

BRB No. 05-0719 BLA

ANNA L. SWIRSKY)
(Widow of GEORGE E. SWIRSKY))

Claimant-Petitioner)

v.)

READING ANTHRACITE COMPANY,)
INCORPORATED)

DATE ISSUED: 10/19/2005

and)

LACKAWANNA CASUALTY COMPANY)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Paul H. Teitler,
Administrative Law Judge, United States Department of Labor.

Anna L. Swirsky, Minersville, Pennsylvania, *pro se*.

A. Judd Woytek (Marshall, Dennehey, Warner Coleman, & Goggin),
Bethlehem, Pennsylvania, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order -

¹ Claimant, Anna L. Swirsky, is the surviving spouse of the miner, George E. Swirsky.

Denying Benefits (2005-BLA-05188) of Administrative Law Judge Paul H. Teitler 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 administrative law judge found that the record supported a finding of pneumoconiosis which arose out of coal mine employment and, supported employer's concession that the miner had a coal mine employment history of 35.35 years, 20 C.F.R. §§718.202(a), 718.203(b), but that the record failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits on this survivor's claim.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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).

On appeal, claimant generally challenges the denial of benefits. Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish that the miner's death is due to pneumoconiosis pursuant to Section 718.205(c) is supported by substantial evidence, and accordingly, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to the instant appeal.

In a survivor's claim filed on or after January 1, 1982, claimant must establish the existence of pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. Death is due to pneumoconiosis where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where death was caused by complications of pneumoconiosis, or where the presumption set forth at Section 718.304, relating to complicated pneumoconiosis, is applicable. 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Coal 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 miner's death. 20 C.F.R. §718.205(c)(5); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR

The miner died on February 3, 2003. Director's Exhibit 10. Claimant filed the instant survivor's claim with the Department of Labor on November 10, 2003. Director's Exhibit 2.

2-12 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Considering the medical opinions of record, the administrative law judge found that Dr. Hertz, whose credentials were not in the record, submitted an opinion in which the doctor, who found that adenocarcinoma was the primary cause of death, stated that “I cannot say with a reasonable degree of medical certainty that coal workers’ pneumoconiosis did not hasten [the miner’s] death.” Claimant’s Exhibit 1; Decision and Order at 7. Dr. Dittman, who is Board-certified in Internal medicine, opined that the miner died due to adenocarcinoma of the lung and that pneumoconiosis did not cause or hasten the miner’s death. Director’s Exhibit 21; Decision and Order at 7. The administrative law judge permissibly discounted Dr. Hertz’s opinion on the basis that it was unclear and equivocal as Dr. Hertz did not definitively state what role, if any, pneumoconiosis had in the miner’s death. Decision and Order at 8; *see Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Zimmerman v. Director, OWCP*, 871 F. 564; 12 BLR 2-254 (6th Cir. 1989); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997). Instead, the administrative law judge permissibly credited the opinion of Dr. Dittman which he found to be better explained, as Dr. Dittman thoroughly reviewed the miner’s medical records and explained why, even though pneumoconiosis was present, it did not contribute to or hasten the miner’s death. Decision and Order at 8; *Trumbo*, 17 BLR at 1-89 n.4; *Clark*, 12 BLR at 1-155; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR at 1-113 (1988); *Justice*, 11 BLR at 1-95; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Cooper v. Director, OWCP*, 9 BLR 1-95 (1988). We affirm, therefore, the administrative law judge’s determination to credit Dr. Dittman’s opinion over Dr. Hertz’s, as a permissible exercise of his discretion.

Finally, the administrative law judge considered the miner’s death certificate, completed by Dr. Sims. Director’s Exhibit 10. The death certificate listed cardiopulmonary arrest and adenocarcinoma of the lung as the immediate causes of death, listing black lung disease as an other condition contributing to death, without explanation. *Id.* The administrative law judge found that the death certificate did not establish death due to pneumoconiosis in this case because a death certificate by itself does not constitute a reasoned medical finding. We affirm, therefore, the administrative law judge’s determination rejecting the miner’s death certificate as evidence supporting a finding that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). *See Lango*, 104 F.3d 573, 21 BLR 2-12; *Dillon*, 11 BLR at 1-115; *Addison v. Director, OWCP*, 11 BLR 1- 68 (1988).

Likewise, the administrative law judge correctly noted that the hospital treatment records showed that the miner was treated for lung cancer from early 2002 until his death on February 3, 2003. The administrative law judge further found that while the records record a history of pneumoconiosis and list pneumoconiosis as one of the many diagnoses affecting the miner they do not show that the miner was being treated for pneumoconiosis or that pneumoconiosis was a primary concern during the miner's hospitalization, or that pneumoconiosis was a primary diagnosis of his condition shortly before his death. The administrative law judge concluded, therefore, that the hospitalization treatment records did not support a finding of death due to pneumoconiosis. 20 C.F.R. §718.205(c); Decision and Order at 8-9; Director's Exhibit 11. We, thereby, affirm the administrative law judge's finding that the evidence of record fails to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and hence, affirm the denial of survivor's benefits in the instant claim.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits in the survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge