

BRB No. 98-1255 BLA

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| JULIA ANN STANEK |) | |
| (Widow of CHARLES STANEK) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: <u>6/30/99</u> |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph J. Schwab, Connellsville, Pennsylvania, for claimant.

Jill M. Otte (Henry L. Solano, 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 the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order Denying Benefits (98-BLA-0092) of Administrative Law Judge Richard A. Morgan on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

¹Claimant is the surviving spouse of the miner, who died on May 14, 1988. Director's Exhibit 30. The miner's death certificate, signed by Dr. Haidet, indicated that the immediate cause of the miner's death was "cardiorespiratory arrest," and that other significant conditions were silicosis and "multiple CVA's," *i.e.*, cerebral vascular accidents. *Id.*

²Joseph J. Schwab, a lay representative acting on behalf of claimant, filed an appeal of the administrative law judge's decision, but Mr. Schwab is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case involves a miner's claim and a survivor's claim. The miner filed a living miner's claim for benefits on June 4, 1984. A formal hearing was conducted by Administrative Law Judge George P. Morin on October 27, 1987.³ In a Decision and Order dated February 9, 1989, Judge Morin credited the miner with nine years of coal mine employment, and considered the miner's claim under the applicable regulations at 20 C.F.R. Part 718. Judge Morin found that the issue of whether the miner had pneumoconiosis under 20 C.F.R. §718.202(a) was not contested.⁴

³Because the miner died subsequent to the hearing, Judge Morin reopened the record for receipt of the death certificate, the autopsy protocol from Dr. Wecht, and a consulting pathology opinion from Dr. Naeye. Director's Exhibits 30, 31, 34.

⁴Whether the miner had pneumoconiosis was not listed as a contested issue by the Director, Office of Workers' Compensation Programs (the Director), when the case was referred to Judge Morin for a formal hearing, which was conducted on October 27, 1987.

Judge Morin further found the evidence sufficient to establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Finding that the miner was not totally disabled pursuant to 20 C.F.R. §718.204(c), however, Judge Morin denied benefits. Subsequently, claimant requested modification of the denial,⁵

Director's Exhibits 22, 24. At the hearing, the Director confirmed that the issue of pneumoconiosis was not being contested. Director's Exhibit 24, Hearing Tr. at 6.

⁵Claimant had initially filed an appeal with the Board by letter dated March 5, 1989, submitted by claimant's lay representative, Joseph J. Schwab. The Board acknowledged the appeal on June 2, 1989. Director's Exhibit 37. Subsequently, while the appeal was pending, Mr. Schwab forwarded to the Board, under cover letter dated May 1, 1990, a curriculum vitae (CV) from Dr. Wecht. Director's Exhibit 42. Noting that the CV had mistakenly not been introduced into evidence, Mr. Schwab asked the Board to consider it in disposing of claimant's appeal under the general standard of review. *Id.* By Order dated May 8, 1991, the Board returned Dr. Wecht's CV to claimant, informing claimant that the Board could not consider it, as it had not been admitted into evidence before Judge Morin. *Stanek v. Director, OWCP*, BRB No. 89-0964 BLA (May 8, 1991)(unpublished Order). The Board further informed claimant that she could file this evidence with the district director in support of a modification request. *Id.* Thereafter, claimant again sent Dr. Wecht's CV to the Board, requesting that it be considered as "grounds for modification" of Judge Morin's 1989 denial. Director's Exhibit 46. In an Order dated October 8, 1991, the Board again

a request which the district director denied on December 2, 1992. Claimant's request for modification was referred to Judge Morin, who issued a decision on the record pursuant to the parties' request.

returned the CV to claimant, instructing claimant to file her request for modification with the district director. *Stanek v. Director, OWCP*, BRB No. 89-0964 BLA (Oct. 8, 1991)(unpublished Order). The Board also informed claimant that, in the event she were to file a modification request with the district director, her appeal would be dismissed with the right of reinstatement. *Id.* Claimant thereafter filed a modification request with the district director, forwarding Dr. Wecht's CV in support thereof. Director's Exhibit 48.

In his Decision and Order - Denying Modification, dated August 11, 1994, Judge Morin found that it was no longer possible for claimant to establish a change in conditions under 20 C.F.R. §725.310 because the miner had died before the prior 1989 Decision and Order was rendered, and his autopsy and related documents were considered at that time. Judge Morin further found claimant failed to establish a mistake in a determination of fact pursuant to Section 725.310 because the only new evidence submitted was Dr. Wecht's curriculum vitae. In this regard, Judge Morin stated that, while Dr. Wecht's curriculum vitae reveals that Dr. Wecht has impressive credentials, Dr. Wecht's medical opinion had not addressed whether the miner was totally disabled. Judge Morin concluded that, even if Dr. Wecht's opinion were given greatest weight in light of the doctor's credentials, it would be insufficient to establish total disability due to pneumoconiosis under Section 718.204. Judge Morin, therefore, again denied benefits. Claimant appealed, and the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Remand the case. The Board stated that the issue before it was whether substantial evidence supported Judge Morin's finding in his original, 1989 Decision and Order that total disability was not established under Section 718.204(c)(1)-(4).⁶ *Stanek v. Director, OWCP*, BRB Nos. 94-3910 BLA and 89-0964 BLA (June 30, 1995)(unpublished). The Board affirmed Judge Morin's findings that the evidence was insufficient to establish total disability under Section

⁶The Board accepted claimant's letter giving notice of appeal, dated August 31, 1994, as both an appeal of Judge Morin's denial of modification, and a request for reinstatement of claimant's prior appeal of Judge Morin's initial, 1989 Decision and Order, an appeal which, as discussed in footnote 5, *supra*, the Board dismissed in an Order dated October 8, 1991. *Stanek v. Director, OWCP*, BRB Nos. 94-3910 BLA and 89-0964 BLA (June 30, 1995)(unpublished); see *Stanek v. Director, OWCP*, BRB No. 89-0964 BLA (Oct. 8, 1991)(unpublished Order). In the October 8, 1991 Order, the Board had informed claimant that she did have the right to request reinstatement of her original appeal. *Stanek v. Director, OWCP*, BRB No. 89-0964 BLA (Oct. 8, 1991)(unpublished Order).

718.204(c)(1)-(3).⁷ *Id.* The Board vacated, however, Judge Morin's finding that claimant failed to establish total disability under Section 718.204(c)(4). *Id.* While the Board held that Judge Morin properly considered the medical opinions of Drs. Wecht, Kristofic, Martin and Naeye, the Board agreed with the Director that Judge Morin erred by not comparing the list of physical limitations identified in Section 7B of Dr. Saloom's standard form medical report with the exertional requirements of the miner's usual coal mine work prior to finding that the miner was not totally disabled. *Id.* The Board thus remanded the case for the fact-finder to determine whether Section 7B of Dr. Saloom's report contained the doctor's medical assessment of the miner's physical limitations, or whether it merely constituted a subjective account of the miner's symptoms. *Id.*

⁷The Board affirmed, as unchallenged on appeal, Judge Morin's determination that the miner had nine years of coal mine employment, as well as Judge Morin's finding that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(c). *Stanek v. Director, OWCP*, BRB Nos. 94-3910 BLA and 89-0964 BLA (June 30, 1995)(unpublished).

In an Order of Remand dated June 26, 1996, Administrative Law Judge Gerald M. Tierney⁸ remanded the case to the district director “to clarify the report of Dr. Saloom.” Director’s Exhibit 78. While the miner’s claim was on remand to the district director, claimant filed a survivor’s claim on August 27, 1996. The district director denied the survivor’s claim in a Proposed Decision and Order dated August 21, 1997. Director’s Exhibit 92. On October 7, 1997, the district director returned the living miner’s claim, and referred the survivor’s claim, to the Office of Administrative Law Judges. Director’s Exhibits 94, 95. Pursuant to the parties’ agreement, a decision was issued on the record. In his Decision and Order dated June 5, 1998, Administrative Law Judge Richard A. Morgan (the administrative law judge),⁹ noted that it was undisputed that the miner worked for nine years in coal mine employment, and suffered from pneumoconiosis arising out of coal mine employment. The administrative law judge found that the evidence was insufficient to establish total disability under Section 718.204(c)(1)-(4), however. Accordingly, the administrative law judge denied benefits in the living miner’s claim. The administrative law judge also found that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge also denied survivor’s benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits in both claims. The Director responds in support of the administrative law judge’s decision denying benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

In order to establish entitlement to benefits under Part 718 in a living miner’s claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

⁸The case was referred on remand from the Board to Judge Tierney, as Judge Morin was unavailable to the Office of Administrative Law Judges.

⁹The case was referred to Judge Morgan as Judge Tierney was unavailable.

In addressing the miner's claim, the administrative law judge reconsidered Dr. Saloom's medical report under Section 718.204(c), as instructed on remand from the Board. Specifically, the administrative law judge considered whether Dr. Saloom's notation, in Section 7B of his report, that the miner, beginning in 1980, could not walk more than one hundred yards, climb more than six stairs, lift more than forty pounds, or carry more than twenty pounds for fifty feet, constituted Dr. Saloom's assessment of what the miner's physical limitations were, or whether this information merely represented a subjective account of the miner's symptoms. Decision and Order at 8-9; Director's Exhibit 7. The administrative law judge found that Section 7B of Dr. Saloom's report was merely an indication of the latter.¹⁰ Ultimately, the administrative law judge reasonably concluded that, because the record does not contain any evidence relevant to the specific physical requirements of the miner's last usual coal mine job as a coal loader, such as the lifting, carrying, climbing or walking requirements of that job, a consideration of the limitations noted by Dr. Saloom would not demonstrate total disability.¹¹ See *Cregger v. United States*

¹⁰In finding that the notations in Section 7B of Dr. Saloom's report represented merely the miner's subjective complaints, the administrative law judge noted that Judge Tierney remanded the case for the district director to attempt to obtain clarification from Dr. Saloom, and that Dr. Saloom informed claimant, who, in turn, informed the district director, that he could provide no further information. Decision and Order at 8; Director's Exhibits 79, 80. The administrative law judge found that, moreover, the miner's hospitalization discharge summary, signed by Dr. Macchiaroli and dated two days before the miner's death on May 14, 1988, indicated that the miner "was very active" with golfing, swimming, and walking approximately two miles per day until March 23, 1988, when he had loss of speech and right side weakness. Decision and Order at 8; Director's Exhibit 86.

¹¹The administrative law judge correctly stated that the miner did not provide testimony at his hearing with regard to what were the specific exertional requirements of his

Steel Corp., 6 BLR 1-1219, 1-1221 (1984); Decision and Order at 8; Hearing Tr. at 22; Director's Exhibit 7. We, therefore, affirm the administrative law judge's conclusion that Dr. Saloom's report does not support a finding of total disability under Section 718.204(c)(4).

job as a coal loader. Decision and Order at 8. The only relevant testimony elicited by the miner's representative at the hearing with regard to the miner's coal loading job was testimony indicating that miner's entire tenure in coal mining was spent underground as a coal loader. Hearing Tr. at 22.

In addition to reconsidering Dr. Saloom's opinion, the administrative law judge adopted the previous findings of Judge Morin with regard to the remaining evidence of record on the issue of total disability under Section 718.204(c)(1)-(4). Decision and Order at 9. In his February 8, 1989 Decision and Order, Judge Morin found that all three of the miner's pulmonary function studies and the three arterial blood gas studies were non-qualifying,¹² and that there was no evidence in the record of cor pulmonale with right sided congestive heart failure. Judge Morin 1989 Decision and Order at 4-6. Judge Morin also credited the opinions of Drs. Martin and Naeye, indicating that the miner was not totally disabled, over the contrary opinion of Dr. Kristofic, and determined that Dr. Wecht had not addressed the issue of total disability. *Id.* at 6-9. These findings were affirmed by the Board. *Stanek v. Director, OWCP*, BRB Nos. 94-3910 BLA and 89-0964 BLA (June 30, 1995)(unpublished). The administrative law judge also considered two additional arterial blood gas studies which were administered on May 2, 1988, during the miner's hospitalization in the days leading up to his death.¹³ The administrative law judge properly discounted the two studies, both of which produced qualifying values, on the basis that they were the only abnormal studies in the record, administered at a time when claimant was hospitalized with a cerebral vascular accident, which was undisputedly the primary cause of the miner's death. See generally *Dillon v. Peabody Coal Co*, 11 BLR 1-113 (1988); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); Decision and Order at 10; Director's Exhibit 85. We, therefore, affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability under Section 718.204(c). Inasmuch as claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits in the miner's claim. *Trent, supra*; *Gee, supra*; *Perry, supra*.

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis or where complicated pneumoconiosis is established. See 20 C.F.R. §§718.1, 718.203, 718.205(c)(1)-(3); *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, within whose jurisdiction the instant case arises, has held that for purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death

¹²A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. See 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" test yields values which exceed the requisite table values.

¹³These studies were not previously considered by Judge Morin, as they were included among the hospitalization records, which were not submitted with the miner's claim, but were subsequently submitted in association with claimant survivor's claim. Director's Exhibit 85.

“where pneumoconiosis actually hastens death.”¹⁴ *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

As the administrative law judge correctly found, none of the medical evidence addressing the causes of the miner’s death indicates that the miner’s pneumoconiosis was the primary cause of his death; and further, there is no evidence in the record that the miner had complicated pneumoconiosis. Decision and Order at 4-7, 9. Claimant was thus precluded from establishing death due to pneumoconiosis under Section 718.205(c)(1) or (c)(3). See 20 C.F.R. §718.205(c)(1), (c)(3).

In addressing the issue under Section 718.205(c)(2) of whether the evidence was sufficient to establish that the miner’s pneumoconiosis hastened his death pursuant to *Lukosevicz*, the administrative law judge first properly discounted the miner’s death certificate, which indicated that silicosis was another significant condition contributing to the miner’s death, because there was no indication that the physician signing the death certificate, Dr. Haidet, had any unique knowledge of the miner or his afflictions. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 10; Director’s Exhibit 30. The administrative law judge further noted that Dr. Haidet’s qualifications were unknown. Decision and Order at 10; Director’s Exhibit 30. The administrative law judge also considered the conflicting reports of Drs. Wecht and Naeye. Dr. Wecht performed the autopsy on the miner, and stated in his report dated August 24, 1988 that he reviewed various medical records and other relevant documents, without being specific. Director’s Exhibit 31. Dr. Wecht opined that the miner “died as a result of [a] cerebral vascular accident.” *Id.* Dr. Wecht further opined that coal workers’ pneumoconiosis was a substantial contributing factor in his death. *Id.* In a letter dated May 22, 1998, Dr. Wecht asserted that, as the autopsy prosector, he was in the best position to reach a diagnosis, and disagreed with the contrary opinion of Dr. Naeye. Claimant’s Exhibit 1. Dr. Wecht also stated with some specificity that the records he had considered in 1988 included “radiology findings and opinions from two clinical physicians, both of whom unqualifiedly expressed their opinions in 1981 and 1985 that [the miner] was permanently disabled as a result of coal workers’ pneumoconiosis.” *Id.*

Dr. Naeye reviewed the seventeen glass slides prepared by Dr. Wecht and, based upon what he saw, opined in his January 11, 1989 report that the miner’s pneumoconiosis was “far too mild to have contributed in any way to his death.” Director’s Exhibit 34. In a

¹⁴Because the miner’s coal mine employment occurred in Pennsylvania, the instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. See 30 U.S.C. §921(e); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

subsequent report dated April 7, 1998, Dr. Naeye indicated that he had just received and reviewed a copy of the miner's death certificate, the miner's medical records detailing his medical problems during the last three years of his life, and normal pulmonary function study and arterial blood gas study results from studies administered in 1987. Director's Exhibit 95. Dr. Naeye also indicated in the 1998 report that he was aware that the miner never smoked, that the miner's eleven year tenure in coal mining ended in 1940, and that the miner subsequently worked in the steel industry for thirty-six years. *Id.* Dr. Naeye reiterated his opinion that the miner's pneumoconiosis was far too mild to have contributed in any way to his death, which he stated was due to a cerebral infarct and pneumonia. *Id.*

The administrative law judge's reasons for crediting Dr. Naeye's opinion over the opinion of Dr. Wecht were tantamount to a finding that Dr. Naeye's opinion was better-documented and reasoned than Dr. Wecht's. See *Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985). Specifically, the administrative law judge found that Dr. Wecht's opinion was undermined by the fact that the miner last worked in coal mining in 1940, and was subsequently employed in a steel mill for thirty-six years, where he was exposed to dust and fumes.¹⁵ Decision and Order at 10. The administrative law judge also questioned Dr. Wecht's opinion in light of the fact that the miner's objective studies were uniformly normal, except for two abnormal blood gas studies which were administered when the miner was hospitalized with a cerebral vascular accident, days before his death. Decision and Order at 10; Director's Exhibits 6-9, 17, 25, 86. The administrative law judge found that, in contrast, Dr. Naeye's opinion was consistent with the objective medical evidence of record and the miner's mild degree of coal workers' pneumoconiosis. Decision and Order at 10; Director's Exhibits 34, 95. The administrative law judge further found it significant that Dr. Naeye clarified the medical evidence he had reviewed, whereas Dr. Wecht was less specific. Decision and Order at 4-5, 10; Director's Exhibit 95; Claimant's Exhibit 1. Additionally, the administrative law judge concluded that the history reported to the hospital shortly before the miner's death that, prior to the miner's March 1988 cerebral vascular accident, he was very active in golfing, swimming and walking two miles per day, supported Dr. Naeye's opinion, and undermined a finding that the miner's coal workers' pneumoconiosis was disabling or hastened his death. Decision and Order at 10; Director's Exhibits 86, 95. Inasmuch as the administrative law judge's reasons for crediting Dr. Naeye's opinion over Dr. Wecht's opinion were rational and within the administrative law judge's discretion as fact-finder, we affirm the administrative law judge's findings in this regard. See *Clark, supra*; *Tackett, supra*; Decision and Order at 10.

¹⁵The miner testified at his hearing before Judge Morin on October 27, 1987 that he worked for nine years in coal mine employment, ending in 1940. Hearing Tr. at 12. The miner further testified that he worked for thirty six years for US Steel, starting out as a laborer, working his way up to work on the furnace, and ultimately getting transferred to the "oxygen furnace." *Id.* at 22. Additionally, when asked whether he was exposed to any dust, gas or fumes while working at US Steel, the miner answered, "Yes I was. A lot of silicate." *Id.* at 23.

Finally, the administrative law judge properly stated that the miner's hospitalization records from May 1988 do not even refer to pneumoconiosis, much less indicate that pneumoconiosis played any role in the miner's death, and that the records, therefore, do not support a finding that pneumoconiosis hastened the miner's death. Decision and Order at 10; Director's Exhibit 86. We affirm, therefore, the administrative law judge's finding that claimant failed to establish by a preponderance of the evidence that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2). See *Lukosevicz, supra*. We thus further affirm the denial of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

