

BRB No. 99-0629 BLA

LORENE DIXON)	
(Widow of HOBERT DIXON))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Donald S. Shire (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, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-0553) of Administrative Law Judge Joseph E. Kane 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).¹ The administrative law judge noted that

¹Claimant is Lorrene Dixon, the surviving spouse of the miner, Hobert Dixon, who died on September 29, 1996. The death certificate lists acute

claimant filed her claim on February 3, 1997, and that the district director determined that the miner had pneumoconiosis arising out of coal mine employment. The administrative law judge found, therefore, that the sole issue for resolution is whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). After consideration of the medical evidence of record, the administrative law judge found the evidence insufficient to establish entitlement to survivor's benefits. Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's weighing of the evidence under Section 718.205(c). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the decision.

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).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *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 Sixth Circuit, under whose jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). See *Brown, supra*.

respiratory failure as the immediate cause of death, with pneumonia and myelodysplastic syndrome as underlying causes of death. Director's Exhibit 7.

Claimant contends that the administrative law judge erred in determining that Drs. Perper, Huh, and Broudy unequivocally rejected pneumoconiosis as a contributing cause of death pursuant to Section 718.205(c)(2).² Claimant suggests that because these physicians did not explicitly exclude pneumoconiosis as a cause of death, the administrative law judge should have treated them as opinions supportive of claimant's burden under Section 718.205(c)(2). This contention is without merit. Claimant bears the burden of proffering evidence that *affirmatively* establishes that pneumoconiosis caused or contributed to the miner's death. See *Brown, supra*; *Neeley, supra*. Dr. Huh opined that the miner's bronchitis "appeared" to be a cause of death, and Dr. Perper stated that pneumoconiosis was an "unlikely" cause of death. Director's Exhibits 8, 11. Dr. Broudy did not offer an opinion as to the cause of death. Director's Exhibit 21. As none of the physicians affirmatively stated that pneumoconiosis caused or contributed to the miner's death, we hold that

²Dr. Broudy examined the miner on August 30, 1985, and opined that the miner suffered from lumbar disc disease and chronic bronchitis. Director's Exhibit 21. Dr. Broudy stated that he did not believe that the miner had pneumoconiosis and had the respiratory capacity to perform his usual coal mine employment. The miner's chronic bronchitis, in the opinion of Dr. Broudy, was due to the miner's cigarette smoking. At Dr. Broudy's deposition on April 10, 1986, Dr. Broudy was asked whether the miner's chronic bronchitis could partially be due to his work. Dr. Broudy stated that chronic bronchitis associated with coal dust exposure subsides after the exposure ceases, and that he knew that the miner had stopped working almost one year prior to his examination of the miner. Dr. Broudy stated that he would not totally exclude coal dust exposure as playing some role in the miner's chronic bronchitis. Director's Exhibit 21 at 22 - 23. Dr. Huh prepared an autopsy report in October and November 1996. His final anatomic diagnoses included active chronic bronchitis with abundant mucoid secretion, simple coal worker's pneumoconiosis, left pleural effusion and marked dehydration and emaciation. Dr. Huh stated that the exact cause of death could not be determined because the autopsy was limited to the lungs, but that the direct cause of death appeared to be respiratory failure, secondary to active chronic bronchitis with abundant mucoid secretions and congestion and hemorrhage along with resolving pneumonia. Director's Exhibit 8. Dr. Perper reviewed the autopsy report, death certificate and autopsy slides and stated that due to the slight and limited involvement of the lungs by the pneumoconiosis and associated centri-lobular emphysema, it was unlikely that pneumoconiosis was a substantial contributory cause of death. Dr. Perper further stated that the lack of sufficient clinical data, related radiological and laboratory findings prevented a final determination on the role of pneumoconiosis in the miner's death. Director's Exhibit 11.

the administrative law judge acted rationally in determining that these opinions are insufficient to meet claimant's burden under Section 718.205(c). See *Director, OWCP v. Greenwich Collieries* [Ondecko], 114 S.Ct. 2251, 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); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Claimant also contends that Dr. Broudy's deposition testimony, that coal dust exposure played a role in the miner's bronchitis, supports a finding of pneumoconiosis, which in conjunction with Dr. Huh's opinion, that chronic bronchitis played a role in the miner's death, establishes that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2). We disagree. The administrative law judge did not err in treating Dr. Broudy's opinion as insufficient to establish that pneumoconiosis, as defined in 20 C.F.R. §718.201, played a role in the miner's demise. Dr. Broudy first stated that the miner's chronic bronchitis was due to his cigarette smoking, but upon further questioning, stated that he would not totally exclude the miner's coal dust exposure as playing a role in the development of this condition. Director's Exhibit 21 at 19-23. The administrative law judge acted within his discretion in declining to treat Dr. Broudy's contradictory statements as supportive of claimant's burden under Section 718.205(c). Decision and Order at 14; see *Justice, supra*. Moreover, even if the administrative law judge credited Dr. Broudy's comments as a diagnosis of legal pneumoconiosis, Dr. Broudy's opinion is insufficient to establish that pneumoconiosis caused or contributed to the miner's death, as Dr. Broudy did not offer an opinion as to the cause of death and the administrative law judge rationally determined that Dr. Huh did not unequivocally identify chronic bronchitis as a cause of the miner's demise. Absent credible medical evidence affirmatively establishing that bronchitis caused or contributed to the miner's death, the administrative law judge could not reach the conclusion urged by claimant without substituting his own medical opinion for that of an expert; an action that the administrative law judge is proscribed from performing. See *Castle v. Eastern Associated Coal Corp.*, 12 BLR 1-105 (1988). We must affirm, therefore, the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.204(c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge