

BRB No. 00-0259 BLA

MARY KLOTZ	)		
(Widow of STEVE KLOTZ)	)		
	)		
Claimant-Petitioner	)		
	)		
v.	)		
	)		
CONSOLIDATION COAL COMPANY	)		
	)	DATE	ISSUED:
Employer-Respondent	)		
	)		
DIRECTOR, OFFICE OF WORKERS'	)		
COMPENSATION PROGRAMS, UNITED	)		
STATES DEPARTMENT OF LABOR	)		
	)		
Party-in-Interest	)	DECISION and ORDER	

Appeal of the Decision and Order on Remand of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

William S. Mattingly (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand (96-BLA-1412) of Administrative Law Judge Michael P. Lesniak 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). This case has been before the

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<sup>1</sup>The miner, Steve Klotz, died on September 19, 1995. Director's Exhibit 3A. Claimant, the miner's widow, filed her survivor's claim, the subject of the instant appeal, on November 17, 1995. Director's Exhibit 1.

Board previously. In the original Decision and Order, the administrative law judge found at least thirty years of coal mine employment. Decision and Order dated April 24, 1998. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge found, and employer conceded, the existence of pneumoconiosis arising out of coal mine employment. Decision and Order dated April 24, 1998; Hearing Transcript at 21-22. The administrative law judge concluded, however, that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order dated April 24, 1998. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.205(c)(1) and (3), but vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.205(c)(2) and remanded the case for the administrative law judge to reconsider the medical opinions of Drs. Naeye, Kleinerman and Cohen and to consider the miner's smoking history in assessing the credibility of these opinions. *Klotz v. Consolidation Coal Co.*, BRB No. 98-1087 BLA (May 6, 1999)(unpublished).

On remand, the administrative law judge concluded that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Decision and Order on Remand at 2-4. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in failing to find the medical evidence sufficient to establish that the miner's death was due to pneumoconiosis. Employer responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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 benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death. See *Griffith v. Director, OWCP*, 49 F.3d

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<sup>2</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the state of Ohio. See *Shupe*

184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal 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. Initially, claimant's contention that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), is without merit. The administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

Claimant further contends that the administrative law judge erred in failing to find the weight of the evidence sufficient to award benefits. Specifically, claimant contends that the administrative law judge failed to properly determine the miner's smoking history and improperly relied upon the medical opinions submitted by employer. Claimant's Brief at 6-11. We disagree. Claimant's contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Contrary to claimant's contention, the administrative law judge fully considered the evidence of record relevant to the miner's smoking history. The administrative law judge properly noted the smoking histories set forth in the relevant medical opinions by Drs. Fish, Tipton, Strimlan, Spyker, Cohen, Naeye and Kleinerman, and rationally, within his discretion as fact-finder, concluded that the miner had a smoking history of twenty to forty pack years. Decision and Order on Remand at 2-3; Director's Exhibits 7, 15, 22A; Claimant's Exhibit 1; Employer's Exhibits 2, 5, 7; *Trumbo, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Additionally, the administrative considered claimant's testimony concerning the miner's smoking history and permissibly determined that it was entitled to no weight as her testimony concerning the length and amount of cigarette smoking was inconsistent with the evidence of record. Decision and Order on Remand at 2; *Trumbo, supra*; *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Kuchwara, supra*; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

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*v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup>The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record..." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Moreover, the administrative law judge properly considered the entirety of the medical opinion evidence of record and rationally concluded that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis. *Piccin, supra*; Decision and Order on Remand at 2-4. Dr. Cohen diagnosed emphysema which was caused by coal dust inhalation and cigarette smoking based upon a five pack year smoking history and this impairment significantly contributed to the miner's death. Claimant's Exhibit 1. Dr. Kleinerman opined that the miner had moderate panacinar emphysema caused solely by cigarette smoking based on a forty pack year smoking history and concluded that coal dust exposure did not cause, contribute, or hasten the miner's death. Employer's Exhibits 2, 7. Dr. Naeye opined that the miner had severe centrilobular emphysema and focal emphysema based on a twenty plus pack year smoking history and stated that the miner would have died at the same time and in the same manner if he had never mined coal. Employer's Exhibit 5. The administrative law judge properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205 as the administrative law judge permissibly determined that the only affirmative evidence, the opinion of Dr. Cohen, was entitled to less weight as the physician based his opinion on an erroneous cigarette smoking history. Decision and Order on Remand at 3; Claimant's Exhibit 1; *Trumbo, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara, supra*. Further, contrary to claimant's arguments, the administrative law judge permissibly concluded that the opinions of Drs. Kleinerman and Naeye were well reasoned and entitled to greater weight as their opinions were based on the miner's significant smoking history and supported by the objective studies. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Piccin, supra*; Decision and Order on Remand at 3-4; Employer's Exhibits 2, 5, 7.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Trumbo, supra*; *Haduck, supra*; *Boyd, supra*; *Oggero, supra*; *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found the opinion of Dr. Cohen entitled to less weight, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo, supra*; *Haduck, supra*; *Boyd, 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, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). 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 as it is supported by substantial evidence and is in accordance with law. *Griffith, supra*; *Brown, 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 Griffith, supra; Brown, supra; Trumbo, supra; Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge