

BRB No. 00-0884 BLA

NELLIE MAE WELCH )  
(Widow of HERMAN WELCH) )  
 )  
 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 Denying Benefits of John C. Holmes,  
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Rita Roppolo (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 the Director, Office of  
Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order Denying Benefits (99-  
BLA-173) of Administrative Law Judge John C. Holmes 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).<sup>1</sup> Applying the regulations found at 20 C.F.R. Part

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<sup>1</sup> 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.

718, the administrative law judge found that claimant established ten years and two and one-half months of coal mine employment but failed to establish the presence of pneumoconiosis or death due to pneumoconiosis.<sup>2</sup> Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing to find the presence of pneumoconiosis and that death was due to pneumoconiosis. The Director, Office of Workers' Compensation Appeals, responds, urging affirmance of the administrative law judge's Decision and Order.

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 9, 2001, to which the parties have responded.<sup>3</sup> Based on the responses of the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will

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<sup>2</sup> The administrative law judge further noted that the miner had filed a claim for benefits on November 13, 1981, which was denied on November 9, 1982, Director's Exhibit 20, that the miner died on September 27, 1997, and claimant subsequently filed a claim for survivor's benefits on October 1, 1997, Director's Exhibits 1, 8, and that as the miner took no further action on his denied claim, the only claim before the administrative law judge was that of the survivor. Decision and Order at 1.

<sup>3</sup> The Director in a brief dated March 26, 2001, asserts that the regulations at issue in the lawsuit did not affect the outcome of this case. In a brief received April 16, 2001, claimant contends that the Board should render a decision on the merits in this claim inasmuch as the amended regulations are merely a codification of currently existing case law.

proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, rational and 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).

To establish entitlement to survivor's benefits, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death; pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis; or the presumption set forth at Section 718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5).

After consideration of the Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence, contains no reversible error, and therefore, it is affirmed. Reviewing the evidence of record, the administrative law judge found that Dr. Porter was the only physician of record to conclude that the miner suffered from pneumoconiosis which contributed to his death. *See* Director's Exhibit 17. In addition, the administrative law judge noted that Dr. Porter signed the death certificate, which listed the cause of death as sepsis, pneumonia, and urinary tract infection, with pneumoconiosis and clostridium difficile as other significant conditions. Director's Exhibit 8. On the other hand, the administrative law judge noted that Dr. Spagnolo found that the miner did not suffer from pneumoconiosis, and that death "was unrelated to and not hastened, even briefly, by pneumoconiosis nor was pneumoconiosis a contributing factor in [the miner's] death." Director's Exhibit 23. Weighing the evidence, the administrative law judge permissibly credited the opinion of Dr. Spagnolo over the opinion of Dr. Porter, on the basis of his superior credentials and his better reasoned opinion. This was proper. Decision and Order at 9; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Kirk, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 114 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 382, 385 (1983). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis and affirm the denial of benefits on the survivor's claim. 20 C.F.R. §718.205(c); *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR 2- (4th Cir. 2000); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Kirk v. Director, OWCP*, 86 F.3d 1151, 20 BLR 2-276 (4th Cir. 1996); *Shuff v. Cedar Coal Co.*,

967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert denied*, 506 U.S. 1050 (1993). Because we affirm the denial of benefits on this basis, we need not address claimant's contentions pursuant to Section 718.202(a).

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge