

BRB No. 04-0859 BLA

MARY M. ISELLA)	
(Widow of LOUIS L. ISELLA))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 07/22/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Frank L. Tamulonis, Jr. (Zimmerman, Lieberman, Tamulonis & Crossen), Pottsville, Pennsylvania, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-06498) of Administrative Law Judge Janice K. Bullard rendered 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). Based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718, and noted that the parties stipulated that the miner suffered from the presence of coal workers' pneumoconiosis.¹ The

¹ The record indicates that the miner filed an application for benefits on June 16, 1989, which were awarded by Administrative Law Judge Robert D. Kaplan on February 11, 1992.

administrative law judge found, however, that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence failed to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). Specifically, claimant contends that the administrative law judge erred in not crediting the opinion of Dr. Malik, the miner's treating physician, over the opinion of Dr. Cander, which was contradicted by the lay evidence of record. The Director, Office of Workers' Compensation Programs, (the Director) moves that the case be remanded because it is unclear if the administrative law judge actually considered the opinion of Dr. Malik, the miner's treating physician, who opined that pneumoconiosis hastened the miner's death and because, in any case, the administrative law judge failed to provide a permissible basis for discrediting Dr. Malik's medical conclusions. The Director further asserts that should the administrative law judge determine that Dr. Malik provided a reliable opinion, that pneumoconiosis hastened the miner's death, benefits should be awarded on the claim because the administrative law judge reasonably discredited Dr. Cander's finding that the miner's death was sudden.

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 on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. Death is due to pneumoconiosis where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where death was caused by complications of pneumoconiosis, or where the presumption set forth at Section 718.304, relating to complicated pneumoconiosis, is applicable. See 20 C.F.R. §§718.202(a), 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). Pneumoconiosis is a "substantially contributing cause of a miner's death" if it hastens the miner's death. 20 C.F.R. §718.205(c)(2); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13

Director's Exhibit 1. The miner died on November 29, 2002, Director's Exhibit 5, and claimant filed a claim for survivor's benefits on December 18, 2002. Director's Exhibit 3.

BLR 2-100 (3d Cir. 1989).²

Since the Director concedes that the miner had pneumoconiosis which arose out of his coal mine employment, that Dr. Malik's statement, "I think it is very possible that, had [the miner] not had COPD and anthracosilicosis, he [might] still be alive," Director's Brief at 5; Claimant's Exhibit 3, would, if found credible, be sufficient to establish that pneumoconiosis hastened the miner's death, and that the administrative law judge failed to fully consider these statements and determine whether they were credible, and, as discussed below, we determine that the administrative law judge erred in finding Dr. Malik's statements as to coronary artery disease inconsistent, we vacate the administrative law judge's decision denying benefits and remand this case for further consideration of Dr. Malik's opinion. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997)(court reversed and awarded benefits to widow based on treating physician's opinion that the miner's underlying chronic lung disease made it more difficult for him to survive a heart attack); *Lukosevicz*, 888 F.2d at 1004, 13 BLR at 2-104 (court agreed to remand for payment based on autopsy prosector's opinion that the miner's anthracosis "shortened [his] life, albeit briefly," and was therefore contributory to his death due to pancreatic cancer unrelated to his anthracosis).

In determining the credibility of Dr. Malik's opinion on remand, we note, as the Director contends, that Dr. Malik had diagnosed the existence of coronary artery disease, although he stated that coronary artery disease was never "documented by cardiac cathetization." Director's Brief at 6; Claimant's Exhibit 3. The administrative law judge's finding that Dr. Malik's statements regarding the existence of coronary artery disease were inconsistent was, therefore, error. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Further, the administrative law judge's finding that the evidence did not support a finding of hypoxemia is unsupported by the record. Director's Brief at 6; Director's Exhibit 1; *see Tackett*, 7 BLR 1-703.

² Since the miner's last coal mine employment took place in the Commonwealth of Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. Director's Exhibit 1; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge