

BRB No. 01-0970 BLA

DAWN KIMMEL)
(Widow of GUY KIMMEL))
)
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 on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Timothy S. Williams (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (99-BLA-1187) of Administrative Law Judge Paul H. Teitler 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 This claim is

¹Claimant is Dawn Kimmel, widow of the miner, Guy Kimmel, who filed her claim for benefits on September 17, 1998. Director's Exhibit 1.

²The Department of Labor 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 20 C.F.R. Parts 718, 722,

before the Board for the second time. Initially, the administrative law judge credited the miner with nine and one-half years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 8-9. Decision and Order at 3. Applying the regulations at 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(2) (2000) and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(b) (2000). Decision and Order at 7-8. Accordingly, benefits were awarded, commencing March, 1998.

Thereafter, the Director, Office of Workers' Compensation Programs (the Director), appealed to the Board. On appeal, the Board vacated the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(b) (2000) inasmuch as this subsection is inapplicable to the instant claim which was filed after January 1, 1982. *See Kimmel v. Director, OWCP*, BRB No. 00-0659 BLA (Apr. 24, 2001)(unpub.). Therefore, the Board remanded this case for the administrative law judge to reconsider the relevant evidence pursuant to 20 C.F.R. ' 718.205(c)(2), the appropriate legal standard. *Id.*

On remand, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2), (c)(5). Decision and Order on Remand at 3-4. Accordingly, benefits were denied.

In this appeal, claimant asserts that the administrative law judge erred in his consideration of the medical opinion evidence at Section 718.205(c). Claimant's Brief at 2-3. The Director has responded urging affirmance of the administrative law judge's denial of benefits.

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 into the Act by 30 U.S.C. ' 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

In his response brief, the Director noted his stipulation to the existence of pneumoconiosis arising out of coal mine employment. Director's Brief at 6.

Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c). See 20 C.F.R. ' 718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. ' 718.205(c)(5); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Pursuant to Section 718.205(c), claimant asserts that the administrative law judge on remand erred in rejecting the opinion of Dr. Bindie solely on the basis that Dr. Bindie's report did not specifically address the miner's smoking history. Claimant's Brief at 2. On remand, the administrative law judge considered all of the relevant evidence of record pursuant to Section 718.205(c). Decision and Order on Remand at 2-4. The administrative law judge noted the qualifications of Drs. Bindie and Spagnolo and stated that both physicians have excellent credentials. Decision and Order on Remand at 4. The administrative law judge found Dr. Spagnolo's opinion to be supported by the record, and more credible than Dr. Bindie's [opinion] in view of [Dr. Bindie's] failure to state an accurate smoking history, and written consideration of the smoking history in his medical opinion. *Id.* Therefore, the administrative law judge determined that Dr. Bindie's opinion was not well reasoned and concluded that claimant failed to establish that the miner's pneumoconiosis substantially contributed to his death. *Id.*

^eDr. Bindie, the autopsy prosector, found the cause of the miner's death was due to respiratory insufficiency and failure secondary to the combination of leukemic infiltration, leukemic intravascular leukostasis, pneumonitis with focal necrotizing pneumonitis, tracheobronchitis, pulmonary emphysema, simple coal workers' pneumoconiosis and the immunocompromised state secondary to multiple myeloma and chronic myelomonocytic leukemia. Director's Exhibit 6. Dr. Spagnolo reviewed the autopsy report and medical evidence and opined that the miner's simple pneumoconiosis did not hasten or contribute to his death. Director's Exhibit 20. The death certificate lists the immediate cause of death as multiple myeloma and chronic myelomonocytic leukemia, with anthracosis listed under Other Significant Conditions. Director's Exhibit 5.

^gDr. Bindie is Board-certified in Anatomical and Clinical Pathology. Director's Exhibit 6. Dr. Spagnolo is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 21.

Contrary to claimant=s contentions, the administrative law judge permissibly discredited Dr. Bindie=s opinion regarding the cause of the miner=s death. In rendering his opinion, Dr. Spagnolo explicitly noted that the miner=s medical records indicate that the miner smoked one and one-half to two packs of cigarettes per day for thirty years. Director's Exhibit 20. Dr. Bindie, however, did not record or discuss the miner=s smoking history in his autopsy report. Director's Exhibit 6. The administrative law judge permissibly chose to credit the opinion of Dr. Spagnolo over the opinion of Dr. Bindie because the administrative law judge found that Dr. Spagnolo=s opinion was more consistent with the evidence in the record and because Dr. Bindie failed to consider the miner=s extensive smoking history. Decision and Order on Remand at 4; *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1983).

Inasmuch as an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met her burden of proof, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we hold that the administrative law judge permissibly found that claimant failed to establish that the miner=s death was due to pneumoconiosis. *See* 20 C.F.R. ' 718.205(c)(2), (c)(5); *Lukosevicz, supra*; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

The administrative law judge relied upon as accurate the miner=s smoking history listed in the report of Dr. Barnes, the miner=s treating physician. Decision and Order at 4. Dr. Barnes recorded that the miner smoked one and one-half to two packs of cigarettes per day for thirty years, that he quit in 1987, and that he smoked six pipefuls of tobacco per day since he quit smoking cigarettes. Director's Exhibit 7.

Since we reject the only assertion raised by claimant addressing the medical evidence that supports her burden of proof pursuant to Section 718.205(c) *see* discussion, *supra*; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), we need not address claimant's contentions regarding the adequacy of the opposing opinion of Dr. Spagnolo. *See Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984); *see generally Cregar v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

Because 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), *see Lukosevicz, supra*; *see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), an essential element of entitlement in a survivor's claim, we also affirm his denial of survivor's benefits under 20 C.F.R. Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*); *see also Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge