

BRB No. 07-0495 BLA

N.P.	)	
(Widow of J.P.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/28/2008
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (06-BLA-5470) of Administrative Law Judge Paul H. Teitler rendered 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). The miner died on March 14, 2004, and claimant filed her claim for survivor's benefits on August 17, 2004. Director's Exhibits 2, 4. The administrative law judge credited the miner with thirty years of coal mine employment.<sup>1</sup> The administrative law judge found that claimant established that the

---

<sup>1</sup> The record indicates that the miner's coal mine employment occurred in Pennsylvania. Miner's Claim, Director's Exhibit 10-2. Accordingly, this case arises

miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), as stipulated by the parties. The administrative law judge further found that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1)-(3). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the evidence at Section 718.205(c)(1),(2).<sup>2</sup> The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge's denial of benefits is supported by substantial evidence. Director's Brief at 5-7. Thus, the Director states that any error in the administrative law judge's consideration of evidence from the miner's claim without regard to the evidentiary limitations applicable to the survivor's claim pursuant to 20 C.F.R. §725.414 was harmless.<sup>3</sup> Director's Brief at 6 n.4.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202, 718.203, 718.205(a)(1)-(3); *Trumbo v.*

---

within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

<sup>2</sup> We affirm the administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.203(b), and 718.205(c)(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>3</sup> The miner did not receive lifetime disability benefits. The miner first filed a claim on November 6, 1978, but withdrew it on September 12, 1980. His next two claims, filed on July 3, 1984, and December 19, 1988, were both finally denied because the miner did not establish that he was totally disabled by a respiratory or pulmonary impairment. The miner filed a fourth claim on November 13, 2000, but it was withdrawn by an order dated June 14, 2001. The medical evidence associated with the miner's claims is contained in the file, but was not designated as evidence by any party in the survivor's claim, to which the evidentiary limitations of 20 C.F.R. §725.414 apply. *See* 20 C.F.R. §725.2(c); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007)(*en banc*).

*Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989). Failure to establish any one of these elements precludes entitlement. See 20 C.F.R. §718.205(a)(1)-(3); *Trumbo*, 17 BLR at 1-87.

As summarized by the administrative law judge, the record reflects that on March 9, 2004, the miner presented at the emergency room of Good Samaritan Regional Medical Center in Pottsville, Pennsylvania, with fever, cough, and shortness of breath. Director's Exhibit 6. The attending physician, Dr. Rashid, noted that the miner was admitted to the hospital from his nursing home with shortness of breath, pneumonia, diabetes, hypertension, dementia, and anemia. *Id.* Antibiotics were started and the miner's breathing improved. *Id.* By March 10, 2004, the miner was more alert and seemed to have improved. *Id.* However, four days later, the miner became lethargic and was in acute renal failure. *Id.* Dr. Rashid reported that the miner's condition deteriorated rapidly, and that the miner died in the hospital on March 14, 2004. *Id.*

Dr. Rashid completed the miner's death certificate and listed the causes of death as pneumonia, hypertension, dementia, anemia, and renal failure. Director's Exhibits 4, 7. No other causes or conditions were listed.

Additionally, the administrative law judge considered the opinions of Drs. Kraynak, Sherman, and Simelaro. Dr. Kraynak rendered a report on February 1, 2005, wherein he stated that the miner's weakened pulmonary system from coal workers' pneumoconiosis made him more susceptible to develop pneumonia and die. Director's Exhibit 5. On July 14, 2006, Dr. Kraynak testified by deposition that pneumoconiosis hastened the miner's death due to pneumonia by compromising his pulmonary system. Claimant's Exhibit 1 at 9-10.

Dr. Sherman prepared medical reports at the request of the district director, who initially informed Dr. Sherman that the miner was receiving benefits for total disability due to pneumoconiosis at the time of his death. In a report dated March 10, 2005, Dr. Sherman opined that pneumoconiosis hastened the miner's death from pneumonia and sepsis with renal failure because, assuming that the miner had a disabling pulmonary impairment due to pneumoconiosis, pneumonia would have caused further impairment to his already compromised pulmonary function. Director's Exhibit 7. Subsequently, however, the district director informed Dr. Sherman that the miner had not been receiving benefits, because he had never established that he was totally disabled. In a report dated

August 26, 2005, Dr. Sherman revised his opinion, and stated that there was no evidence to support a conclusion that the miner's pneumoconiosis contributed to, hastened, or caused his death. *Id.*

Dr. Simelaro rendered a report dated July 28, 2006, after reviewing evidence from both the miner's and survivor's claims. Claimant's Exhibit 2. Dr. Simelaro concluded that the miner's lifetime pulmonary function studies showed a pattern of worsening obstruction due to pneumoconiosis, starting in 1980 and continuing up until the most recent study that Dr. Simelaro reviewed, in January of 2001. Claimant's Exhibit 2 at 3-4. Dr. Simelaro concluded that while the miner's blood gas studies were normal back in 1980, the blood gas studies showed hypoxemia by 1984, hypoxia in 1991, and hypoxemia again in January 2001. *Id.* Dr. Simelaro reasoned that the miner's pneumonia increased the obstruction and hypoxemia due to pneumoconiosis shown by the lifetime pulmonary function study and blood gas study results, and concluded that the miner would have had a better chance of survival if he had not had pneumoconiosis. Claimant's Exhibit 2 at 4. Dr. Simelaro further opined that the miner's anthracosilicosis "may even have" directly caused the miner's death. Claimant's Exhibit 2 at 5.

In a report dated August 25, 2006, Dr. Sherman reviewed and critiqued Dr. Simelaro's report. Director's Exhibit 16. Dr. Sherman reviewed the pulmonary function studies performed from 1989 to 1995, noting that although these tests showed abnormal values, their validity had been questioned by reviewing physicians. *Id.* Dr. Sherman also reviewed the results of a March 2001 pulmonary function study. Because the March 2001 pulmonary function study was non-qualifying,<sup>4</sup> Dr. Sherman reasoned that the improvement in lung function in March 2001, assuming that the earlier pulmonary function studies between 1989 and 1995 were valid, indicated that a different disease, such as asthma, not pneumoconiosis, had been causing the miner's impairment. *Id.*

On September 18, 2006, Dr. Simelaro responded that blood gas study results are more definitive regarding lung function, and noted that the miner's lifetime blood gas study results from 1980 to January 2001 showed hypoxemia. Claimant's Exhibit 3. Dr. Simelaro therefore concluded that the miner had a respiratory problem due to anthracosilicosis, also taking into account the miner's lifetime chest x-rays and pulmonary function study results. Claimant's Exhibit 3.

Pursuant to Section 718.205(c)(1), the administrative law judge found that the evidence did not establish that pneumoconiosis was the cause of death. The

---

<sup>4</sup> A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

administrative law judge noted that the death certificate, which listed the causes of death as pneumonia, hypertension, dementia, anemia, and renal failure, was consistent with the records from the miner's last hospitalization. The administrative law judge found that Dr. Simelaro's opinion that pneumoconiosis "may" have directly caused the miner's death was equivocal and not supported by the evidence. Decision and Order at 5-6. The administrative law judge accorded greater weight to Dr. Sherman's opinion that the cause of death was pneumonia and sepsis with renal failure, because it was consistent with the hospital records and the death certificate. Decision and Order at 6.

Claimant argues that the administrative law judge erred in relying on the death certificate, and improperly credited Dr. Sherman's opinion over that of Dr. Simelaro. Claimant's Brief at 14, 20, 23. Claimant's arguments lack merit.

Contrary to claimant's contention, the administrative law judge permissibly relied on the death certificate, because it was completed by the miner's attending physician and was consistent with the miner's last hospitalization records. *See Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Moreover, the administrative law judge reasonably found equivocal Dr. Simelaro's opinion that pneumoconiosis "may even have" caused the miner's death. *Soubik v. Director, OWCP*, 366 F.3d 226, 234 n.12, 23 BLR 2-82, 2-98 n.12 (3d Cir. 2004). We, therefore, affirm the administrative law judge's finding at Section 718.205(c)(1).

Regarding whether pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2), (5), the administrative law judge considered Dr. Kraynak's opinion in light of his status as the miner's treating physician. *See* 20 C.F.R. §718.104(d). Decision and Order at 6. Contrary to claimant's contention that the administrative law judge failed to accord proper weight to Dr. Kraynak's opinion, the administrative law judge reasonably declined to accord determinative weight to Dr. Kraynak's opinion as that of the treating doctor, because there was no evidence that Dr. Kraynak was treating the miner at the time of his death, no evidence that Dr. Kraynak treated the miner after September 8, 1995, and no evidence that Dr. Kraynak treated the miner for his heart problems. *See* 20 C.F.R. §718.104(d)(2), (4); *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997). Additionally, the administrative law judge acted within his discretion when he found that Dr. Kraynak's opinion was conclusory, and was not based on any particular findings on physical examination or objective or medical studies. *See Lango*, 104 F.3d at 577, 21 BLR at 2-20. As substantial evidence supports the administrative law judge's permissible credibility determinations, we reject claimant's allegations of error.

Additionally, the administrative law judge found that Dr. Simelaro's opinion that pneumoconiosis hastened the miner's death was not as well-reasoned or supported as was the contrary opinion of Dr. Sherman, because Dr. Simelaro relied on a deterioration in the

results of the lifetime pulmonary function studies, many of which were invalid, when Dr. Sherman reported that the results actually improved as of the March 2001 pulmonary function study. Decision and Order at 7. The administrative law judge further found that Dr. Simelaro's opinion did not establish that the miner had a pulmonary impairment due to pneumoconiosis, because Dr. Simelaro had relied on incomplete results of the miner's blood gas studies. *Id.*

Claimant argues that the administrative law judge erred in discounting Dr. Simelaro's opinion and in crediting Dr. Sherman's opinion, when Dr. Sherman relied on the March 2001 pulmonary function study, which predated the miner's death, to conclude that pneumoconiosis did not hasten the miner's death. Claimant's Brief at 21-22. We disagree. As the Director notes, both Drs. Simelaro and Sherman reviewed medical evidence predating the miner's death. Thus, even if claimant is correct that Dr. Sherman should not have relied on medical evidence predating the miner's death, claimant's own opinion from Dr. Simelaro would suffer from the same defect.

Upon review, we conclude that substantial evidence supports the administrative law judge's decision to accord less weight to Dr. Simelaro's opinion. The administrative law judge permissibly found that Dr. Simelaro's opinion that pneumoconiosis hastened the miner's death was not as well-reasoned or supported as was Dr. Sherman's opinion, and substantial evidence supports this finding. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Specifically, the administrative law judge found that although Dr. Simelaro relied on a deterioration in the results of the miner's pulmonary function studies, many of which were invalid, Dr. Sherman reported that the miner's function had improved as of the March 2001 pulmonary function study, a factor that Dr. Simelaro did not adequately address. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Moreover, the administrative law judge acted within his discretion to find that Dr. Simelaro had conducted an incomplete analysis of the miner's blood gas studies. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

Further, as the Director argues, Dr. Simelaro cited no documentation of the miner's condition at the time of his death to support the physician's conclusion that the miner's pneumoconiosis hastened his death, and the lifetime studies predating the miner's death by at least three years are, at best, of questionable support for the physician's conclusion. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 210, 22 BLR 2-467, 2-480 (3d Cir. 2002); Director's Brief at 6. Because it is claimant's burden to establish that the miner's death was due to pneumoconiosis, and substantial evidence supports the administrative law judge's decision to discount the opinions of Drs. Kraynak and Simelaro, we affirm the administrative law judge's finding that claimant did not establish

that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2).<sup>5</sup> *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

Because claimant did not establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to Section 718.205(c), an essential element of entitlement in a survivor's claim, we affirm the denial of benefits.

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

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge

---

<sup>5</sup> Based on our disposition of this appeal, we agree with the Director that any error in the administrative law judge's consideration of evidence from the miner's claim without regard to the evidentiary limitations at Section 725.414 was harmless in this specific case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).