

BRB No. 99-0987 BLA

VIOLET PAVINSKI)	
(Widow of RUDOLF PAVINSKI))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Violet Pavinski, Holtsville, New York, *pro se*.

Rita Rappolo (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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow,¹ appeals, without the assistance of counsel, the Decision and Order - Denial of Benefits (98-BLA-988) of Administrative Law Judge Paul H. Teitler 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

¹ The miner died on December 13, 1987, and the death certificate, signed by Dr. Ergener, lists the cause of death as cardio-respiratory failure, due to myocardial infarction or pulmonary emboli, due to severe ASCVP, old stroke. Director's Exhibit 4. The widow filed a survivor's claim on August 6, 1997. Director's Exhibit 1.

² The history of this case is as follows. The miner filed his initial claim for benefits on

June 28, 1971, which was denied by the Social Security Administration on September 23, 1980. The miner filed a second claim on April 26, 1984, which was denied by the district director on May 21, 1995. In the meantime, the miner died on December 13, 1987. A formal hearing was held, and Administrative Law Judge Thomas W. Murrett found that claimant established pneumoconiosis arising from coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), but failed to establish total disability at 20 C.F.R. §718.204(c) or death due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits were denied. Claimant, the miner's widow, appealed, and in *Pavinski v. Director, OWCP*, BRB No. 88-3454 BLA (July 30, 1992)(unpub.), the Board affirmed in part, vacated in part, and remanded the case for further consideration at Sections 718.204(c) and 718.304(a). In addition, the Board found that as claimant had not yet filed a survivor's claim, the issue of death due to pneumoconiosis was not properly before the administrative law judge, and furthermore instructed the administrative law judge to determine whether a material change in conditions had been established pursuant to 20 C.F.R. §718.309. On remand, Administrative Law Judge Donald W. Mosser found that although claimant established a material change in conditions pursuant to 725.309, she failed to establish total disability on the merits at Section 718.204(c). Accordingly, benefits were denied on the miner's claim. Claimant appealed, and in *Pavinski v. Director, OWCP*, BRB No. 93-1387 BLA (July 19, 1994)(unpub.), the Board affirmed the denial of benefits. Claimant appealed the Board's denial to the United States Court of

administrative law judge noted that he found, and the parties stipulated to, ten and one-half years of coal mine employment, and based on the filing date of the claim, applied the regulations at 20 C.F.R. Part 718. The administrative law judge further found that the existence of pneumoconiosis arising out of coal mine employment was established at Sections 718.202(a), and 718.203(b). Decision and Order at 4-5. The administrative law judge found, however, that as claimant failed to establish death due to pneumoconiosis at Section 718.205(c), benefits must be denied. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law. 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 the existence of pneumoconiosis, *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993), that the pneumoconiosis arose out of coal mine employment, *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988), and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); 20 C.F.R. §§718.202, 718.203, 718.205(c). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death. See *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989); see also *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Appeals for the Third Circuit, in whose jurisdiction this case arises. The Third Circuit, however, dismissed claimant's appeal as untimely.

The evidence of record contains the medical opinions of Drs. Ergener and Michos, as well as the 1987 death certificate, Director's Exhibit 4, and a discharge summary from the Brookhaven Memorial Hospital Center where the miner was hospitalized at the time of his death. Director's Exhibit 8. In a letter dated April 23, 1999, Dr. Ergener reviewed evidence compiled prior to the miner's death in 1987 and stated that the miner had a "history of lung disease known as pneumoconiosis which contributed to his death," and that the miner's "respiratory dysfunction in and of itself would be sufficient to cause his death." Claimant's Exhibit 1. In an earlier letter dated December 9, 1997, Dr. Ergener stated that he had treated the miner since 1981 and that the miner had "black lung disease which had caused his death on December 13, 1987 of Cardio-Respiratory Failure." The hospital discharge summary written and signed by Dr. Ergener at the time of the miner's death, December 13, 1987, however, failed to mention the existence of pneumoconiosis. Director's Exhibit 8.³ Moreover, the death certificate dated December 13, 1987, also signed by Dr. Ergener, did not mention that pneumoconiosis caused or contributed to the miner's death. The evidence also contains the 1999 opinion of Dr. Michos, who reviewed the medical evidence and found that simple pneumoconiosis, even if present, did not cause the miner's death from cardiopulmonary arrest. Dr. Michos further stated that he would "agree with the death certificate which lists death secondary to a cardiopulmonary arrest either from an acute myocardial infarction or from pulmonary emboli." Director's Exhibit 22. Dr. Michos concluded that simple coal workers' pneumoconiosis "did not hasten nor cause his death, and that death would have occurred at around the same time had claimant not been employed in prior coal mine employment." Director's Exhibit 22.

In weighing the evidence, the administrative law judge permissibly accorded less weight to Dr. Ergener's 1997 and 1999 opinions, as they were based on an x-ray reading of complicated pneumoconiosis by Dr. Gill, which had been discredited in an earlier Decision and Order, and because Dr. Ergener failed to discuss the miner's history of tuberculosis. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Additionally, the administrative law judge permissibly found Dr. Ergener's 1997 and 1999 statements attributing death due to pneumoconiosis undermined by the discharge summary written by him at the time of the miner's death which did not even mention pneumoconiosis. *See Clark v. Director, OWCP*, 917 F.2d 374, 14 BLR 2-85 (8th Cir. 1990); *Clark, supra*; *Hopton v.*

³ The hospital discharge summary written by Dr. Ergener on the miner's death listed the following: cardiopulmonary failure; possible myocardial infarction or pulmonary emboli; symptomatic large abdominal aortic aneurysm; aneurysm of the left common femoral artery; severe arteriosclerotic cardiovascular disease; congestive heart failure, old stroke; and thromboembolism of left bifurcation of graft. Director's Exhibit 8.

U.S. Steel Corp., 7 BLR 1-12 (1984). Furthermore, we reject claimant's contention that the administrative law judge erred in crediting Dr. Michos' opinion merely because he did not examine the miner. *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *see also Lango, supra*. The administrative law judge permissibly accorded greater weight to the opinion of Dr. Michos as it was well reasoned and supported by the hospital discharge summary written at the time of the miner's death. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (1986); *Cadwallder v. Director, OWCP*, 7 BLR 1-879, 881 (1985). Contrary to claimant's contention, the administrative law judge also permissibly accorded greater weight to Dr. Michos' opinion because his credentials were superior to those of Dr. Ergener.⁴ *Carson, supra*; *Clark, supra*. As the administrative law judge permissibly accorded greater weight to the opinion of Dr. Michos, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was caused by, or contributed to by pneumoconiosis. *See Lango, supra*; *Lukosevich, supra*. As claimant failed to establish death due to pneumoconiosis at Section 718.205(c), we affirm the denial of benefits.

⁴ Dr. Michos is Board Certified by the National Board of Medical Examiners, a Diplomat of Internal Medicine and a Diplomat of Pulmonary Medicine, and a Fellow of the American College of Chest Physicians. Dr. Ergener is listed as a General Surgeon in the American Medical Directory and has no specialty in pulmonary medicine. Decision and Order at 10, 11.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge