

Claimant¹ appeals the Decision and Order (98-BLA-0144) 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). Initially, we note that the parties agreed that the miner had twelve and one-half years of coal mine employment and pneumoconiosis arising out of coal mine employment. Director's Exhibit 19. Applying the regulations at 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 2-3. Accordingly, benefits were denied. Thereafter, claimant filed a motion for reconsideration, which the administrative law judge denied.

On appeal, claimant contends that the administrative law judge erred in relying on the opinion of Dr. Spagnolo pursuant to Section 718.205(c) to find that claimant failed to establish that the miner's death was due to pneumoconiosis. Claimant's Brief at 4-7. The Director, Office of Workers' Compensation Programs, [the Director], responds, urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 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 718.205(c), claimant specifically contends that the administrative law judge erred in accepting the opinion of Dr. Spagnolo over the contrary opinions of Drs. Pilarek, Tischler, and Jefferies. Claimant's Brief at 5. Claimant reasons that Dr. Spagnolo's opinion should not have been relied upon because his opinion is contrary to the administrative law judge's previous legal determination that the miner was totally disabled

¹Claimant is Donna M. Kline, sister of Kimberly A. Hunlock, the disabled daughter of the deceased miner, Edward Hunlock, who filed a claim for benefits on behalf of her sister, on January 22, 1997. Director's Exhibit 1. The miner filed two claims for benefits on July 12, 1984 and November 5, 1990. Director's Exhibit 23. Administrative Law Judge Ainsworth H. Brown awarded benefits on the miner's second claim. Director's Exhibit 21.

due to pneumoconiosis, a finding he made in awarding benefits on the miner's claim, Director's Exhibit 21. Claimant's Brief at 5-6. Thus, claimant concludes that the opinions of Drs. Tischler and Jefferies, the miner's treating physicians, prove that the miner's death was hastened by pneumoconiosis, citing *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Claimant's Brief at 6-7.

In his response brief, the Director agrees with claimant that "Dr. Spagnolo's opinion is inconsistent with the [administrative law judge's earlier] award of benefits to the miner and, therefore, undeserving of credit." Director's Brief at 3. Therefore, the Director "concede[s] that Dr. Spagnolo's opinion is not creditworthy in this survivor's claim." *Id.* However, the Director asserts that the administrative law judge's error is harmless inasmuch as "he provided independent reasons for discrediting each of the opinions supportive of entitlement." *Id.* The Director argues that because the administrative law judge properly determined that claimant has failed to carry her burden of proof, the Board should affirm the administrative law judge's denial of benefits. Director's Brief at 5.

The relevant medical evidence of record at 20 C.F.R. §718.205(c) is as follows. Dr. Spagnolo found that the miner's death was not significantly related to or substantially hastened by pneumoconiosis. Drs. Pilarek and Jefferies determined that the miner's death was hastened by pneumoconiosis, and Dr. Tischler found that the immediate cause of death was metastatic liver cancer with other significant conditions including arteriosclerotic heart disease, seizure disorder, chronic obstructive pulmonary disease, and tuberculosis (1985). Director's Exhibits 4, 8, 23; Claimant's Exhibit 1. Dr. Tischler later amended the death certificate to include anthracosilicosis under the section entitled "Other Significant Conditions." Director's Exhibit 5.

In resolving the conflict in the medical opinion evidence, the administrative law judge found Dr. Spagnolo's opinion "possesses greater probative value based on his actual analysis of the medical record describing the miner's terminal process." Decision and Order at 3. Conversely, the administrative law judge determined that Dr. Pilarek attempts "to hypoth[e]cate a rationale for a relationship between CWP and the miner's fatal cancer process by stating that cancer destroyed lung tissue already compromised by the occupational disease" when the record documents that the tumors were in the liver, not the lung. Decision and Order at 2, 3. Additionally, the administrative law judge stated that neither Dr. Jefferies nor Dr. Pilarek "provided critical analysis of their patient's pulmonary function and gas exchange function prior to his death" whereas Dr. Spagnolo "placed emphasis on the lack of blood gas exchange abnormality as the basis for his opinion." Decision and Order at 2-3. Therefore, the administrative law judge concluded that claimant failed to carry "her burden of persuasion in showing that her father's CWP had any influence" on his death. Decision and Order at 3.

In his evaluation of the medical opinion evidence, the administrative law judge properly discredited Dr. Pilarek's opinion inasmuch as this physician based his opinion on the erroneous assumption that the miner had lung cancer. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). However, the administrative law judge's analysis of Dr. Jefferies' opinion is undermined inasmuch as the administrative law judge appears to base his discrediting of this opinion on his crediting of Dr. Spagnolo's opinion, which is flawed because of the Director's concession, *see* discussion, *supra*. Additionally, the administrative law judge does not provide any rationale for his implicit discrediting of Dr. Tischler's opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Therefore, we vacate the administrative law judge's Section 718.205(c) finding and remand this case for him to reconsider on remand whether the opinions of Drs. Jefferies and Tischler are sufficient to meet claimant's burden of proof pursuant to this subsection. *See Lango, supra*; *Lukosevich, supra*; *see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge