

BRB No. 01-0226 BLA

ANNA WITTIC )  
(Widow of WALTER WITTIC, SR.) )

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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Dorothy L. Page (Howard M. Radzely, 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, SMITH, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1160) of Administrative Law Judge Ainsworth H. Brown with respect to a claim for survivor's benefits 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> Claimant filed her application for benefits on

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<sup>1</sup>Claimant is Anna Wittic, the surviving spouse of miner Frank Wittic, Sr., who died on October 15, 1996. Director's Exhibit 2. Mr. Wittic filed an application for benefits on July 5, 1984, which was finally denied on October 4, 1984. Director's Exhibit 10. Mr. Wittic filed a second claim on February 16, 1993. *Id.* In a Decision and Order

November 17, 1996. Director's Exhibit 1. In a Decision and Order dated September 24, 1998, the administrative law judge determined that the evidence of record was insufficient to establish that pneumoconiosis caused or contributed to the miner's death pursuant to 20 C.F.R. §718.205(c) (2000).<sup>2</sup> Accordingly, benefits were denied.

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dated March 9, 1995, Administrative Law Judge Frank D. Marden awarded benefits. *Id.* The Director, Office of Workers' Compensation Programs, did not appeal the award of benefits.

<sup>2</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 20 C.F.R. Parts 718, 722, 725, and 726 (2001).

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 for the duration of the lawsuit, and stayed, *inter alia*, all

Subsequent to claimant's appeal, the Board issued a Decision and Order on May 31, 2000, vacating the administrative law judge's findings with respect to the medical opinions of Drs. Kraynak, Simelaro, and Spagnolo and remanded the case to the administrative law judge for reconsideration of these opinions pursuant to Section 718.205(c) (2000).

On remand, the administrative law judge again determined that the medical evidence of record did not establish that pneumoconiosis played any role in the miner's death. Accordingly, benefits were denied. In the present appeal, claimant argues that the administrative law judge did not properly weigh the opinions of Drs. Kraynak and Simelaro. The Director, Office of Workers' Compensation Programs, has responded and urges affirmance of the denial of benefits.<sup>3</sup>

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 applicable law. 33 U.S.C. §921(b)(3), as incorporated into the

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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). 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).

<sup>3</sup>The administrative law judge's determination that Dr. Spagnolo's opinion, that pneumoconiosis did not cause, contribute to, or hasten the miner's is entitled to little weight, is affirmed, as it is unchallenged on appeal. Decision and Order at 9 n.5; Director's Exhibits 6, 12; see *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act 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 had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304 (2001); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Pneumoconiosis is considered a “substantially contributing cause” of a miner’s death if it hastens death. 20 C.F.R. §718.205(c)(5) (2001); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).<sup>4</sup>

The evidence relevant to the cause of the miner’s death includes the death certificate, the records relating to the miner’s terminal hospitalization, and the medical opinions of Drs. Kraynak, Simelaro, and Spagnolo. On the death certificate, Dr. Zasik identified pneumonia, acute leukemia, and myelodysplasia as the immediate causes of death. Director’s Exhibit 2. He further indicated that coal workers’ pneumoconiosis was a significant condition contributing to death. *Id.* Dr. Burlew attended the miner during his final hospitalization and diagnosed acute leukemia and noted that the miner was in an immunocompromised state and experiencing respiratory failure due to infectious pneumonia, leukemic infiltrates, or bleeding. Director’s Exhibit 3. Dr. Zasik also treated the miner in the hospital and in a “Death Summary,” identified coal workers’ pneumoconiosis as a “cause listed at death.” *Id.* Dr. Kraynak was the miner’s treating physician for a number of years. In his written reports and deposition testimony, Dr. Kraynak stated that pneumoconiosis contributed to the miner’s demise, as if he did not have coal workers’ pneumoconiosis resulting in a totally disabling pulmonary impairment, “he would have been in better condition to fight off his pneumonia, as well as leukemia.” Claimant’s Exhibit 6; *see also* Claimant’s Exhibit 5 at 11-12. Dr. Simelaro

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<sup>4</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner’s qualifying coal mine employment occurred in the Commonwealth of Pennsylvania. Director’s Exhibit 10; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

reviewed the medical evidence of record and concluded that the miner died from pneumonia, which he was prone to develop due to the immunosuppressive effects of leukemia and due to chronic bronchitis caused by coal dust inhalation. Claimant's Exhibit 3. Dr. Spagnolo reviewed the medical evidence pertaining to the miner's final hospitalization, the death certificate, a letter authored by Dr. Kraynak, and the Decision and Order in which the miner was awarded benefits. Dr. Spagnolo concluded that the miner's death was caused by acute leukemia and that pneumoconiosis did not hasten his demise in any way. Director's Exhibits 6, 12.

The administrative law judge found that the death certificate and the medical reports generated during the miner's terminal hospitalization did not satisfy claimant's burden under Section 718.205(c), as no rationale was supplied for the references to pneumoconiosis as a contributing cause of the miner's death. Decision and Order at 8-9. The administrative law judge determined that despite Dr. Kraynak's status as the miner's treating physician, his opinion was entitled to little weight, as "Dr. Kraynak does not explain the link between the miner's pneumoconiosis and his ultimate demise." *Id.* at 8. The administrative law judge also referred to Dr. Kraynak's statement at his deposition that the myelodysplasia from which the miner suffered can lead to pneumonia. *Id.*; Claimant's Exhibit 5 at 12. Similarly, the administrative law judge discredited Dr. Simelaro's opinion on the ground that he did not explain how the miner's pneumoconiosis played a role in his death. *Id.* The administrative law judge cited Dr. Simelaro's statement that people who suffer from chronic bronchitis are more likely to develop pneumoconiosis as compared to the general population and determined that it "does not fulfill claimant's burden of persuasion in this specific case." *Id.* The administrative law judge did not rely upon Dr. Spagnolo's opinion to find that claimant had failed to carry her burden of proof. *Id.* at 9 n.5.

Claimant argues that the administrative law judge erred in failing to find that Dr. Kraynak's opinion, as supported by the death certificate, hospital records, the miner's daughter's hearing testimony, and Dr. Simelaro's report, was sufficient to establish that pneumoconiosis was a contributing cause of the miner's death. Claimant's contention is without merit. The administrative law judge rationally determined that the death certificate and hospital records do not support a finding that pneumoconiosis contributed to the miner's death, as these documents do not contain a rationale detailing how pneumoconiosis affected the miner's terminal course. Decision and Order at 8-9; *see Neeley, supra*; *see also King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). With respect to the opinions of Drs. Kraynak and Simelaro, the administrative law judge acted within his discretion in determining that neither physician adequately explained his determination that pneumoconiosis hastened the miner's death from pneumonia, as Drs. Kraynak and Simelaro did not actually describe the mechanism by which pneumoconiosis interacted with the miner's

pneumoconiosis to hasten his death nor did either physician identify specific medical data which supports their conclusions. Decision and Order at 8; *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Finally, inasmuch as the administrative law judge rationally determined that the medical evidence of record did not support a determination that pneumoconiosis was a contributing cause of the miner's death, the miner's daughter's testimony could not satisfy claimant's burden of establishing that pneumoconiosis caused or contributed to the miner's death. 20 C.F.R. §718.205(c); *see also Lukosevicz, supra; Neeley, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge