

BRB No. 01-0691 BLA

ELIZABETH SZCZERBA)		
(Widow of WILLIAM SZCZERBA)		
)		
Claimant-Petitioner)		
)		
v.)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)	DATE	ISSUED:
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.

Elizabeth Szczerba, Pottsville, Pennsylvania, *pro se*.

Timothy S. Williams (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (00-BLA-0781) of Administrative Law Judge Ainsworth H. Brown denying 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).² The administrative

¹Claimant is Elizabeth Szczerba, the miner's widow. The miner, William Szczerba, died on May 12, 1999, and claimant filed her survivor's claim, the subject of the instant appeal, on May 24, 1999. Director's Exhibits 1, 4.

²The Department of Labor has amended the regulations implementing the Federal Coal

law judge found that the weight of the evidence of record was insufficient to establish the sole contested issue herein of whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to properly weigh the medical opinion and lay evidence of record which establishes that the miner's death was due to pneumoconiosis. The Director, Office of Worker's Compensation Appeals (the Director), responds, urging affirmance.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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 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 suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; see *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). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the

Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

miner's death. 20 C.F.R. §718.205(c)(5); *see also Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).³

³This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge properly considered the entirety of the evidence which was relevant to the cause of the miner's death, and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to Section 718.205(c). Although Dr. Kraynak stated in a letter dated June 17, 1999, that the miner had been under his care for treatment of black lung disease, Director's Exhibit 5, and the physician enclosed a copy of the death certificate he had completed, which indicated that the miner's death was caused by respiratory arrest secondary to coal workers' pneumoconiosis, Director's Exhibit 4, the administrative law judge permissibly accorded this evidence little weight because he could not determine whether Dr. Kraynak had reviewed the final hospitalization records or was aware of the miner's terminal course,⁴ and the physician provided no explanation or supporting medical data for his conclusions.⁵ See *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge acted within his discretion as trier of fact in finding that the original certification of Dr. Rosenbaum, that the miner's death was attributable to

⁴The administrative law judge determined that on April 30, 1999, the miner fell from his wheelchair and was admitted, unconscious and unresponsive, to the Hershey Medical Center for treatment of a suspected intracranial hemorrhage. Hospital notes handwritten and/or signed by Drs. Cockroft and Rosenbaum documented the grave prognosis, course of treatment, and deterioration of the miner's condition which culminated in his death on May 12, 1999. Decision and Order at 2-3; Director's Exhibits 6, 7.

⁵The administrative law judge additionally noted that although the record in the living miner's claim reflected Dr. Kraynak's involvement in the miner's respiratory care, there was no indication of the extent to which Dr. Kraynak treated the miner toward the end of his life. Decision and Order at 3-4.

pulseless electrical activity due to intracranial hemorrhage, Director's Exhibit 7, was more probative and entitled to greater weight, as it was documented by the hospital records, treatment notes on the miner's terminal course, and CT findings of a massive intraparenchymal hemorrhage involving the left basal ganglia, thalamus and hypothalamus, Director's Exhibits 6-7. The administrative law judge also reasonably credited the consultative report of Dr. Sherman, Director's Exhibit 9, who reviewed all of the relevant evidence and concluded that the miner's death was caused by acute cardiopulmonary arrest from the effects of a brain hemorrhage, and that there was no evidence to support Dr. Kraynak's opinion that death was caused by respiratory arrest due to pneumoconiosis. Decision and Order at 3; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See generally Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found the evidence indicating that the miner's death was due to pneumoconiosis was outweighed by the contrary evidence of record, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Furthermore, since the determination of whether the miner's death is due to pneumoconiosis is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's findings and therefore could not satisfy claimant's burden of proof on this issue. *See 20 C.F.R. §718.205; Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Anderson, supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) as it is supported by substantial evidence and is in accordance with law. *See Lukosevicz, supra; Neeley, supra; Trumbo, supra*.

Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Lukosevicz, supra; Trumbo, supra; Neeley, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits in this survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge