

BRB No. 00-0923 BLA

MARCELLA KOSIK)
(Widow of GEORGE M. KOSIK))
)
Claimant-) DATE ISSUED:
Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF)
WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Respondent) DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Judith E. Kramer, 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:

Claimant¹ appeals the Decision and Order Denying Benefits (99-BLA-0235)

¹ Claimant is the widow of the miner, George M. Kosik, who died on November 23, 1996. Director's Exhibit 2. The miner filed his original application for benefits on June 20, 1973 with the Social Security Administration (SSA), which was denied on March 15, 1974. Director's Exhibit 16 at Director's Exhibit

of Administrative Law Judge Ainsworth H. Brown 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 credited the miner with twenty-nine years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000), based on claimant's March 4, 1998 filing date. Addressing the merits of the survivor's claim, the administrative law judge accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and found the evidence established that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). However, the administrative law judge found the medical evidence of record insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits in this survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis, arguing that the administrative law judge erred in weighing the

25. The miner elected review of this claim by SSA, which again denied benefits on April 20, 1979. *Id.* Following transfer to the Department of Labor (DOL), the claim was denied on October 2, 1980. *Id.* The miner filed a second application for benefits on March 10, 1986, which was denied on April 8, 1988. Director's Exhibit 16 at Director's Exhibits 1, 7. Following a formal hearing and in a Decision and Order issued on May 28, 1991, the administrative law judge denied benefits. Director's Exhibit 16. The Board affirmed the administrative law judge's denial of benefits in a Decision and Order dated March 24, 1993. *Kosik v. Director, OWCP*, BRB No. 91-1573 BLA (Mar. 24, 1993)(unpub.). Thereafter, the United States Court of Appeals for the Third Circuit affirmed the denial in *Kosik v. Director, OWCP*, No. 93-3237 (3d Cir. Dec. 3, 1993)(unpub.). No further action was taken on this claim. Claimant filed her survivor's claim on March 4, 1998. Director's Exhibit 1.

² 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

relevant medical evidence. Claimant also generally contends that the medical evidence submitted on her behalf is sufficient to establish entitlement to benefits. In response, the Director urges affirmance of the administrative law judge's denial of benefits.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 amended regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association 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 March 16, 2001, to which all the parties have responded. Both claimant and the Director assert that the amended regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by the parties, and our review, we hold that the ultimate disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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).

³ The parties do not challenge the administrative law judge's decision to credit the miner with twenty-nine years of coal mine employment or his findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.205(c)(3) (2000). Therefore, these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Benefits are payable on a survivor's claim filed on or after January 1, 1982, only when claimant meets her burden of establishing that the miner's death was due to pneumoconiosis arising out of coal mine employment, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established. 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c) (2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Moreover, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises,⁴ has held that, pursuant to Section 718.205(c)(2), pneumoconiosis is considered to have substantially contributed to death if it hastened the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In challenging the administrative law judge's denial of benefits, claimant generally contends that the administrative law judge erred in failing to find the weight of the evidence sufficient to award benefits. Specifically, claimant argues that the administrative law judge erred in failing to accord determinative weight to the opinions of Drs. Druffner, Koval and Pelczar, the miner's treating physicians, who opined that pneumoconiosis was a substantially contributing cause of the miner's death, over the contrary medical opinion of Dr. Perper, who reviewed the medical evidence of record. Claimant's Brief at 9-10 (unpaged). We disagree.

Contrary to claimant's contention, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). Rather, this is merely one factor which may be taken into consideration in the administrative law judge's weighing of the medical evidence. *Tedesco, supra*; see also *Schaaf v. Mathews*, 574 F.2d 160

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment occurred in the Commonwealth of Pennsylvania. Decision and Order at 2, n.2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

(3d Cir. 1978). Therefore, the administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. See *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Herein, the relevant evidence of record concerning the cause of death consists of four medical opinions and the miner's death certificate.⁵ Of the relevant medical reports, Drs. Druffner, Koval and Pelczar, each of whom treated the miner, opined that the miner's pneumoconiosis was a significantly contributing cause of his death. Decision and Order at 3-7; Director's Exhibits 2, 5. The record also contains the report of Dr. Perper, who reviewed the evidence of record, including the medical reports of Drs. Druffner, Koval and Pelczar, and opined that while the miner suffered from pneumoconiosis, his death was unrelated to pneumoconiosis inasmuch as the pneumoconiosis was "too mild to be a substantial or significant cause of death, a contributory cause of death or a hastening factor in the miner's death." Director's Exhibit 21. Rather, Dr. Perper opined that the miner's death was due to a "massive cerebro-vascular incident (massive brain stem infarct) with terminal mild bronchopneumonia." *Id.*

⁵ The death certificate lists the cause of the miner's death as "acute respiratory failure ... due to, or as a consequence of chronic obstructive pulmonary disease ... [and] anthracosilicosis ... [and] other significant causes contributing to but not directly resulting in the underlying cause [were] cerebrovascular accident and 'ASCVD'." Director's Exhibit 2.

The record also contains the report of Dr. Won, the autopsy prosector, who diagnosed the presence of anthracosilicosis consistent with simple coal workers' pneumoconiosis. However, Dr. Won did not render an opinion regarding the cause of the miner's death. Director's Exhibit 5. Likewise, the record contains the medical reports of Drs. Antognoli and Patchefsky, both of whom reviewed the autopsy slides and diagnosed the existence of simple coal workers' pneumoconiosis, but did not render an opinion regarding the cause of death. Claimant's Exhibits 1, 2.

In addition, the record contains the Discharge Summary from the miner's terminal hospitalization which contained a description of the course of the miner's condition and treatment. Director's Exhibit 6. The Discharge Summary also stated that the Final Diagnosis was: (1) brain stem infarct; (2) acute respiratory failure; (3) chronic obstructive pulmonary disease secondary to anthracosilicosis; (4) arteriosclerotic cardiovascular disease; and, (5) diabetes. *Id.*

The administrative law judge properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to Section 718.205 (2000). Contrary to claimant's arguments, the administrative law judge permissibly concluded that the opinions of the treating physicians were entitled to little probative weight as the physicians did not adequately explain the bases for their conclusions that pneumoconiosis was a contributing cause of the miner's death, other than to rely on the fact that pneumoconiosis was present. Decision and Order at 8-10; *Lango, supra*; *Clark, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). In particular, the administrative law judge acted within his discretion, as fact-finder, in according less weight to the opinion of Dr. Druffner as the physician did not provide a sufficient rationale for his opinion that pneumoconiosis caused the miner's death and failed to explain how the objective evidence of record supported his underlying supposition that the miner's pneumoconiosis was a "severe underlying problem" which led to his conclusion that pneumoconiosis made the miner's survival less likely. Decision and Order at 8; Director's Exhibit 5; *Clark, supra*; *Lafferty, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In addition, the administrative law judge reasonably questioned the reliability of Dr. Druffner's opinion, as set forth on the death certificate, because the physician "greatly discounts the role of the miner's stroke, naming it another significant condition.... Indeed, the miner's stroke was the central event which precipitated the miner's sudden terminal hospitalization." Decision and Order at 8; Director's Exhibit 2; *Clark, supra*; *Kuchwara, supra*.

The administrative law judge also permissibly accorded less weight to the opinion of Dr. Pelczar, who treated the miner prior to his terminal hospitalization, that the miner was "greatly limited by and eventually succumbed to anthracosilicosis," based on his determination that the physician failed to explain his conclusion other than to refer to the presence of the disease. Decision and Order at 9; Director's Exhibit 5; *Lango, supra*; *Clark, supra*. In addition, the administrative law judge reasonably questioned the probative value of Dr. Pelczar's opinion, finding that the physician failed to explain how the objective medical evidence of record supported his opinion that the miner suffered from a severe pulmonary or respiratory impairment during his lifetime, which led to the miner's weakened lungs and the inability to withstand any aggressive treatment. Decision and Order at 9; compare Director's Exhibit 5 with Director's Exhibit 16; see *Clark, supra*; *Lucostic, supra*; see also *Lango, supra*. In particular, the administrative law judge found that Dr. Pelczar failed to explain this conclusion of a severe pulmonary impairment in light of the miner's April 24, 1995 pulmonary function study which Dr. Pelczar interpreted as showing a mild restriction with

improvement in FVC after administration of bronchodilators. Decision and Order at 9; Director's Exhibit 5.

The administrative law judge also reasonably found the opinion of Dr. Koval, who attended the miner during his terminal hospitalization, entitled to little weight because the physician did not adequately explain the rationale for his conclusion that the miner's respiratory failure, which he opined was due to retained secretions and pneumonia, was due to the miner's underlying anthrasilicosis, in light of the miner's stroke which resulted in his hospitalization. Decision and Order at 9; Director's Exhibit 5; see *Lango, supra*; *Clark, supra*. Rather, the administrative law judge reasonably accorded greater weight to the medical opinion of Dr. Perper, that the miner's respiratory failure was due to his brain stem infarct and not his pneumoconiosis, finding that Dr. Perper's explanation was more a thorough and detailed analysis of the miner's condition than the sparse analysis of Dr. Koval.⁶ Decision and Order at 9-10; compare Director's Exhibit 21 with Director's Exhibit 5; see *Lango, supra*; *Clark, supra*; see generally *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Specifically, the administrative law judge accorded greatest weight to Dr. Perper's medical opinion, that coal workers' pneumoconiosis was "too mild to be a substantial or significant cause of death, a contributory cause of death or a hastening factor in the miner's death," finding it well documented and reasoned as it was better supported by the underlying documentation of record, including the autopsy evidence and clinical findings. *Id.* Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000) as it is supported by substantial evidence and is in accordance with law. *Lukosevicz, supra*; *Lango, supra*.

Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim

⁶ Dr. Perper, in discussing the miner's development of terminal pneumonia, stated that the area of the brain in which miner suffered a massive cerebrovascular incident, the brain stem, is the structure containing the main centers of circulation and respiration. In addition, Dr. Perper noted that the miner entered into a coma with Cheyne-Stokes breathing, see Director's Exhibit 5, which "is not a manifestation of primary pulmonary disease, but a pattern of breathing 'characteristically seen in coma from affection of the nervous centers of respiration.'" Director's Exhibit 25, citing *Stedman's Medical Dictionary*, 25th Edition, 1990.

pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. See *Lukosevicz, supra*; *Trumbo, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge