

BRB No. 01-0733 BLA

GLADYS HARLAN)		
(Widow of RODNEY HARLAN))		
)		
Claimant-Petitioner)		
)		
v.)		
)		
BELLAIRE CORPORATION)		
)	DATE	ISSUED:
Employer-Respondent)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld, Schiller & Holmes) Pittsburgh, Pennsylvania, for claimant.

John C. Artz (Polito & Smock, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ the miner's widow, appeals the Decision and Order (2000-BLA-421) of Administrative Law Judge Michael P. Lesniak 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).² The administrative law judge found,

¹Claimant is Gladys Harlan, the miner's widow. The miner, Rodney Harlan died on August 27, 1997, and claimant filed her survivor's claim, the subject of the instant appeal, on January 14, 1999. Director's Exhibits 1, 6.

²The Department of Labor has amended the regulations implementing the Federal Coal

and employer conceded, the existence of pneumoconiosis, and the parties further stipulated to at least nineteen years of coal mine employment and that employer is the proper responsible operator. Decision and Order at 3-4; Hearing Transcript at 5-8. Considering entitlement in this survivor's claim pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the only issue to be resolved was whether the miner's death was due to pneumoconiosis. Decision and Order at 3. The administrative law judge, after reviewing all of the relevant evidence of record, concluded that claimant failed to establish either the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2001). Decision and Order at 4, 10-11. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to properly weigh the medical opinions which establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2001). Employer responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

³The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a) and 718.304 (2001) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5) (2001); *see also Lukosevicz 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 is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge rationally found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 (2001). *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Claimant argues that the administrative law judge erred in failing to find the opinions of Drs. Baysal and Green sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2001). Claimant's Brief at 6, 8-10. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Claimant initially contends that, in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 (2001), the administrative law judge failed to properly consider the opinion of Dr. Baysal, the miner's treating physician. Claimant's Brief at 9. Contrary to claimant's contention, an

⁴This 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 31, 32.

administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, claimant's reliance upon 20 C.F.R. §718.104(d) (2001) is misplaced in this instance. Although an administrative law judge may give a treating physician's opinion controlling weight, the weight that is to be given to the treating physician must also be based on the credibility of the physician's opinion in light of its reasoning and documentation. *See* 20 C.F.R. §718.104(d)(5) (2001); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo, supra*; *Clark, supra*. In the instant case, the administrative law judge properly determined that the treating physician's opinion was insufficient to meet claimant's burden of proof. *Piccin, supra*. Dr. Baysal opined that the miner suffered from pneumoconiosis, but did not offer any opinion concerning the effect of pneumoconiosis on the miner's death. Director's Exhibits 11, 25. The administrative law judge, noting that the physician had treated the miner for a long period of time, rationally found that the opinion of Dr. Baysal failed to carry claimant's burden of proof as the physician did not opine that pneumoconiosis, or any other dust related condition, played a role in the miner's death. *See* 20 C.F.R. §718.205 (2001); Decision and Order at 10; Director's Exhibits 11, 25; *Lukosevicz, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*. We therefore affirm the administrative law judge's determination that the opinion of Dr. Baysal is insufficient to establish that the miner's death was due to pneumoconiosis.

Claimant further contends that the administrative law judge erred in his weighing of Dr. Green's medical opinion. Claimant's Brief at 6-8. We disagree. The administrative law judge properly considered the entirety of the medical opinion evidence of record and rationally concluded that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis. *Kuchwara, supra*; *Piccin, supra*; Decision and Order at 5-11. The relevant evidence of record concerning the cause of death consists of four medical opinions and the death certificate.⁵ Dr. Baysal, who was the miner's treating physician, did not offer an opinion as to whether the miner's death was due to pneumoconiosis. Director's

⁵The administrative law judge also properly noted that the record contains the discharge summaries from the Reynolds Memorial Hospital, which did not address the cause of death, and the Ohio Valley Medical Center, which indicate that the miner's death was due to carcinoma of the lung with metastases and congestive heart failure. Decision and Order at 5-6, 10; Director's Exhibits 7, 11.

Exhibits 11, 25. Dr. Oesterling, a reviewing pathologist, opined that the miner died of cancer of the liver and that the miner's pneumoconiosis did not contribute to or hasten the miner's death. Employer's Exhibit 1. Dr. Fino, a reviewing pulmonologist, stated that the miner died due to liver cancer, unrelated to coal dust exposure, and opined that the miner would have died as and when he did even if he had never set foot in the coal mines. Employer's Exhibit 2. Dr. Green, a reviewing pathologist, opined that pneumoconiosis was a factor that contributed to the miner's respiratory failure and was therefore a significant contributing factor to his death. Claimant's Exhibit 1. The death certificate, based upon the certification of Dr. Sushil K. Mehrota who treated the miner immediately prior to his death, listed the cause of death as "Carcinoma Liver." Director's Exhibit 6. The administrative law judge, in the instant case, properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205 (2001) as the administrative law judge permissibly determined that the opinion of Dr. Green, that the miner's pneumoconiosis was a significant contributing factor to his death, was outweighed by the preponderance of the contrary evidence of record. *See Clark, supra; Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Perry, supra; King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel, supra; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 10; Director's Exhibits 6, 7, 11, 25; Employer's Exhibits 1, 2; Claimant's Exhibit 1. The administrative law judge rationally accorded less weight to the opinion of Dr. Green as he is the only physician to opine that the miner suffered a respiratory death and the great weight of the medical evidence indicates that the miner died from liver cancer. *See Lafferty, supra; Clark, supra; Dillon, supra; Perry, supra; Lucostic, supra; Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara, supra; Piccin, supra*; Decision and Order at 10; Director's Exhibits 6, 7, 11, 25; Employer's Exhibits 1, 2; Claimant's Exhibit 1. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with respect to the weighing of the medical opinion evidence, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Trumbo, supra; Haduck, supra; Boyd, supra; Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found the evidence indicating that the miner's death was due to pneumoconiosis outweighed by the contrary evidence of record, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo, supra; Haduck, supra; Boyd, supra*. 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, supra*;

Worley v. Blue Diamond Coal Co., 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 (2001) as it is supported by substantial evidence and is in accordance with law. *See Lukosevicz, supra; Neeley, supra; Trumbo, supra.*

Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Lukosevicz, supra; Trumbo, supra; Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Accordingly, the administrative law judge's Decision and Order denying benefits in this survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge