

BRB No. 97-1298 BLA

MARIE TASKY)	
(Widow of VICTOR TASKY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
FREEMAN UNITED COAL MINING)	
COMPANY)	
)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Rebecca Whittingdon, Carbondale, Illinois, for claimant.

David N. Michael (Gould & Ratner), Chicago, Illinois, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (86-BLA-4262) of Administrative Law Judge Clement J. Kichuk denying benefits on claims 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 case is before the Board for the third time. The miner's initial application for benefits was initially denied and deemed abandoned. Director's Exhibits 1, 20, 27. When the miner's second application for benefits reached the Office of Administrative Law Judges, the

administrative law judge determined that the miner had not abandoned his first claim, which the administrative law judge concluded was still pending. Accordingly, the administrative law judge applied the regulations in effect as of the filing date of the first claim and awarded benefits pursuant to the presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.305.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding regarding the viability of the first claim, but vacated the award and remanded the case for the administrative law judge to weigh all of the relevant evidence regarding total respiratory disability pursuant to 20 C.F.R. §718.204(c). *Tasky v. Freeman United Coal Mining Co.*, BRB No. 88-2985 BLA (Apr. 8, 1993)(unpub.). On remand, the administrative law judge again awarded benefits, and the Board affirmed. *Tasky v. Freeman United Coal Mining Co.*, BRB No. 93-2417 (Apr. 27, 1995)(unpub.).

Subsequently, employer appealed to the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, which held that the miner's first claim had been abandoned and thus, was finally denied. *Freeman United Coal Mining Co. v. Director, OWCP [Tasky]*, 94 F.3d 384, 20 BLR 2-350 (7th Cir. 1996). The court therefore remanded the case for the miner's second claim to be considered as a duplicate claim pursuant to 20 C.F.R. §725.309(d), without the benefit of the Section 718.305 presumption, and for the survivor's claim to be decided.

On remand, the administrative law judge noted that the miner's first claim was denied because the evidence then in the record failed to establish that the miner was totally disabled due to pneumoconiosis.¹ Decision and Order on Remand at 3; Director's Exhibits 20, 24. The administrative law judge found that the evidence developed since the denial of the first claim failed to demonstrate that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and thus failed to establish a material change in conditions pursuant to Section 725.309(d). See *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(en

¹ A claims examiner informed the miner that pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1) and (4) but that the evidence failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Director's Exhibit 24.

banc rehearing). The administrative law judge further found that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), but concluded that the medical evidence of record failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits on both claims.

On appeal, claimant contends that the administrative law judge failed to accord proper weight to a treating physician's medical opinion that the miner was totally disabled due to pneumoconiosis. Claimant further asserts that the administrative law judge failed to determine whether the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c)(2). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.²

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

Pursuant to Section 718.204(b), claimant contends that the administrative law judge failed to accord proper weight to the disability causation opinion of Dr. Rosecan, the miner's treating physician. Claimant's Brief at 6-8. Under Section 718.204(b), a miner must show that pneumoconiosis was at least a contributing cause of his total disability. *Collins v. Director, OWCP*, 932 F.2d 1191, 15 BLR 2-108 (7th Cir. 1991). Based on his examination and treatment of the miner, Dr. Rosecan opined that the miner was "totally disabled from the . . . effects of black lung disease" Director's Exhibit 64. Dr. Getty examined and tested the miner and diagnosed "no pulmonary or respiratory impairment." Director's Exhibit 38. Dr. Long reviewed the medical evidence of record and concluded that the miner was "not totally disabled by pneumoconiosis or any respiratory impairment." Director's Exhibit 41.

Contrary to claimant's contention, the administrative law judge considered Dr. Rosecan's status as the miner's treating physician, Decision and Order on Remand at 10, but permissibly found that Dr. Rosecan's failure to explain how he accounted for the miner's forty-year smoking history, cardiovascular disease, and congestive

² We affirm as unchallenged on appeal the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(2). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

heart failure as potential causative factors “diminish[ed] the weight this tribunal can give” to the physician's opinion. Decision and Order on Remand at 13; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Inasmuch as the administrative law judge permissibly declined to accord Dr. Rosecan's opinion determinative weight, see *Berta v. Peabody Coal Co.*, 16 BLR 1-69 (1992), we affirm the administrative law judge's findings pursuant to Sections 718.204(b) and 725.309(d). See *Spese, supra*. Therefore, we affirm the denial of the miner's claim.

Pursuant to Section 718.205(c)(2), claimant contends that the administrative law judge failed to apply the proper standard to determine whether the miner's death was due to pneumoconiosis. Claimant's Brief at 7-9. Pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner's death was due to pneumoconiosis. See 20 C.F.R. §718.205. For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The Seventh Circuit court has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Dr. Gabrawy conducted an autopsy and diagnosed a ruptured aortic aneurysm, coronary atherosclerosis, and “pulmonary anthracosilicosis, mild.” Director's Exhibit 50. In the autopsy report, Dr. Gabrawy did not specify a cause of death or state whether any of the diagnosed conditions contributed to death. *Id.* Dr. Gabrawy also signed the miner's death certificate, which listed “coal miners['] pneumoconiosis, moderate,” as a condition contributing to the miner's death from acute circulatory failure due to a ruptured aneurysm due in turn to atherosclerosis and hypertension. Director's Exhibit 49. A notation in block 19b. of the death certificate indicated that the autopsy findings were considered in determining the cause of death. *Id.* Drs. Rodman and Eggleston reviewed the autopsy report and tissue slides, concluded that pneumoconiosis was absent, and opined that the miner's death was due solely to the ruptured aneurysm. Director's Exhibits 58, 60.

The administrative law judge accorded “no weight” to the death certificate, which bore the certifying signature of the county coroner, because he found that “[t]he coroner's statement [was] not a correct representation of the findings reported by Dr. Gabrawy who did not report that a coal miners' pneumoconiosis, moderate contributed to the death of Mr. Tasky.” Decision and Order at 17. In so doing, the administrative law judge did not indicate whether he was aware that Dr. Gabrawy also signed the death certificate in his capacity as the coroner's physician. Director's Exhibit 49. The administrative law judge concluded that the autopsy report and the

reviewing pathologists' reports established that the ruptured aneurysm was the sole cause of death and that “[t]here was no contribution by coal workers' pneumoconiosis to the cause of death.” Decision and Order at 17.

The standard is not whether pneumoconiosis contributed to the immediate cause of death, but rather, whether pneumoconiosis hastened death. See *Railey, supra*. The miner's death certificate indicated that although pneumoconiosis was “not related to [the] cause of death,” it was a condition “contributing to death.” Director's Exhibit 49. When the administrative law judge discredited the death certificate on the grounds that it was a statement by the coroner that was inconsistent with the autopsy prosector's report, the administrative law judge does not appear to have been aware that the autopsy prosector signed the death certificate.³ Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.205(c)(2) and remand the case for him to reweigh the relevant evidence to determine whether pneumoconiosis hastened the miner's death. See 20 C.F.R. §718.205(c)(2); *Railey, supra*.

³ We note that the administrative law judge accorded determinative weight to the autopsy prosector's opinion at Section 718.202(a)(2). Decision and Order on Remand at 9.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge