

BRB No. 97-1103 BLA

BETTY R. WISEMAN)	
(Widow of FLOYD WISEMAN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
B & D COAL COMPANY)	DATE ISSUED: _____
)	
and)	
)	
OHIO BUREAU of WORKERS')	
COMPENSATION)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Donald W. Mosser,
Administrative Law Judge, United States Department of Labor.

Rita S. Fuchsman, Chillicothe, Ohio, for claimant.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (96-BLA-1615) of Administrative Law Judge Donald W. Mosser 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). This claim, filed in August 1995, was properly

¹Claimant is the surviving spouse of the deceased miner, Floyd Wiseman, who died on August 3, 1995. Director's Exhibit 2.

adjudicated pursuant to the permanent regulations at 20 C.F.R. Part 718.² After noting that a miner's claim had been filed and awarded, the administrative law judge turned his consideration to the issue of whether the evidence of record established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge found that the evidence failed to establish that the miner's death was either caused or hastened by pneumoconiosis, and accordingly denied benefits. Claimant appeals, arguing that the administrative law judge erred in weighing the medical opinion evidence. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, has not filed a brief 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 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 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17

²The relevant procedural history of this case is as follows: Claimant filed her claim for Black Lung survivor's benefits with the Department of Labor in August 1995. Director's Exhibit 1. The claim was denied by the district director on October 20, 1995, January 10, 1996, and July 29, 1996. Director's Exhibits 13, 15, 20. On August 2, 1996, claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 21. Pursuant to a request by the parties, Administrative Law Judge Donald W. Mosser cancelled the scheduled hearing on the claim, and issued an order announcing that the case would be decided on the record. Decision and Order at 2; Order of Continuance, dated January 14, 1997. Judge Mosser issued his decision on April 18, 1997.

³The administrative law judge's findings regarding the miner's years of coal mine employment, as well as his findings under 20 C.F.R. §718.205(c)(1) and (c)(3), are unchallenged on appeal, and are hereby affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under 20 C.F.R. §718.205(c), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held in *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993), that pneumoconiosis will be found to be a substantially contributing cause or factor in the miner's death where it is found to have actually hastened death.

Under Section 718.205(c)(2), the administrative law judge discussed all of the medical opinions in the record relevant to the miner's death. Decision and Order at 3-6. The administrative law judge noted that the opinions of Dr. Harder, who treated the miner in connection with a brain injury, and Dr. Walker, the miner's treating physician, as well as the death certificate, did not support a finding that the miner's death was hastened by pneumoconiosis. Decision and Order at 6. Initially, claimant argues that the administrative law judge erred in selectively analyzing Dr. Walker's two opinions. Claimant contends that the administrative law judge irrationally relied on one line in the doctor's second opinion, although that opinion did not repudiate the first opinion. We disagree. The administrative law judge rationally interpreted Dr. Walker's statement in his second opinion, that "it would appear that a cardiac arrest was the cause of his demise," to supersede his statement from his initial opinion that the miner's coal mine employment "contributed to his lung disease and finally his death." See *O'Keeffe, supra*; *Peabody Coal Co. v. Benefits Review Board [Wells]*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977); Decision and Order at 4; Compare Director's Exhibit 14 with Director's Exhibit 16. It is the responsibility of the administrative law judge to assess and weigh the evidence of record. See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); see also *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1988). Claimant's argument amounts to little more than a request that the Board re-weigh the evidence of record, a task we may not perform. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Claimant's first assignment of error is therefore rejected.

Next, claimant argues, citing the opinion of the United States Court of Appeals for the Sixth Circuit in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), that the administrative law judge erred in failing to credit Dr. Walker's opinion as the treating physician. Additionally, claimant contends that the administrative law judge's statement, that Dr. Appleton's opinion⁴ was the only one supportive of her burden of proof, is inaccurate in light of the existence of Dr. Walker's opinion in the record. Claimant's

⁴The administrative law judge gave no weight to Dr. Appleton's opinion that the miner's pneumoconiosis contributed to his death because Dr. Appleton admitted that his report was not well documented and that he was not familiar with the miner's history, having treated him on only "one short occasion." Decision and Order at 6; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985).

arguments are rejected, as we have affirmed the administrative law judge's finding that Dr. Walker's opinion does not support a finding that the miner's death was caused or hastened by his pneumoconiosis. See *discussion supra* at 3. Accordingly, we affirm the administrative law judge's weighing of Dr. Walker's opinion.

Finally, claimant argues that the administrative law judge erred in crediting the opinion of Dr. Wilkinson, the signatory on the death certificate, because there is no evidence that he was familiar with Dr. Walker's opinion or the miner's condition. Claimant's contention does not provide a basis to vacate the administrative law judge's finding. Inasmuch as the death certificate does not support claimant's position, her argument is moot because even if it were excluded from the administrative law judge's consideration, it would not assist claimant in meeting her burden of proof. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 117 S.Ct. 2251, 18 BLR 2A-1 (1994); *Kuchwara, supra*; cf. *Bibbs v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984). Claimant's final assignment of error is therefore rejected, and we hold that substantial evidence supports the administrative law judge's finding that the evidence of record fails to establish that pneumoconiosis caused or hastened the miner's death under Section 718.205(c)(2). See *Brown, supra*.

We therefore affirm the administrative law judge's finding that the evidence of record fails to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c), and consequently affirm his denial of benefits on this survivor's claim. See *Trumbo, supra*; *Neeley, supra*; see also *Brown, supra*.

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

REGINA C. McGRANERY
Administrative Appeals Judge

