

BRB No. 00-0941 BLA

RUTH SUNDAY	)	
(Widow of RUSSELL SUNDAY)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
MARTIKI COAL CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Ruth Sunday, Louisa, Kentucky, *pro se*.

Harold H. Davis (Arter & Hadden LLP), Washington, D.C., for employer.

Dorothy L. Page (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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, SMITH, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order (97-BLA-1136) of Administrative Law Judge Clement J. Kichuk denying benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

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<sup>1</sup>The miner initially filed an application for benefits on October 3, 1984, which was denied by Administrative Law Judge Daniel J. Roketenetz in a Decision and Order issued on March 3, 1989, due to the miner's failure to establish the presence of coal workers' pneumoconiosis. Director's Exhibit 54. On appeal, the Board affirmed the denial of benefits. *Sunday v. Martiki Coal Corporation*, BRB No. 89-1163 BLA (Nov. 26, 1991)(unpub.). Director's Exhibit 54. No further action was taken regarding the living miner's claim. The miner died on October 11, 1994, and claimant filed an application for survivor's benefits on February 6, 1995. Director's Exhibits 1, 5. The district director denied claimant's application for survivor's benefits on October 27, 1995, and on January 22, 1996, claimant requested modification of the denied claim. Director's Exhibits 31, 35. On January 22, 1997, the district director denied the modification request, and claimant requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibits 38, 50.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>2</sup> This case is before the Board for a second time. Based on the filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718, and credited the miner with nine and one-quarter years of coal mine employment. On the merits, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b)(2000), but insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2000). Accordingly, benefits were denied.

On appeal, claimant generally contends that she is entitled to benefits. Employer responds, urging affirmance of the denial of benefits, and contending that the administrative law judge erred by finding that claimant established the existence of coal workers' pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not participate in the merits of this appeal.

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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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United 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 claims, determines 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 only the Director, and employer have responded, asserting that the regulations at issue in the law suit do not affect the outcome of this case. Claimant has not responded to the Board's order.<sup>3</sup> Based on the briefs submitted by the Director and employer, 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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

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<sup>3</sup>Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis.<sup>4</sup> See 20 C.F.R. §§718.202(a), 718.203, 718.205(c)(2000); *Griffith [Myrtle] v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1994); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6<sup>th</sup> Cir. 1993); *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 States Court of Appeals for the Sixth Circuit has held that any condition that hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205(c)(2) (2000). See *Griffith, supra*.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The record contains the medical opinions of eleven physicians. Dr. Hieronymus, a family practitioner, and Dr. Bangudi, who has no pulmonary qualifications, opined that pneumoconiosis contributed to the miner's death. Director's Exhibits 15, 49. Dr. Fritzhand, a board-certified urologist, did not address the cause of the miner's death. Director's Exhibit 54. Dr. Kumar, who is board-certified in allergy and immunology, and Dr. Stark, a board-certified pulmonologist, both stated that it was "probable" that pneumoconiosis contributed to the miner's death. Director's Exhibits 31, 46, 49. Dr. Stark also signed the miner's death certificate, and indicated that death was due to severe pneumonia, and that bullous emphysema was an underlying condition which contributed to death. Director's Exhibit 5. Dr. Anderson, a board-certified pulmonologist, diagnosed severe emphysema due to smoking, and heart disease, but found no evidence of pneumoconiosis, and did not render an opinion regarding the cause of the miner's death. Director's Exhibits 10, 54. Drs. Fino and Chandler, both board-certified pulmonologists, and Drs. Naeye and Hutchins, both board-certified pathologists, found no evidence of coal workers' pneumoconiosis and therefore concluded that pneumoconiosis did not contribute to the miner's death. Director's Exhibits 16, 47, 48, 51, 52. Lastly, Dr. Kovacs, a board-certified pathologist who conducted the miner's autopsy, noted the presence of extensive bullous emphysema, diffuse alveolar

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<sup>4</sup>Since the miner's last coal mine employment took place in the Commonwealth of Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

damage, moderate to severe anthracosis, marked fibrosis, and micro abscesses, and indicated that severe lung parenchymal damage was the most likely cause of death. Director's Exhibit 6.

The administrative law judge considered the relevant evidence,<sup>5</sup> and rationally accorded no weight to Dr. Fritzhand's opinion as this physician did not address the cause of the miner's death and therefore cannot support claimant's burden of proof on this issue. Decision and Order at 21-22; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). It was also within the administrative law judge's discretion to accord little weight to the opinions of Drs. Kumar, Hieronymus, Bangudi and Stark, as their brief narratives failed to provide a rationale for their diagnoses, and did not address the miner's smoking history, or how his smoking related emphysema and lung infections worsened his condition. Decision and Order at 21-22; *see Tennessee Consolidation Coal Co. v. Crisp*, 866 F.2d 179 (6th Cir. 1989); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Trumbo, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also rationally accorded little weight to Dr. Stark's opinion as his findings were equivocal since he concluded that it was "probable" that pneumoconiosis contributed to the miner's death and he failed to explain why he did not list pneumoconiosis as a contributing cause of death on the miner's death certificate, but reached this conclusion in a later report. Decision and Order at 21-22; *Tedesco, supra*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

We also hold that substantial evidence supports the administrative law judge's reliance on Dr. Fino's opinion that pneumoconiosis did not contribute to the miner's death, as well documented and reasoned, and based on Dr. Fino's status as a board-certified pulmonologist.<sup>6</sup> Decision and Order at 22; Director's Exhibits 47, 52; *Trumbo, supra*; *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Thus, the administrative law judge rationally found that claimant failed to satisfy her affirmative burden of proof to

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<sup>5</sup>The Decision and Order indicates that the administrative law judge considered the opinions of Drs. Naeye, Kovacs, Chandler and Hutchins, but did not specifically discuss their findings at Section 718.205(c)(2000). Decision and Order at 10-11, 13-14, 21-22. This omission is harmless however, since these opinions do not affirmatively establish claimant's burden of proof. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

<sup>6</sup>Contrary to the administrative law judge's findings, the record reflects that Dr. Anderson did not address the cause of the miner's death. Director's Exhibits 10, 54. This error is harmless however, since the administrative law judge rationally accorded little or no weight to those opinions supportive of claimant's affirmative burden of proof on this issue. *Ondecko, supra*; *Griffith, supra*; *Larioni, supra*.

establish that the miner's death was caused, or hastened by coal workers' pneumoconiosis. *See Ondecho, supra; Griffith, supra; Trumbo, supra.*

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, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Inasmuch as the administrative law judge's determination is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2000), and the denial of survivor's benefits.<sup>7</sup> *Griffith, supra; Trumbo, supra.*

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge

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<sup>7</sup>As we hold that substantial evidence supports the administrative law judge's findings pursuant to Section 718.205(c)(2000), and the denial of benefits, we need not address employer's arguments pursuant to Section 718.202(a)(2000), and Section 718.203(2000).