

BRB No. 00-0932 BLA

SHIRLEY M. LEE)
(Widow of JAMES L. LEE))

Claimant-Petitioner)

v.)

GREENWICH COLLIERIES)

Employer-Respondent)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,))

UNITED STATES DEPARTMENT)
OF LABOR)

Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania,
for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown,
Pennsylvania, for employer.

Sarah M. Hurley (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-1332) of Administrative Law Judge Daniel L. Leland 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 accepted employer's stipulation that the record establishes fifteen years of coal mine employment. The administrative law judge found that all pathologists of record agreed that the miner had pneumoconiosis and that the primary cause of the miner's death was centrilobular emphysema. The administrative law judge, however, accorded greatest weight to the opinions by Drs. Naeye and Kleinerman, that the miner's coal dust exposure did not contribute to the miner's emphysema. Accordingly, the administrative law judge concluded that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. 718.205(c)(2000), and benefits were denied. On appeal, claimant contends that the administrative law judge erred in according determinative weight to the opinions by Drs. Naeye and Kleinerman. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has decline to participate in this appeal.

¹Claimant, Shirley M. Lee, is the surviving spouse of the deceased miner, who died on March 15, 1998. Director's Exhibit 4. Claimant filed the instant survivor's claim on June 8, 1998. Director's Exhibit 1.

²The 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.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all Black Lung claims pending on appeal before the Board, except for those cases where the Board determines after briefing by the parties, that the 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 claimant, employer and the Director have responded.³ Based upon the briefs submitted by the parties, and our review, we hold that the 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).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304 (2000); *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). The United

³The Director asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant also states that the challenged regulations should have no affect on the outcome of the pending appeal. Employer argues that it is unduly burdensome and calls for significant speculation for employer to assess how the challenged regulations will impact the current case. Employer further alleges that “there is an inconsistency between the Board’s Order and the Order in the subject litigation with the latter staying proceedings unless the parties demonstrate the case should go forward and the former indicating that the case shall go forward unless the parties demonstrate that it should not.” Employer’s Brief dated March 22, 2001. Employer urges that a decision be delayed until the preliminary injunction is made permanent, or alternatively, if the injunction is ultimately denied, the case should be remanded for the development of medical evidence which “specifically addresses all of the issues above raised.” *Id.*

States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantial contributing cause of death if it hastened the miner's death. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In addressing the issue of death due to pneumoconiosis, the administrative law judge set forth a detailed review of the opinions of the nine pathologists of record and determined that although all of the physicians agreed that the miner's death was caused by centrilobular emphysema, the physicians did not concur as to the source of the emphysema. Decision and Order at 3-6. The administrative law judge stated that:

Three of the pathologists, Dr. Perper, Dr. Rizkalla, and Dr. Goldblatt, assert that the miner's coal dust exposure as well as his cigarette smoking contributed to the development of his emphysema. Six of the pathologists, Dr. Bush, Dr. Naeye, Dr. Kleinerman, Dr. Crouch, Dr. Griffin, and Dr. Mendelow are just as certain that the miner's emphysema is solely due to cigarette smoking and that his coal dust exposure played no part in his death. Drs. Perper and Rizkalla cite medical treatises supporting the proposition that coal dust exposure causes centrilobular emphysema; Drs. Naeye, Kleinerman, and Bush cite medical treatises finding that coal dust exposure does not produce significant centrilobular emphysema.

Decision and Order at 6. The administrative law judge also noted the miner's fifteen years of coal mine employment and his forty year smoking history that extended to the time of his death. The administrative law judge then accorded greatest weight to the opinions by Drs. Naeye and Kleinerman based upon his determination that they had greater expertise than Drs. Perper, Rizkalla, and Goldblatt "because they have published articles on occupational lung diseases and are recognized as experts in that field." *Id.* The administrative law judge concluded, therefore, that claimant failed to demonstrate by a preponderance of the evidence that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to Section 718.205(c)(2000). *Id.*

Claimant contends that the administrative law judge erred in giving greatest weight to the opinions of Drs. Naeye and Kleinerman, as opposed to the opinion of Dr. Perper, and in suggesting that the severity of the miner's emphysema precluded a finding that coal dust exposure was a contributing cause of the disease. We disagree. In the present case, the administrative law judge noted correctly that in order to determine whether claimant met her burden of proof under Section 718.205(c)(2000), he was required to resolve the conflict between the opinions of physicians who reached different conclusions as to the source of the miner's terminal disease; many of whom cited studies in support of their opinions and critiqued the studies relied upon by the physicians who did not reach the same conclusion.

The administrative law judge acted within his discretion in resolving this conflict by relying upon the superior degree of expertise possessed by Drs. Kleinerman and Naeye, as evidenced by their extensive bibliographies of published articles regarding occupational lung disease and their status as acknowledged experts in the field.⁴ *Id.*; see *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Lafferty v. Cannerton Industries, Inc.*, 12 BLR 1-190 (1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Inasmuch as the administrative law judge's findings are supported by substantial evidence, we affirm his conclusions at Section 718.205(c)(2000).

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

⁴Claimant does not dispute the administrative law judge's determination that Drs. Naeye and Kleinerman are recognized as experts in the field of occupational lung disease. We affirm, therefore, the administrative law judge's finding in this regard. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge