

BRB No. 00-0645 BLA

DONNA M. KLINE)
(O/B/O KIMBERLY A. HUNLOCK)
Disabled daughter of EDWARD HUNLOCK,)
the deceased miner))

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 Upon Remand of Ainsworth H. Brown,
Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Edward Waldman (Judith E. Kramer, Acting 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

Claimant appeals the Decision and Order Upon Remand (98-BLA-00144) denying benefits of Administrative Law Judge Ainsworth H. Brown on a 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 This is the second time this case is before us. Pursuant to

¹ The Department of Labor has 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

claimant's prior appeal to the Board, the Board acknowledged that the parties had agreed that the miner had twelve and one-half years of coal mine employment and pneumoconiosis arising out of coal mine employment.² The Board vacated the administrative law judge's finding that the evidence was insufficient to establish death due to pneumoconiosis, however, and remanded the case to the administrative law judge to consider whether the opinions of Drs. Jefferies and Tischler were sufficient to meet claimant's burden of establishing death due to pneumoconiosis. On remand, the administrative law judge concluded that the opinions of Drs. Jefferies and Tischler, as well as the opinion of Dr. Pilarek, were insufficient to establish that pneumoconiosis hastened the miner's death. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his weighing of the opinions of Drs. Jefferies, Tischler and Pilarek. Rather, claimant contends that these opinions were sufficient to establish death due to pneumoconiosis because they established that pneumoconiosis hastened the miner's death.³ The Director, Office of Workers'

² The miner, Edward Hunlock, filed two claims for benefits on July 12, 1984 and November 5, 1990. Director's Exhibit 23. Administrative Law Judge Ainsworth H. Brown awarded benefits in the miner's second claim. Director's Exhibit 21. The miner died January 18, 1997. Director's Exhibits 4, 5. Claimant is Donna M. Kline, sister of Kimberly A. Hunlock, the miner's disabled adult daughter. Claimant filed a claim on behalf of her sister on January 22, 1997. Director's Exhibit 1. The claim was denied and on appeal, the Board affirmed in part, vacated in part, and remanded the case to the administrative law judge for further consideration on November 30, 1999. *Kline v. Director, OWCP*, BRB No. 99-0132 BLA (November 30, 1999)(unpub.).

³ Claimant concedes that death due to pneumoconiosis was not established pursuant to Section 718.205(c)(1) and (c)(3)(2000). As these findings were not challenged on appeal and these sections remain the same under the amended regulations, we affirm the administrative

Compensation Programs, responds, urging affirmance of the denial of benefits.

law judge's findings. *Skrack v. island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which both claimant and the Director have responded.⁴ Based on the responses submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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'Keeffe 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 on a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the miner's death was due to, or substantially contributed to by pneumoconiosis. 20 C.F.R. §§718.1, 718.205, 718.201; *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 cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5). Moreover, the United States Court of Appeals for the Third Circuit, in whose jurisdiction this case arises, has held that any condition that actually hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205(c). *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3rd Cir. 1989).

Claimant contends that the opinions of Drs. Tischler and Jefferies are sufficiently documented and are therefore sufficient to establish that the miner's death was hastened by pneumoconiosis. Claimant also contends that Dr. Pilarek's opinion supports a finding that pneumoconiosis hastened the miner's death.

⁴ Claimant and the Director both asserted that the regulations at issue in the lawsuit do not affect the outcome of this case.

In a hospital discharge summary, Dr. Tischler diagnosed metastatic cancer of the liver, unknown source. Director's Exhibit 7. In the death certificate, Dr. Tischler listed the immediate cause of death as metastatic liver cancer, with arteriosclerotic heart disease, seizure disorder, chronic obstructive pulmonary disease and tuberculosis listed as other significant conditions. Director's Exhibit 4. In an amended death certificate, Dr. Tischler added anthracosilicosis as an other significant condition. Director's Exhibit 5. In a note dated April 11, 1997, Dr. Tischler opined that the cause of death was the development of cancer, with anthracosilicosis and associated lung disease contributing to and hastening death. Director's Exhibit 12. In a note dated June 4, 1997, Dr. Tischler opined that anthracosilicosis hastened and contributed to death by rendering the miner less capable of maintaining adequate oxygenation and ventilation during the progression of his cancer. Director's Exhibit 14. Dr. Jefferies opined that the miner died from a combination of emphysema and coal workers' pneumoconiosis and that death was hastened by the presence of pneumoconiosis. Claimant's Exhibit 1.

The administrative law judge found Dr. Tischler's subsequent notes stating that pneumoconiosis hastened the miner's death and amended death certificate listing anthracosilicosis as an other significant cause of death suspect, as Dr. Tischler failed to mention anthracosilicosis in the initial hospital discharge summary and death certificate and provided no explanation, support or documentation for the change in his opinion and inclusion of anthracosilicosis in the amended death certificate and two subsequent notes. This was rational. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 856 F.2d 916 (7th Cir. 1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, the administrative law judge found Dr. Tischler's subsequent opinion suspect inasmuch as Dr. Tischler admitted in his June 4, 1997 report that he only knew the miner during his final days in the Hospice Unit. Decision and Order Upon Remand at 2-3; Director's Exhibit 14. Likewise, the administrative law judge accorded little weight to the opinion of Dr. Jefferies, who had been treating the miner for renal failure due to prostate obstruction, inasmuch as he found that it was not adequately explained or documented, and was therefore conclusory, *i.e.*, there was no evidence indicating that Dr. Jefferies had reviewed the records from the miner's final hospitalization, Claimant's Exhibit 1; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark, supra*; *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In the instant case, the administrative law judge rationally concluded that the evidence of record was insufficient to establish death due to pneumoconiosis as the evidence showed that death was due to metastatic liver cancer and the evidence that the miner's pneumoconiosis hastened

his death was unreasoned. Consequently, we affirm the administrative law judge's denial in this survivor's claim as it is supported by substantial evidence and is in accordance with law.⁵ *Trumbo, supra; Lukosevicz, supra; Neeley, supra.* Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, entitlement to benefits in this survivor's claim is precluded. See *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP [Ondecko]*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

⁵ In its previous decision, the Board affirmed the administrative law judge's finding that Dr. Pilarek's opinion, that pneumoconiosis contributed to and hastened death, was insufficient to establish death due to pneumoconiosis as it was based on the erroneous assumption that the miner had lung cancer. Decision and Order at 3; Claimant's Exhibit 1. Claimant contends that there is evidence in the record to "support the possibility that Mr. Hunlock's cancer did spread to his right lung." Claimant's Brief at 3. The Board, however, will not depart from the law of the case as there has been no change in the underlying factual situation, there has been no intervening case law, and there is no evidence indicating that the first decision was erroneous. Based the evidence referred to by claimant, *i.e.*, the miner's final hospital records only suggest that lung cancer was a possibility, claimant has failed to show that the law of the case doctrine should not apply in this case. Accordingly, we will not reconsider the administrative law judge's finding concerning Dr. Pilarek's opinion. See *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge