

BRB No. 00-0961 BLA

MARGARET H. TOPORCER)
(Widow of JOSEPH J. TOPORCER))

Claimant-Petitioner)

v.)

DATE ISSUED:

NORTHERN CONTINENTAL)
OPERATING COMPANY)

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 Richard A. Morgan, Administrative Law Judge,
United States Department of Labor.

C. Jerome Moschetta, Washington, Pennsylvania, for claimant.

George H. Thompson (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for
employer.

Barry H. Joyner (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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals
Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order (98-BLA-1215) of Administrative Law Judge Richard A. Morgan denying benefits 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 adjudicated this claim

¹Claimant is Margaret H. Toporcer, the surviving spouse of the miner, Joseph J. Toporcer, who died on June 7, 1997. Director's Exhibit 11. The miner filed his initial claim for benefits on June 25, 1982, and requested the withdrawal of his claim on January 14, 1983. Director's Exhibit 30. The request for withdrawal of his claim was denied on January 20, 1983, and on March 15, 1983, the claim was denied by reason of abandonment. Director's Exhibit 30. The miner filed another application for benefits on June 17, 1991, which was denied by the district director on December 13, 1991, due to the miner's failure to establish total disability due to pneumoconiosis. Director's Exhibit 29. Claimant filed an application for survivor's benefits on September 25, 1997, which is the only claim at issue herein. Director's Exhibit 2.

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

pursuant to 20 C.F.R Part 718, and credited claimant with thirty-three years of coal mine employment based on the stipulation of the parties. Director's Exhibit 26. On the merits, the administrative law judge found the evidence of record sufficient to support the stipulation of the parties that the miner suffered from pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b)(2000), but insufficient to demonstrate that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(2000). Director's Exhibit 26. Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge pursuant to Section 718.205 regarding the cause of the miner's death. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in the merits of this appeal.³

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.

³We affirm the findings of the administrative law judge on the length of coal mine employment, and at 20 C.F.R. §§718.202(a), and 718.203 (2000), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 the Director, and employer responded. Claimant has not responded to the Board's order.⁴ 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.⁵ Therefore, the Board will proceed to adjudicate the merits of this appeal.

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).

⁴Pursuant 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.

⁵The Director's brief, dated April 4, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. In a brief dated April 16, 2001, employer asserted that the regulations at issue in the lawsuit "may" affect the outcome of this case. Employer's Brief at 2-4. Employer contends that the provisions contained at 20 C.F.R. §§718.104(d), 718.201(a),(c), 718.204(a), and 718.205(c)(5), (d) may affect the disposition of this case, but has not specifically indicated how the application of the new regulations to the facts of the case herein could affect the outcome of the instant appeal.

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, or that the miner had complicated pneumoconiosis.⁶ See 20 C.F.R. §§718.1, 718.202(a), 718.203, 718.205(c), 718.304 (2000); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3rd Cir. 1989). *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 Third 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)(2000). See *Lukosevicz, supra*.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal 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. Pursuant to Section 718.205(c)(2000), claimant contends that the administrative law judge erred in finding the opinion of Dr. Shockcor, the only physician of record who found that coal workers' pneumoconiosis contributed to the miner's death, unreasoned and entitled to little weight. Specifically, claimant contends that the administrative law judge erred by finding that Dr. Shockcor was unaware of the miner's smoking history, his coronary bypass surgery and his subsequent sternum infection and its relationship to the miner's pneumonia and death. Claimant contends that as this physician reviewed the miner's medical records and autopsy report, Dr. Shockcor was clearly familiar with the course of the miner's final illness, and his death. Claimant's Brief at 2-6.

We find no merit in claimant's argument. The record indicates that Dr. Shockcor reviewed the miner's medical records, and found that the miner's panlobar emphysema with anthracosis caused his recurrent pneumonia and respiratory failure, which caused severe respiratory distress syndrome which resulted in the miner's death.. Dr. Shockcor also found

⁶Since 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. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

that the miner's cardiac arrest was secondary to his lung disease and infection. Director's Exhibit 14. The administrative law judge rationally accorded little weight to this opinion since Dr. Shockor's qualifications were not contained in the record. Decision and Order at 22; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Moreover, contrary to claimant's contention, the administrative law judge did not reject this opinion due to this physician's lack of knowledge of claimant's medical and smoking histories, but rationally determined that this report was unreasoned since Dr. Shockor did not discuss whether the miner's smoking history contributed to his emphysema, or the effects of the miner's bypass surgery which other physicians related to the cause of the miner's infection prior to his death. Decision and Order at 22; Director's Exhibit 14; *Trumbo, supra*; *Clark, supra*.

The administrative law judge's determination to accord no weight to the opinions of Drs. Levine, Cho, Garson, Stewart and Kroh, is also rational since none of these physicians rendered an opinion regarding the cause of the miner's death, and cannot satisfy claimant's burden of proof on this issue. Decision and Order at 22; Director's Exhibits 15, 29; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). Further, it was within the administrative law judge's discretion to accord determinative weight to the opinions of Drs. Sinnenberg and Oesterling based on their superior qualifications and their well reasoned opinions. Decision and Order at 22; Employer's Exhibits 11, 14, 15; *Trumbo, supra*; *Clark, supra*; *Dillon, supra*. The record indicates that both of these physicians are Board-certified pathologists who reviewed the miner's autopsy report and slides, and concluded that the miner's pneumoconiosis was minimal and did not contribute to his death. Dr. Sinnenberg opined that the miner's death was due to severe heart disease, smoking related emphysema, and complications from surgery which caused an infection and led to pneumonia and respiratory distress syndrome. Employer's Exhibits 11, 14. Dr. Oesterling also found that the miner died from severe cardiac disease and its complications. Employer's Exhibit 15. Dr. Fino's report finding that the miner's death was due to complications of an infection following coronary artery bypass surgery, was also properly accorded great weight since the administrative law judge found that it was consistent with the reports of Drs. Sinnenberg and Oesterling, and due to Dr. Fino's status as a Board-certified pulmonologist. Decision and Order at 22-23; Employer's Exhibits 8, 13; *Trumbo, supra*; *Clark, supra*; *Dillon, supra*.

Moreover, contrary to claimant's contention, the administrative law judge rationally accorded little weight to the opinion of Dr. Taylor, the prosector, since this physician, although diagnosing severe anthracosis, did not provide an opinion regarding the cause of the miner's death and cannot satisfy claimant's affirmative burden of proof on this issue. Decision and Order at 23; Director's Exhibits 12, 13; *Ondecko, supra*. Lastly, the administrative law judge considered the numerous records produced during the miner's

lifetime, and rationally found that they supported the conclusions of the physicians who determined that the miner's death was due to his heart disease, and that his emphysema was related to his lengthy smoking history. Decision and Order at 23; Employer's Exhibits 1-7; Director's Exhibit 7; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, the administrative law judge rationally concluded that the preponderance of the evidence failed to establish that the miner's death was due to pneumoconiosis. See *Lukosevicz, supra*; *Tackett v. Armco, Inc.*, 17 BLR 1-103 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Neeley, supra*.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray, supra*, 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 (1989). Inasmuch as the administrative law judge properly considered the evidence pursuant to Section 718.205(c)(2000), we affirm the denial of survivor's benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge