

BRB No. 01-0593 BLA

SHIRLEY A. KINNEY)	
(Widow of PATRICK KINNEY))	
)	
Claimant-Respondent)	
v.)	
)	
INLAND STEEL COMPANY)	DATE ISSUED:
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Eugene Scalia, Solicitor of Labor; Donald S. Shire, 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: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order (2000-BLA-0124) of Administrative Law Judge Richard A. Morgan awarding 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).¹ After accepting the parties' stipulation to at least eighteen years of coal mine employment and to the existence of pneumoconiosis arising out of coal mine employment, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2001).² Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established that pneumoconiosis was a contributing cause of the miner's death. In response, claimant argues that the administrative law judge's award of survivor's benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, did not file a brief on the merits of this appeal.³

¹Claimant, Shirley A. Kinney, is the surviving spouse of the miner Patrick Kinney, who died on October 24, 1994. Director's Exhibit 10. Claimant filed her claim for survivor's benefits on May 20, 1999. Director's Exhibit 1.

²The 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 at 20 C.F.R. Parts 718, 722, 725, and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

³We affirm the administrative law judge's findings with respect to the length of the miner's coal mine employment and the existence of pneumoconiosis arising out

of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203 (2000), as these findings have not been challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The administrative law judge correctly noted that the requirements of Section 718.205(c) are satisfied if claimant proves that pneumoconiosis hastened the miner's death. Decision and Order at 11; see 20 C.F.R. §718.205(c)(5); see also *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).⁴

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's last coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibits 2, 4. Employer's suggestion that the administrative law judge erred by referring to *Northern Coal Co. v. Director, OWCP* [Pickup], 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996), has no merit. The administrative law judge identified and applied the standard enunciated in 20 C.F.R. §718.205(c) and *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Decision and Order at 11.

Employer argues the administrative law judge’s credibility findings regarding the medical opinions in which Drs. Mendelow, Cagle, Bush, Naeye, Kane and Griffin excluded pneumoconiosis as a contributing cause of death, do not conform to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). We disagree. In determining the weight to be assigned to a particular medical opinion, the administrative law judge must specifically determine if the opinions of record are reasoned and documented and therefore credible.⁵ See *Trumbo, supra*. In the instant case, the administrative law judge acknowledged the opinions of the well-qualified, reviewing pathologists and stated that:

the degree of pneumoconiosis they found on slide review, coupled with the lack of evidence of lifetime pulmonary problems at least up until shortly before death, led them to believe that pneumoconiosis was not a substantial contributor to death.

⁵The death certificate indicates that the miner’s immediate cause of death was “metastatic synovial sarcoma of lung,” with “coal workers pneumoconiosis” listed as an other significant condition. Director’s Exhibit 10. The administrative law judge noted that the death certificate, completed by Dr. Thomas Owens, does not refer to the autopsy.

Decision and Order at 11. The administrative law judge further stated that some of the physicians of record also found that the miner “would have died as and when he did had he not had simple pneumoconiosis.” *Id.* The administrative law judge determined that these opinions were entitled to little weight because they consisted of “conjecture based on what these doctors find to be statistical probability.”⁶ *Id.* Reading these words in the context of the entire decision, it is clear that the administrative law judge found that the opinions of these doctors, that pneumoconiosis was not a substantial contributor to death, reflected the doctors’ understanding of the degree of pulmonary impairment which they would normally associate with the degree of pneumoconiosis found in claimant, without regard to either claimant’s rapidly declining lung condition immediately prior to death or the specific issue, whether pneumoconiosis hastened death. Decision and Order at 11. In contrast to the other doctors, Dr. Yerger focused on claimant’s condition immediately prior to death. He testified that the miner’s breathlessness induced cardio-respiratory arrest which was the mechanism of death. Tr. 12. The shortness of breath was caused principally by his sarcoma to the lung but also by “coal workers’ disease” and anemia. *Id.* Dr. Yerger called “coal workers’ disease” the combination in the miner of pneumoconiosis with emphysema which was caused by deposits of coal dust in the lungs, around which the emphysema developed. *Id.* Dr. Yerger made clear that the miner’s pneumoconiosis, together with emphysema “was a factor affecting his ability to oxygenate his system,” leading to his death. *Id.*

Contrary to employer’s assertion, the administrative law judge, acting within his discretion, found that claimant’s testimony, that the miner had breathing problems prior to his death, was credible despite the absence of scientific documentation of his lung condition. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge found that employer’s experts had relied in part on the absence of data relating to the miner’s lung condition in support of their contention that pneumoconiosis did not contribute to the miner’s death. The administrative law judge reasonably observed that the records reflected the treating doctors’ focus on the aggressive treatment of cancer and that “testing for pneumoconiosis or lung ailments would not have been the primary focus of treatment or major cause of concern.” Decision and Order at 11. Because the

⁶The administrative law judge found that the miner died in the hospital after a scheduled blood transfusion. Decision and Order at 4. The administrative law judge determined that approximately two years prior to the miner’s death in 1994, a horse stepped on the miner’s foot and after several weeks and a biopsy, it was determined that he had bone cancer (synovial sarcoma). *Id.* He underwent “chemotherapy that depleted his blood cells, leading to the transfusion. The night before his death, he had become ill, passed out and was taken by ambulance to the hospital.” *Id.*

administrative law judge rationally explained how the doctors' reliance on this lack of data undermined their opinions, his weighing of the medical opinion evidence should be affirmed.⁷ See *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). The administrative law judge permissibly found that Dr. Yerger's opinion, that pneumoconiosis hastened the death of the miner, is entitled to "greatest weight" inasmuch as he found: the physician was "an eminent and experienced pathologist..."; as the autopsy prosector and a physician who had treated the miner when living, he was in the best position to determine whether death was hastened "to any degree" by pneumoconiosis ; the opinion was well reasoned and documented; the doctor "clearly, consistently and unwaveringly opined that pneumoconiosis played a role in death"; and Dr. Yerger provided a plausible explanation of how pneumoconiosis hastened death in the miner's last hours of his life when lung capacity was most important. Decision and Order at 11; *Urgolites, supra*; see *United States Steel Corp. v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir.1982); see also *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997).

The record reflects that Dr. Yerger was a highly intelligent and knowledgeable expert witness, that he candidly admitted that he did not attribute great significance to the miner's lung disease, but, despite rigorous cross-examination, he insisted that he "believe[d] in good conscience that [he] could say ..." that coal workers' disease accelerated the miner's death, that it was a contributing cause. Tr. 21. Because the administrative law judge offered sound reasons for crediting, over the contrary opinions, Dr. Yerger's clear, unqualified, expert testimony, that the miner's

⁷The record belies our dissenting colleague's assertion that the administrative law judge relied on speculation to discredit employer's experts for basing their opinions in part on the absence of data relating to a lung condition. The lack of pulmonary symptoms in the miner's medical records was specifically pointed out by Dr. Bush, in his report and testimony, Director's Exhibit 23, Employer's Exhibit 5 at 16-18; by Dr. Naeye, in his report, Director's Exhibit 27; by Dr. Griffin, in his report, Employer's Exhibit 2; by Dr. Mendelow, in his report, Employer's Exhibit 1; and by Dr. Kane, in his report, Employer's Exhibit 6.

pneumoconiosis hastened death, substantial evidence supports his decision and the Board is not authorized to overturn it, 33 U.S.C. §921(b)(3), “even if the facts permit an alternative conclusion.” *Youghioghny Ohio Coal Co., v. Webb*, 49 F.3d 244, 246 BLR 2- (6th Cir. 1995). As the Sixth Circuit recently observed, “we recognize that the record may permit an alternative conclusion, but we also respect and defer to the Administrative Law Judge’s authority in the finding of facts.” *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, BLR 2- (6th Cir. 2002).

Consequently, we affirm the administrative law judge's finding that claimant established that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

GABAUER, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority’s opinion affirming the administrative law judge’s award of benefits in this case. The Board has held that an administrative law judge must explain the rationale for his conclusions and issue a decision in compliance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). However, the administrative law judge has not explained crucial elements of his rationale for discrediting the medical opinions that concluded the miner’s death was not due to pneumoconiosis.

The administrative law judge acknowledged that the reviewing physicians, Drs. Mendelow, Cagle, Bush, Naeye, Kane and Griffin were well qualified pathologists. The administrative law judge stated that:

the degree of pneumoconiosis they found on slide review, coupled with the lack of evidence of lifetime pulmonary problems at least up until shortly before death, led them to believe that pneumoconiosis was not a substantial contributor to death. Some, like Drs. Naeye, Bush, Kane and Cagle found that the miner would have died as and when he did had he not had simple pneumoconiosis. I find the opinions of these physicians to be conjecture based on what these doctors find to be statistical probability.

Decision and Order at 11. The administrative law judge discredits these reviewing physicians by merely stating that their opinions are “conjecture based on what these doctors find to be statistical probability,” without more. The administrative law judge fails to explain what he means by “statistical probability” and therefore has not explained, in any way, the basis for his conclusion. *Id.*

Further, the administrative law judge relied upon his own speculation that “the absence of data relating to a lung condition does not equate to the absence of a lung condition” to discredit the opinions of the physicians who determined that pneumoconiosis did not play a role in the miner’s death.⁸ Consequently, because the administrative law judge did not adequately explain his rationale for discrediting

⁸The administrative law judge determined that:

[I]n the aggressive treatment of this rare and rapidly progressing primary cancer, and the records available, it seems entirely plausible that testing for pneumoconiosis or lung ailments would not have been the primary focus of treatment or major cause of concern.

Decision and Order at 11.

the contrary opinions of Drs. Mendelow, Cagle, Bush, Naeye, Kane and Griffin, his finding that the preponderance of the evidence establishes that pneumoconiosis hastened the miner's death, based solely on Dr. Yerger's opinion, should be vacated and this case remanded for reconsideration of the evidence under 20 C.F.R. §718.205(c). *Wojtowicz, supra*; see *Wensel v. Director, OWCP*, 888 F.2d 14, 16, 13 BLR 2-88, 2-91-92 (3d Cir. 1989).

Accordingly, I would vacate the administrative law judge's Decision and Order and remand this case to the administrative law judge to provide further explanation of his findings under Section 718.205(c).

PETER A. GABAUER, Jr.
Administrative Appeals Judge