

BRB No. 97-1206 BLA

ROSE M. SEBASTIANELLI)
(Widow of LEO SEBASTIANELLI))

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Gary K. Stearman (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits (96-BLA-1116) of Administrative Law Judge Ralph A. Romano 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 found the evidence

¹ Claimant is Rose Sebastianelli, the widow of Leo Sebastianelli, the miner, who died on March 10, 1995, see Director's Exhibit 3. The miner was awarded federal black lung benefits by Administrative Law Judge Ainsworth H. Brown in a Decision and Order issued on July 31, 1990. Director's Exhibit 14.

² As an initial matter, we accept claimant's response to the Board's Order to Show Cause and claimant's Petition for Review and brief. See 20 C.F.R. §802.218(b).

sufficient to establish the existence of pneumoconiosis arising out of the miner's coal mine employment. The administrative law judge noted the standard for establishing that the miner's death is due to pneumoconiosis provided in 20 C.F.R. §718.205(c), and the standard enunciated by the United States Court of Appeals for the Third Circuit in *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989), and found the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, he denied benefits.

On appeal, claimant maintains that the administrative law judge erred in finding that pneumoconiosis was not a contributing cause to the miner's death. Claimant asserts that Dr. Spagnolo's opinion is contrary to the evidence of record and hostile to the Act, and alleges that the administrative law judge erred by not explaining why his opinion is well documented and reasoned. Claimant asserts that Dr. Sebastianelli's opinion is well reasoned and documented and constitutes a sufficient basis to award benefits pursuant to *Lukosevicz*. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand. The Director contends that although the administrative law judge identified the *Lukosevicz* standard, he failed to apply it in rendering his findings. The Director also contends that the administrative law judge erred by finding that Dr. Sebastianelli's opinion does not meet the legal standard, and argues that it satisfies the *Lukosevicz* standard.³

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).

In finding that the miner's death was not due to pneumoconiosis, the administrative law judge stated:

Weighing the opinions of Dr. Spagnolo and Dr. Sebastianelli as well as the hospital records and the neurological consultation, I find that the Claimant failed to establish that the miner's death was due to pneumoconiosis. While the miner had a

³ Inasmuch as the administrative law judge's finding that the miner suffered from pneumoconiosis arising out of his coal mine employment, and his finding that death due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.205(c)(3), are not challenged on appeal, they are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pulmonary impairment caused by his coal mine employment, the evidence does not establish that the pulmonary condition caused his death. The record shows that the cerebrovascular accident caused the miner's death. Dr. Spagnolo's supplemental report is well-reasoned, well-documented, and supported by the evidence.

Dr. Sebastianelli's own testimony shows that the cerebral vascular accident caused the miner's death. Although Dr. Sebastianelli provided a well-reasoned explanation for concluding that black lung contributed to the miner's death, his explanation does not meet the legal standard to show that the pneumoconiosis was a substantially contributing cause in the miner's death especially based on his testimony that other stroke victims follow a similar course with or without pulmonary impairments.

Therefore, I find that the Claimant has not established that the miner's death was due to pneumoconiosis. Therefore, the Claimant is not entitled to survivor benefits under the Act.

Decision and Order - Denying Benefits at 7.⁴

⁴ The evidence of record relevant to the cause of the miner's death includes a death certificate signed by the miner's treating physician, Dr. Sebastianelli. The immediate cause of death was identified as acute respiratory arrest, due to anoxic encephalopathy, due to hemorrhagic cerebral vascular attack. "Black Lung" was listed as a significant condition contributing to death but not resulting in the underlying causes previously noted. Director's Exhibit 3. In a letter dated January 23, 1996, Dr. Sebastianelli indicated that the miner died due to acute respiratory arrest. Dr. Sebastianelli indicated that the miner had been placed on a mechanical ventilatory due to his inability to breathe following his hemorrhagic cerebrovascular accident, and stated that:

although his coal workers' pneumoconiosis did not directly cause his death, his overall condition was weakened by this condition, and he was unable to sustain any spontaneous respirations when placed on the ventilator. Therefore, on his death certificate, "Black Lung" is listed under "other significant conditions contributing to death, but not resulting in the underlying cause given."

Director's Exhibit 11. In a deposition Dr. Sebastianelli stated that after the miner had a stroke he "became unresponsive and had difficulty breathing." Claimant's Exhibit 1 at 10. When asked whether the miner's pneumoconiosis contributed to his death, Dr. Sebastianelli stated "Well, I feel that the fact if he was -- that he had a respiratory failure and that he had an underlying lung problem to start with, that the underlying lung problem contributed to the fact that he had a respiratory arrest requiring intubation and subsequently ventilatory support." Claimant's Exhibit 1 at 12. Dr. Sebastianelli stated "I feel that since he was on the ventilator and was doing poorly on the ventilator, if he had, perhaps, better lungs to start with, that his, he could have lived longer."

Claimant's Exhibit 1 at 12. When asked "Did the pneumoconiosis then hasten his death...?" and he answered "It could have been perhaps prolonged if he didn't have the pneumoconiosis." Claimant's Exhibit 1 at 12-13. Dr. Sebastianelli also indicated that people who have the kind of stroke that the miner had are usually put on ventilators. Claimant's Exhibit 1 at 17.

Dr. Spagnolo reviewed the evidence of record and in a report dated October 13, 1996, opined that there is "no reasonable evidence for the presence of pneumoconiosis." Director's Exhibit 16. Dr. Spagnolo opined that the miner's death was not related to or substantially hastened by pneumoconiosis and that pneumoconiosis was not a substantial contributing factor in the miner's death. Director's Exhibit 16. At the Director's request, Dr. Spagnolo authored a supplemental report on November 11, 1996, where he assumed the existence of pneumoconiosis. Dr. Spagnolo stated "In view of the normal arterial blood gases in February 1989 and May 1990 such a pneumoconiosis would have been insufficient to have contribute[d] to [the miner's] death which was the result of a massive cerebral hemorrhage." Director's Exhibit 18. Dr. Spagnolo opined that the miner's cerebral hemorrhage was caused by his hypertension, and indicated that there is no relationship between pneumoconiosis and hypertension. Dr. Spagnolo concluded "Given all the medical information in this case and even assuming the presence of pneumoconiosis, it remains my conclusion that [the miner's] death was not related to or substantially hastened by a pneumoconiosis, nor was a pneumoconiosis a substantially contributing factor in his death." Director's Exhibit 18.

We agree, with claimant and the Director, that the administrative law judge erred in the standard he applied in this case, inasmuch as the administrative law judge did not consider whether the medical opinions establish that pneumoconiosis hastened, even briefly, the miner's death. See *Lukosevicz, supra*. The regulations provide that a miner's death is considered to be due to pneumoconiosis where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(2). In *Lukosevicz*, the United States Court of Appeals for the Third Circuit held that if the medical evidence establishes that pneumoconiosis hastened the miner's death, even briefly, it is a substantial contributor to the miner's death pursuant to Section 718.205(c). See *Lukosevicz, supra*; see also *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Accordingly, we vacate the administrative law judge's finding that pneumoconiosis did not contribute to the miner's death. On remand, the administrative law judge must reconsider the evidence to determine whether it establishes that pneumoconiosis hastened, even briefly, the miner's death, and, thus, whether pneumoconiosis was a substantially contributing cause to the miner's death. See 20 C.F.R. §718.205(c); *Lukosevicz, supra*.

In addition, we agree with the Director that the administrative law judge slightly misinterpreted Dr. Sebastianelli's testimony. See Claimant's Exhibit 1. In weighing the evidence, the administrative law judge found that Dr. Sebastianelli's opinion did not satisfy the legal standard "especially based on [Dr. Sebastianelli's] testimony that *other stroke victims* follow a similar course with or without pulmonary impairments." Decision and Order - Denying Benefits at 7 (emphasis added). In fact, what Dr. Sebastianelli stated in his deposition, when asked "Do people who *have the kind of stroke that [the miner] had* often have to be put on ventilators?" was "To the extent that he had, yes. Usually -- yes. *The type of stroke that he had, yes.*" When the attorney attempted to clarify this, asking "So whether or not he had black lung, is it likely that he would have had to have been on a ventilator anyway?" Dr. Sebastianelli answered "Initially, yes." Claimant's Exhibit 1 at 17(emphasis added). In view of the administrative law judge's misinterpretation of Dr. Sebastianelli's opinion, the administrative law judge, on remand, should reconsider this opinion. See *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); Director's Exhibits 3, 11; Claimant's Exhibit 1.

Claimant asserts that Dr. Spagnolo's opinion is hostile to the Act, that his findings in his October 1996 opinion are contrary to the prior findings of Judge Brown and that even when asked to assume the existence of pneumoconiosis, Dr. Spagnolo implies that he would not diagnose pneumoconiosis without a positive x-ray. The Director notes that although Dr. Spagnolo assumes the presence of pneumoconiosis, he never accepts the presence of total disability or total disability due to pneumoconiosis, both of which were found to be established by Judge Brown. The Director also notes that Dr. Spagnolo's report ignores the May 1990 qualifying pulmonary function study which was the basis for the prior award.

While we reject claimant's assertion that Dr. Spagnolo's opinion, see Director's

Exhibits 16, 18, is in conflict with the spirit of the Act, since Dr. Spagnolo does not foreclose all possibility that simple pneumoconiosis can be totally disabling, see *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988), we vacate the administrative law judge's findings regarding Dr. Spagnolo's opinion. See Decision and Order - Denying Benefits at 7. The administrative law judge is advised that Dr. Spagnolo's opinion does not specifically conform to the *Lukosevicz* standard. Dr. Spagnolo opines that pneumoconiosis did not "*substantially* hasten the miner's death" Director's Exhibits 16, 18 (emphasis added); however the standard is whether pneumoconiosis hastened, even briefly, the miner's death, see *Lukosevicz, supra*. On remand, the administrative law judge is instructed to reconsider Dr. Spagnolo's opinion and determine the impact, if any, the conflict between Dr. Spagnolo's opinion and the findings of Judge Brown, and also determine the impact Dr. Spagnolo's implication that he would not diagnose pneumoconiosis in the absence of a positive x-ray, have on the credibility of his opinion. See *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge