

BRB No. 99-0129 BLA

ANNA WITTIC)	
(Widow of WALTER WITTIC, Sr.))	
)	
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 Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Richard A. Seid (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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (97-BLA-1160) of Administrative Law Judge Ainsworth H. Brown (the administrative law judge) 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 administrative law judge properly considered the instant survivor’s claim, filed on November 17, 1996, pursuant to the permanent regulations at 20 C.F.R. Part 718. After noting that the miner had been credited with ten and one-half years of coal

¹Claimant is the surviving spouse of the miner, who died on October 15, 1996. Director’s Exhibit 2. The miner’s death certificate, signed by Dr. Zasik, indicated that the immediate cause of the miner’s death was pneumonia, which was due to or as a consequence of acute leukemia and myelodysplasia. *Id.* Coal workers’ pneumoconiosis was listed as an “other significant condition contributing to death.” *Id.*

mine employment in 1995 by Administrative Law Judge Frank D. Marden, when Judge Marden awarded benefits in a living miner's claim, the administrative law judge stated that the only contested issue in the instant survivor's claim is whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).² The administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that pneumoconiosis was a substantially contributing factor in the miner's death pursuant to Section 718.205(c)(2). The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's decision denying benefits.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis or where complicated pneumoconiosis is established. See 20 C.F.R. §§718.1, 718.203, 718.205(c)(1)-(3); *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 Third Circuit, within whose jurisdiction the instant case arises, has held that, for purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death "where pneumoconiosis actually hastens death." *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

²The miner filed a claim for benefits on July 5, 1984, which the district director finally denied on October 4, 1984. Director's Exhibit 10. The miner took no further action in pursuit of benefits until filing a second claim on February 16, 1993. *Id.* In a Decision and Order dated March 9, 1995, Administrative Law Judge Frank D. Marden found that the miner established all of the requisite elements of entitlement in the living miner's claim pursuant to 20 C.F.R. Part 718, and, consequently, awarded benefits. *Id.* The Director, Office of Workers' Compensation Programs, did not appeal the award of benefits.

On appeal, claimant contends that the administrative law judge improperly credited Dr. Spagnolo's medical opinion over the medical opinions of Drs. Kraynak and Simelaro in finding that the preponderance of the evidence was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c)(2). Dr. Spagnolo opined that the miner died as a result of his acute leukemia, which has a very high mortality rate, and its complications. Dr. Spagnolo opined that the miner's death was not significantly related to or hastened in any way by pneumoconiosis.³ Director's Exhibits 6, 12. Dr. Kraynak indicated that the miner died from pneumonia, acute leukemia and myelodysplasia, but in contrast to Dr. Spagnolo, opined that pneumoconiosis was clearly a "substantial contributing factor" in the miner's death because the miner would have been able to fight off his other diseases absent pneumoconiosis. Director's Exhibits 4, 5; Claimant's Exhibits 1, 5, 6. Dr. Simelaro stated that while the miner concomitantly suffered from acute leukemia and myelodysplasia, the miner died from pneumonia which he "was prone to develop from his immunosuppressive state of leukemia and chronic bronchitis, which was a direct result of his coal mining inhalation." Claimant's Exhibits 3, 6. In discounting the opinions of Drs. Kraynak and Simelaro, the administrative law judge essentially determined that Drs. Kraynak and Simelaro failed to explain adequately their shared conclusion that pneumoconiosis was a contributing factor in the miner's death.

Claimant contends that it was improper for the administrative law judge to discount Dr. Kraynak's opinion without discussing Dr. Kraynak's status as the miner's treating physician. We agree. An administrative law judge has great leeway in evaluating the record evidence; nonetheless, he may not reject evidence without adequate explanation. *See McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Brewster v. Director, OWCP*, 7 BLR 1-120 (1984); *Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1983). As claimant contends, the administrative law judge did not consider that Dr. Kraynak was the miner's treating physician for more than two years leading up to the time of the miner's death, a factor which, although not necessarily dispositive, bears on the credibility of medical opinions and should be considered by the administrative law judge.⁴ The administrative law judge's reference to the fact that Dr. Kraynak is not Board-certified in internal medicine or pulmonary diseases, whereas Drs. Simelaro and Spagnolo are Board-certified in both specialties, Decision and Order at 5, does not render harmless the administrative law judge's failure

³In his report dated March 27, 1997, Dr. Spagnolo indicated that the miner's death "was not significantly related to or substantially hastened by the presence of pneumoconiosis nor was a pneumoconiosis a substantial contributing factor in his death." Director's Exhibit 6. In a letter dated December 16, 1997, Dr. Spagnolo stated that the miner's death "was directly related to [the miner's] acute leukemia and his death was not related to or hastened in any way by a pneumoconiosis." Director's Exhibit 12. Dr. Spagnolo further stated that acute leukemia "has a very high short term mortality and is in marked contrast to chronic leukemia." *Id.*

⁴In his report dated February 4, 1994, Dr. Kraynak indicated that the miner had been under his care since January 24, 1994, and in a letter dated July 15, 1998, Dr. Kraynak indicated that he last saw the miner on June 19, 1996, approximately four months prior to the miner's death in October 1996. Director's Exhibit 5; Claimant's Exhibit 6.

to consider this factor. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-14 (3d Cir. 1997); *Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978).

Claimant further argues that the administrative law judge mischaracterized the opinions of Drs. Kraynak and Simelaro in finding them unpersuasive because “Dr. Spagnolo’s report clearly shows that an acute leukemia carries a very poor prognosis for much longevity and neither Dr. Kraynak or [sic] Dr. Simelaro discuss the nature of the condition that was the direct cause of death,” *i.e.*, the miner’s acute leukemia. Decision and Order at 5; Director’s Exhibit 12. As claimant notes, Drs. Kraynak and Simelaro both indicated that the miner suffered from acute leukemia and that the condition was a significant cause of the miner’s death. Claimant’s Exhibits 1, 3, 5, 6. The administrative law judge thus incorrectly discounted the opinions of the two physicians on the basis that they did not comment on the miner’s leukemia. Furthermore, claimant persuasively argues that the administrative law judge irrationally discounted Dr. Simelaro’s opinion on the basis that Dr. Simelaro does not disagree with Dr. Spagnolo that the miner’s acute leukemia was the direct cause of death. Decision and Order at 5. The administrative law judge did not adequately explain how that aspect of Dr. Simelaro’s opinion necessarily detracted from Dr. Simelaro’s opinion with regard to the role pneumoconiosis played in the miner’s death. In addition, we agree with claimant that the administrative law judge improperly discounted the opinions of Drs. Kraynak and Simelaro without accounting for the fact that Dr. Spagnolo reviewed only a portion of the medical evidence of record, while Drs. Kraynak and Simelaro reviewed all of the medical evidence of record. Director’s Exhibits 5, 6, 12; Claimant’s Exhibits 1, 3, 5. Moreover, in referencing the “terrible effects of the fatal disease [of leukemia],” and in failing to provide an adequate explanation for crediting Dr. Spagnolo’s opinion that pneumoconiosis did not contribute in any way to the miner’s death over the contrary opinions of Drs. Kraynak and Simelaro, the administrative law judge appears to have effectively improperly substituted his opinion for that of Drs. Kraynak and Simelaro. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order at 5; Employer’s Exhibit 2. We, therefore, vacate the administrative law judge’s findings with regard to the opinions of Drs. Spagnolo, Kraynak and Simelaro under Section 718.205(c)(2), and remand the case for the administrative law judge to reweigh the opinions upon considering all of the relevant factors bearing on the credibility of these opinions.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge