to benefits. Employer responds urging the Board to affirm the denial of benefits. In its cross-appeal, employer contends that the administrative law judge erred in concluding that the evidence of record established the existence of pneumoconiosis based on the medical opinion evidence of record. The Director, Office of Workers' Compensation Programs (the Director), declined to participate in this appeal.³

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 20, 2001, to which employer and the Director have responded. The Director states that none of the regulations at issue in the lawsuit affects the outcome of this case. However, employer contends that four of the challenged regulations, 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease), 20 C.F.R. §718.205(c)(5)(defining pneumoconiosis as a cause of death if it "hastens" death), 20 C.F.R. §718.205(d)(governing the allocation of the burden of proof in survivor's claims), and 20 C.F.R. §718.104(d)(governing the weighing of a treating physician's opinion), affect the outcome of this case.

Having reviewed the briefs submitted by employer and the Director, and reviewed the record, we hold that the disposition of this case is not impacted by the challenged regulations. Revised Section 718.104(d) is inapplicable because the treating physician evidence in this record was developed prior to January 19, 2001. Revised Section 718.201(c) will not alter the outcome of this case inasmuch as the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has already recognized the progressive nature of pneumoconiosis, *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-82 (6th Cir. 1996); 65 Fed. Reg. 79937, 79971-72. Similarly, 20 C.F.R. Section 718.205(c)(5) and Section 718.205(d) merely codify existing law as they recognize the "hasten death" standard and require claimant to present evidence of such. *See Brown v. Rock*

Creek Mining Co., Inc., 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *see also Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); 65 Fed. Reg. 79937-38, 79949-50. Additionally, based on our review, we conclude that none of the other challenged regulations affect the outcome of this case. Therefore, we will proceed with the adjudication of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown, supra*.

In finding that claimant failed to establish that the miner's death was due to pneumoconiosis, the administrative law judge provided affirmable bases for rejecting the medical opinions of record which could be supportive of claimant's burden. Decision and Order at 15-16. Specifically, the administrative law judge permissibly accorded little weight to the opinion of Dr. Pajel, that chronic obstructive pulmonary disease may have contributed to the miner's ultimate demise, Director's Exhibit 22, because the physician's opinion was speculative. *See Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Further, the administrative law judge accorded little weight to the conclusions of Dr. Santos who, notwithstanding the fact that the "detailed circumstances" regarding the miner's death were "unavailable" to him, nevertheless opined that coal workers' pneumoconiosis played a role in the miner's failing health and subsequent death, Director's Exhibit 24. The administrative law judge permissibly concluded that the

opinion Dr. Santos provided no support for the conclusions therein and thus the opinion was not well-reasoned or well-documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Similarly, the administrative law judge permissibly accorded little weight to Dr. Sundaram's conclusion that the miner's "compromised pulmonary status due to prolonged exposure to coal dust...lead to his demise," Director's Exhibit 23, inasmuch as the physician failed to provide any support for his conclusions, *see Clark, supra; Peskie, supra; Lucostic, supra.*

Further still, in a permissible exercise of his discretion, the administrative law judge accorded greatest weight to the opinions of Drs. Castle, Dahhan, Caffrey, Fino and Broudy, Director's Exhibit 9, Employer's Exhibits 5, 6, 8-11, as these physicians possessed superior qualifications, *see Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and proffered opinions that were best supported by the underlying documentation of record, *see Clark, supra; Peskie, supra; Lucostic, supra.*⁴

Accordingly, the administrative law judge has provided valid bases for the weight accorded the medical evidence, *see Clark, supra; Peskie, supra; Lucostic, supra*, and substantial evidence supports his findings. Therefore, we affirm the administrative law judge's finding that the weight of the credible medical evidence was not sufficient to establish that pneumoconiosis did not cause, contribute to or hasten the miner's death. *See 20 C.F.R. §718.205(c); see Brown, supra.*

Because claimant has failed to establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits.⁵ *See 20 C.F.R. §718.205(c). Brown, supra; Trumbo, supra.*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge