

BRB No. 01-0833 BLA

GERTRUDE LOCKHART	)	
(Widow of LEONARD LOCKHART)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
OLD BEN COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits and the Supplemental Decision and Order - Motion for Reconsideration of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Lenore S. Ostrowsky (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order on Remand and the Supplemental Decision and Order on Reconsideration (1997-BLA-1915) of Administrative Law Judge Donald W. Mosser denying benefits on a survivor's claim filed pursuant to the

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<sup>1</sup>Claimant is the surviving spouse of the deceased miner who died on October 1, 1996. Director's Exhibit 4.

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).<sup>2</sup> This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited the miner with forty years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4) and 718.203(b) (2000). The administrative law judge, however, found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits. The administrative law judge subsequently denied claimant's motion for reconsideration.

Claimant appealed the denial of benefits to the Board and in *Lockhart v. Old Ben Coal Co.*, BRB No. 99-1300 BLA (Nov. 30, 2000) (unpub.), the Board affirmed the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000) or complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000), but was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(2) and (a)(4) and 718.203(b) (2000). The Board vacated the administrative law judge's finding that the evidence was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c) (2000). The Board held that the administrative law judge's analysis of the pathology related evidence and medical opinion evidence did not comport with the Administrative Procedure Act (APA), see 5 U.S.C. §557(c)(3)(A). The Board remanded the case to the administrative law judge to reconsider whether the evidence was sufficient to establish that the miner's death was due to his "clinical" pneumoconiosis or supportive of a finding that the miner's death was due to statutory or "legal" pneumoconiosis. Additionally, the Board instructed the administrative law judge to resolve a conflict in the evidence with respect to the physicians' diagnoses of cor pulmonale and the role it played in the miner's death, if

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<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

any.

On remand, the administrative law judge reconsidered the evidence in accordance with the Board's instructions and found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. In so finding, the administrative law judge initially found that the evidence was insufficient to establish that the miner's death was due to "clinical" pneumoconiosis and further found that claimant failed to establish that the miner's chronic obstructive pulmonary disease was attributable, in part, to his coal dust exposure. Additionally, the administrative law judge found that the miner did not suffer from cor pulmonale and thus it did not contribute to his death. Finally, the administrative law judge found that none of the revisions to the regulations would have any effect on the outcome of this case. Accordingly, benefits were denied. On claimant's motion for reconsideration, the administrative law judge found that claimant had not established good cause for vacating the Decision and Order on Remand and reopening the record for the filing of additional briefs. Accordingly, claimant's Motion for Reconsideration was denied.

On appeal, claimant generally contends that the administrative law judge failed to comply with the APA. Claimant also argues that the administrative law judge erred in finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000). Employer responds in support of the administrative law judge's denial of benefits. In a reply brief, claimant reiterates her previous contentions. The Director, Office of Workers' Compensation Programs, responds, agreeing with claimant that the administrative law judge's reliance on certain medical opinions is erroneous.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.201, 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). Under 20 C.F.R. §718.205(c)(2) (2000), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the

miner's death. The United States Court of Appeals for the Seventh Circuit has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); see 20 C.F.R. §718.205(c)(5). In the instant case, it is undisputed that the miner had pneumoconiosis which arose out of his coal mine employment. Thus, claimant must establish that the miner's death was due to pneumoconiosis under Section 718.205(c).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order on Remand is supported by substantial evidence and contains no reversible error. See *Piccin v. Director, OWCP*, 6 BLR 1- 616 (1983). Contrary to claimant's contention, the administrative law judge provided a full, detailed opinion which complies with the APA, 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), and which fully explains the specific bases for his decision under Section 718.205(c) (2000), the weight assigned to the evidence and the relationship he found between the evidence and his legal and factual conclusions. See *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

Claimant further contends that the administrative law judge erred in finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000).<sup>3</sup> The administrative law judge previously recognized that all of the reviewing physicians agreed that the miner suffered from pneumoconiosis since Dr. Combs, Jones, Cohen, Naeye, Kleinerman, Tuteur, and Branscomb each diagnosed "pneumoconiosis." 1999 Decision and Order at 15; Director's Exhibits 4-5; Claimant's Exhibits 8, 17; Employer's Exhibits 19, 20-22, 24-26, 28. Dr. Combs, Jones and Cohen opined that the miner's death was due to his pneumoconiosis, Director's Exhibits 4, 5; Claimant's Exhibits 8, 9, while Drs. Naeye, Kleinerman Tuteur and Branscomb opined that the miner's pneumoconiosis was too mild to have contributed to his

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<sup>3</sup>The administrative law judge found that the hospital records and the notes of Dr. Powers indicated that the miner's respiratory condition caused his death. The administrative law judge also determined that the physicians who reviewed the medical evidence in this claim all agreed that the miner's death was related to his respiratory condition and his chronic obstructive pulmonary disease. 1999 Decision and Order at 16.

death.<sup>4</sup> Employer's Exhibits 19-22, 24-26, 28.

In his Decision and Order on Remand, the administrative law judge, in accordance with the Board's remand instructions, initially reconsidered the opinions of the pathologists, Dr. Jones, the autopsy prosector, and Drs. Naeye and Kleinerman, the reviewing pathologists, regarding the extent of the miner's clinical pneumoconiosis and its effect on the miner's death. Decision and Order on Remand at 3. The administrative law judge noted that Dr. Jones opined that the miner's pneumoconiosis was severe and hastened his death because the pneumoconiosis injured the miner's lungs, thus increasing his pulmonary vasculature resistance, while Drs. Naeye and Kleinerman both agreed that the miner's pneumoconiosis was too mild to have affected the miner's lungs and hastened his death. Decision and Order on Remand at 3-4. The administrative law judge noted that all three physicians were Board-certified pathologists and rendered well-documented and reasoned opinions. Decision and Order on Remand at 4.

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<sup>4</sup>Dr. Naeye opined that although the miner suffered from simple coal workers' pneumoconiosis, it was too mild to have had any effect on his lung function or to have shortened his life. Employer's Exhibits 19, 28. Dr. Kleinerman opined that the miner's death was not caused by his mild simple coal workers' pneumoconiosis. Employer's Exhibits 20, 25. Dr. Tuteur opined that the miner's minimal to mild coal workers' pneumoconiosis was not of sufficient severity to cause or hasten the miner's death. Employer's Exhibits 21, 24. Dr. Branscomb opined that although the miner suffered from minimal pneumoconiosis, it did not cause his death. Employer's Exhibits 22, 26.

In resolving the conflicting opinions, the administrative law judge was persuaded by Drs. Naeye and Kleinerman since their opinions, that the miner had only mild simple pneumoconiosis and not complicated pneumoconiosis, were supported by the overall x-ray evidence and his prior finding that the existence of complicated pneumoconiosis was not established. *Id.* Furthermore, the administrative law judge determined that that the reports of Drs. Tuteur and Branscomb corroborated the explanation by Drs. Naeye and Kleinerman,<sup>5</sup> whereas Dr. Cohen did not address whether the miner's pneumoconiosis was sufficient to lead to emphysema or an obstructive defect. *Id.* The administrative law judge, finding that the opinions of Drs. Naeye and Kleinerman were logical and based on the objective evidence, rationally credited their reports over Drs. Jones's in finding that the evidence was insufficient to establish that the miner's death was due to clinical pneumoconiosis. See *Willis v. Birchfield Mining Co.*, 15 BLR 1-59 (1991).

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<sup>5</sup>Drs. Naeye and Kleinerman concluded that the type of emphysema or obstructive impairment that led to the miner's death was not caused by the mild clinical pneumoconiosis the miner suffered from since there was no progressive massive fibrosis or complicated pneumoconiosis present. Employer's Exhibits 19-20.

We also reject claimant's assertion that the administrative law judge failed to consider all relevant evidence since he not only discussed the opinions of Drs. Kleinerman, Naeye and Jones, who are the pathologists of record, as instructed by the Board, he also considered the opinions of Drs. Tuteur, Branscomb and Cohen.<sup>6</sup> Decision and Order on Remand at 3-4. Furthermore, we reject claimant's assertion that the administrative law judge did not consider whether the miner's clinical pneumoconiosis caused or contributed to his death and therefore did not make the proper inquiry pursuant to Section 718.205(c). The administrative law judge explicitly acknowledged that "any acceleration of the miner's death that is attributable to pneumoconiosis will entitle the claimant to benefits" and properly stated the correct legal standard. See *Railey, supra*; Decision and Order on Remand at 3. Further, the opinions of Drs. Naeye and Kleinerman, relied on by the administrative law judge, specifically state respectively that the miner's simple coal workers' pneumoconiosis was "too mild to have had any effect on the (sic) his lung function or to have shortened his life" and "the mild simple coalworkers (sic) pneumoconiosis did not cause nor hasten [the miner's] death because the minimal extent of the simple coalworkers (sic) pneumoconiosis was not of sufficient severity to produce significant alteration to cause, contribute to or hasten [the miner's] death." Employer's Exhibit 19-20.

In addition, we reject claimant's assertion that the administrative law judge relied on physicians' opinions that express a view that conflicts with the Act. Dr. Kleinerman stated at his deposition that simple coal workers' pneumoconiosis does not cause or contribute to the development of centrilobular emphysema or panalobular emphysema, but it is a cause of focal emphysema. Employer's Exhibit 25 at 20. Dr. Naeye stated that the miner had severe centrilobular emphysema and panalobular emphysema due to smoking and unrelated to coal workers' pneumoconiosis, but acknowledged that coal mine dust exposure resulting in coal

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<sup>6</sup>While the administrative law judge did not specifically discuss Dr. Combs's report when considering the evidence regarding the role of the miner's clinical pneumoconiosis in his death, the administrative law judge previously discussed Dr. Combs's opinion that coal mine dust was the direct and primary cause of the miner's chronic lung disease, which significantly reduced his pulmonary reserve to the point where his lungs could no longer function properly, and that this caused respiratory failure and death. 1999 Decision and Order at 8-9; Claimant's Exhibit 9. Thus, as Dr. Combs only diagnosed statutory pneumoconiosis, the administrative law judge reasonably discussed his opinion in his consideration of the legal pneumoconiosis issue. *Lockhart v. Old Ben Coal Co.*, BRB No. 99-1300 BLA (Nov. 30, 2000) (unpub.) at 5-6.

worker's pneumoconiosis can lead to focal emphysema or obstruction without massive pulmonary fibrosis. Employer's Exhibits 19, 24 at 19-21. Both physicians explained that in this case, the miner's clinical pneumoconiosis did not cause the severe emphysema, which resulted in the chronic obstructive pulmonary disease that caused the miner's death. Whether pneumoconiosis hastened the miner's death is a medical determination for the physicians, not the administrative law judge, to make. We, therefore, affirm the administrative law judge's decision to credit the opinions of Drs. Naeye and Kleinerman over the opinion of Dr. Jones on this issue as he has provided an adequate rationale that is supported by substantial evidence. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence fails to establish death due to clinical pneumoconiosis under 20 C.F.R. §718.205(c) (2000).

Having found that the miner's clinical pneumoconiosis was too mild to have caused the emphysema or obstructive impairment which actually led to the miner's death, the administrative law judge next addressed whether coal dust exposure caused the miner's death. The administrative law judge thus reconsidered the evidence to determine if the miner's chronic obstructive pulmonary disease arose out of coal mine employment, thereby establishing the existence of legal pneumoconiosis. Claimant asserts initially that collateral estoppel barred the administrative law judge from considering the opinions relevant to a determination of whether the miner's death was due to legal pneumoconiosis. Collateral estoppel, or issue preclusion, refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in an initial action. See *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). Since the issues, evidence and parties in the instant claim are not the same as in the claim filed by the miner during his lifetime, the doctrine of collateral estoppel does not apply. *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). The administrative law judge noted that the physicians agreed that, based upon evidence that was not in existence at the time of the miner's claim, the miner's death was due to his chronic obstructive pulmonary disease. Decision and Order on Remand at 4. The administrative law judge also noted that while Drs. Jones, Combs and Cohen opined that the miner's chronic obstructive pulmonary disease was due in part to his coal dust exposure, Drs. Naeye, Kleinerman, Tuteur and Branscomb concluded that cigarette smoking was the sole cause of the miner's chronic obstructive pulmonary disease. Decision and Order on Remand at 4-5.

In finding that claimant failed to establish, by a preponderance of the evidence, that the miner's chronic obstructive pulmonary disease was attributable, in part, to his coal dust exposure, the administrative law judge credited the opinions of

Drs. Naeye, Kleinerman, Tuteur and Branscomb over the contrary opinions of Drs. Jones, Combs and Cohen. Decision and Order on Remand at 5. The administrative law judge determined that the reasoning of Drs. Naeye, Kleinerman, Tuteur and Branscomb on this issue was more complete and that these physicians not only disagreed with the position espoused by Drs. Jones, Combs and Cohen, they also provided a cogent explanation for their position. The administrative law judge noted that Drs. Jones, Combs and Cohen opined that an impairment resulting from cigarette smoking cannot be differentiated from one caused by coal dust exposure. Decision and Order on Remand at 5; Director's Exhibits 4-5; Claimant's Exhibits 8-9, 17. The administrative law judge then stated:

[Drs. Tuteur, Branscomb, Naeye and Kleinerman] stated that the effects can be distinguished in that the lack of focal emphysema - emphysema which gathers around coal macules - and little fibrosis indicate smoking, not pneumoconiosis, as the cause thereof. Two other types of emphysema, i.e., centrilobular and panalobular, which are due to cigarette smoking, were found in the miner's lungs. By contrast, none of the physicians found focal emphysema. I am more persuaded by the more detailed explanations of [Drs. Tuteur, Branscomb, Naeye and Kleinerman], which I find are supported by the autopsy findings of no focal emphysema. Accordingly, I credit the reports of Drs. Naeye, Kleinerman, Tuteur, and Branscomb on this issue over those of Drs. Jones, Combs and Cohen.

Decision and Order on Remand at 5.

Thus, the administrative law judge thoroughly reviewed the evidence and, within a rational exercise of his discretion, found that it failed to establish that the miner's chronic obstructive pulmonary disease was due to coal dust exposure, and thus failed to establish that the miner suffered from legal pneumoconiosis pursuant to Section 718.202(a) (2000). *Wilburn v. Director, OWCP*, 11 BLR 1-135 (1988); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*);

Moreover, in considering the evidence relevant to whether the miner's death was due to pneumoconiosis, the administrative law judge, in accordance with the Board's instructions, reconsidered the conflicting evidence in the record regarding the existence of cor pulmonale.<sup>7</sup> The administrative law judge, noting that Dr. Jones,

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<sup>7</sup>Since cor pulmonale is a recognized sequela of pneumoconiosis, a diagnosis of cor pulmonale may be indicative of the existence of pneumoconiosis. *Christian v. Monsanto Corp.*, 12 BLR 1-56 (1988).

Cohen, Combs and Branscomb diagnosed cor pulmonale, reasonably credited the opinion of Dr. Kleinerman, who opined that the miner did not have cor pulmonale and whose opinion was supported by Dr. Naeye's failure to find cor pulmonale, over those contrary opinions on the basis that Dr. Kleinerman's opinion was more thoroughly reasoned and better documented. See 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 5-6. Thus, the administrative law judge rationally concluded that the miner did not suffer from cor pulmonale and that it did not contribute to his death.

Inasmuch as the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, where the administrative law judge's findings are supported by substantial evidence and in accordance with the law, see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis. See 20 C.F.R. §718.205(c)(2) (2000); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Neeley, supra*.

Because we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis, *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *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), an essential element of entitlement in a survivor's claim, we also affirm his denial of survivor's benefits under 20 C.F.R. Part 718, see *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry, supra*; see also *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits and the Supplemental Decision and Order - Motion for Reconsideration denying benefits are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge