

BRB No. 05-0133 BLA

CONSTANCE R. COLEMAN)	
(Widow of JAMES R. COLEMAN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 06/20/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Scott E. Schermerhorn, Scranton, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (2004-BLA-05531) of Administrative Law Judge Robert D. Kaplan 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). The administrative law judge found, and the Director, Office of Workers' Compensation Programs (the Director), conceded three years of qualifying coal mine employment, and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ Decision and Order at 2-4; Director's Brief at 2. The

¹ Claimant is Constance R. Coleman, the miner's widow. The miner, James R.

administrative law judge found, and the parties stipulated to, the existence of pneumoconiosis. Decision and Order at 2-3; Hearing Transcript at 10. Considering the evidence of record, the administrative law judge concluded that it did not establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Decision and Order at 4-6. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the miner had a 150 pack-year smoking history. Claimant further asserts that the administrative law judge erred in finding that the miner's pneumoconiosis did not arise out of coal mine employment pursuant to Section 718.203(c). The Director responds that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to Section 718.203(c) and requests that this case be remanded² for the administrative law judge to reconsider the evidence.³

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 law. 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 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 and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing

Coleman, filed claims for benefits in 1972, 1989, 1995, and 2000, with the last claim being denied on August 8, 2000. Director's Exhibits 1-4. The miner died on September 16, 2002 and claimant filed a survivor's claim, the subject of the instant appeal, on November 15, 2002, which was denied by the district director on October 1, 2003. Director's Exhibits 6, 9, 21. Claimant subsequently requested a hearing on October 6, 2003. Director's Exhibit 22.

² The Director has filed a Motion to Remand in this case. The Board accepts the Director's Motion to Remand as his response brief, and herein decides this case on its merits.

³ The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202 and 718.304 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

cause” of a miner’s death if it hastens the miner’s death. *See* 20 C.F.R. §718.205(c)(5); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).⁴

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 Decision and Order of the administrative law judge denying benefits must be vacated and the case remanded to the administrative law judge for further consideration. Claimant initially contends that the administrative law judge improperly weighed the lay testimony in determining the extent of the miner’s smoking history. Claimant’s Brief at 3-4. We find no merit in claimant’s argument.

Contrary to claimant’s contention, the administrative law judge considered the lay testimony of record and permissibly concluded that claimant’s testimony concerning the miner’s smoking history was not credible in light of the medical opinion evidence indicating that the miner had a significant smoking history of at least 150 pack-years.⁵ *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Gattuso v. Director, OWCP*, 10 BLR 1-155 (1987); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Director’s Exhibits 1, 2, 3, 16, 29; Decision and Order at 4. The administrative law judge has broad discretion in determining whether lay evidence is credible. *Gattuso*, 10 BLR at 1-157. We therefore affirm the administrative law judge’s finding that claimant’s lay testimony was not credible as it is supported by substantial evidence. *See generally Koppenhaver v. Director, OWCP*, 864 F.2d 287, 12 BLR 2-103 (3d Cir. 1989); Decision and Order at 4.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibits 1-4, 7.

⁵ Dr. Cacciomani stated in his report dated November 23, 1979, that the miner smoked 1½ packs per day for forty years. Director’s Exhibit 1. Dr. Shingala on October 12, 1983 stated that the miner smoked about three packs a day but had ceased smoking three months earlier. Director’s Exhibit 2. Dr. Desai, in a report dated December 5, 1989, reported a smoking history of three to four packs a day from age eight ending in 1984. Director’s Exhibit 2. Dr. Levinson, on April 25, 1995, noted a smoking history of four packs a day from age eight until age fifty-eight. Director’s Exhibit 3. Dr. Sherman, in his report dated April 6, 2003, stated that the minor had an extensive smoking history of up to four packs a day. Director’s Exhibit 16. Dr. Shingala, in a letter dated August 4, 2003, indicated that he had treated the miner from 1983 to 2001 and that the miner had smoked three to four packs a day until Dr. Shingala began treating him in 1983. Director’s Exhibit 29.

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(c). Where a miner has less than ten years of coal mine employment, claimant must establish that the miner's pneumoconiosis arose, at least in part, out of his coal mine employment. 20 C.F.R. §718.203(c). The United States Court of Appeals for the Third Circuit has held that it is error for an administrative law judge to consider a miner's smoking history as relevant to determining whether the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c) because smoking cannot cause the radiologic impressions characteristic of pneumoconiosis. *Wisniewski v. Director, OWCP*, 929 F.2d 952, 959, 15 BLR 2-57, 2-70 (3d Cir. 1991).

In letters dated September 23, 2003 and June 30, 2004, Dr. Levinson opined that the miner's coal mine employment history was the primary contributing factor to his pneumoconiosis. Claimant's Exhibits 7, 10. In letters dated October 21, 2003 and July 12, 2004, Dr. Conaboy noted that pneumoconiosis was "a player in his cardiovascular disease" and was a cause of the miner's death. Claimant's Exhibits 8, 10. The administrative law judge construed the statements by Dr. Conaboy as constituting the opinion that, despite the brief coal mine employment history, the miner's pneumoconiosis was caused by his coal mine employment. Decision and Order at 5.

The administrative law judge found that since neither Dr. Levinson nor Dr. Conaboy indicated an awareness of the miner's extensive smoking history, their opinions that the miner's pneumoconiosis arose out of his coal mine employment were not reasoned. Decision and Order at 5-6. The administrative law judge therefore found that the evidence was insufficient to establish that the miner's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(c). Decision and Order at 6.

Claimant contends that the administrative law judge improperly determined that claimant failed to establish this element of entitlement. Claimant's Brief at 4-9. The Director agrees with claimant that the administrative law judge "erred in denying benefits on the grounds that Drs. Conaboy and Levinson failed to consider the miner's smoking history in addressing the cause of his pneumoconiosis" at Section 718.203(c). Director's Brief at 2. The Director notes that he has conceded, and the Third Circuit Court has held, that "smoking cannot cause the radiologic impressions characteristic of pneumoconiosis," and therefore, "it is not an alternative exposure capable of contributing to a miner's clinical pneumoconiosis." *Wisniewski*, 929 F.2d at 959, 15 BLR at 2-71; Director's Brief at 2-3. In the case at bar, the administrative law judge's finding at Section 718.203(c) was improperly based upon whether the physicians considered the miner's smoking history as a cause of his pneumoconiosis. *Wisniewski*, 929 F.2d at 959, 15 BLR at 2-71. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.203(c) and remand the case for him to reconsider the evidence consistent with *Wisniewski* and determine whether the miner's pneumoconiosis

arose out of his coal mine employment. If the administrative law judge finds that the miner's pneumoconiosis arose out of coal mine employment, he must determine whether the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). 20 C.F.R. §718.205(c)(5); *Lukosevich*, 888 F.2d at 1006, 13 BLR at 2-108.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge