

BRB No. 99-0321 BLA

MARIE TASKY)	
(Widow of VICTOR TASKY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
FREEMAN UNITED COAL MINING)	DATE ISSUED:
COMPANY)	
)	
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 No. II - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Rebecca Whittington, Carbondale, Illinois, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand No. II (86-BLA-4262) of Administrative Law Judge Clement J. Kichuk denying benefits on a 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 previously been before the Board. In its most recent prior decision, the Board affirmed the denial of benefits in the miner's claim, but remanded the case to the administrative law judge for further consideration of the evidence in the survivor's claim pursuant to 20 C.F.R. §718.205(c)(2) in light of the holding

of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).¹ On remand, the administrative law judge again found the evidence insufficient to establish that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c)(2) and the Seventh Circuit's holding in *Railey*. Accordingly, the administrative law judge again denied benefits in the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in concluding that pneumoconiosis did not substantially contribute to the miner's death. Employer responds, urging affirmance of the denial of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis or where complicated pneumoconiosis is established. See 20 C.F.R. §§718.1, 718.203, 718.205(c)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP* 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction the instant case arises, has held that, for purposes of Section 718.205(c)(2), pneumoconiosis is considered 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).

¹The prior procedural histories of both the miner's and survivor's claims are set forth in the Board's Decision and Order of May 6, 1998. *Tasky v. Freeman United Coal Mining Co.*, BRB No. 97-1298 BLA (May 6, 1998)(unpublished).

On remand, pursuant to the Board's instructions,² the administrative law judge explicitly acknowledged that the autopsy prosector, Dr. Gabrawy, signed the death certificate as the "coroner's physician," and that the death certificate listed "coal miners pneumoconiosis" as a "condition contributing to death but not related to (the immediate cause)." Director's Exhibit 49. Nonetheless, the administrative law judge declined to credit the death certificate, noting an apparent discrepancy in Dr. Gabrawy's findings. To wit, the administrative law judge noted that while the death certificate included a diagnosis of "coal miners pneumoconiosis," Dr. Gabrawy's autopsy's report instead diagnosed "pulmonary anthracosilicosis, mild." Director's Exhibit 50. Moreover, the administrative law judge noted that Dr. Gabrawy's autopsy report included no findings as to what caused or contributed to the miner's death. Finally, the administrative law judge found that the death certificate, on its face, purported to be the declaration of the coroner, rather than the "official declaration of (Dr. Gabrawy's) findings and diagnoses." Decision and Order at 4. Thus, the

² In remanding this case, the Board stated, in pertinent part:

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. [Footnote omitted.] 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*.

1998 Board Decision and Order at 4-5.

administrative law judge, declined to credit the death certificate to find death due to pneumoconiosis pursuant to Section 718.205(c), notwithstanding the fact that the death certificate was signed by the autopsy prosector, Dr. Gabrawy. *Id.*

Claimant argues that the administrative law judge erred in not finding that pneumoconiosis hastened the miner's death inasmuch as the autopsy prosector, Dr. Gabrawy, despite not specifying a singular cause of death in his autopsy report, signed the death certificate, which stated that "coal miners pneumoconiosis, moderate with panlobular emphysema" contributed to the miner's death.

Notwithstanding claimant's contention, we find no error in the administrative law judge's refusal to conclude that claimant met her burden under 20 C.F.R. §718.205(c)(2) merely because the autopsy prosector signed the death certificate as the "coroner's physician." The administrative law judge, in a rational exercise of the broad discretion given him, *see Anderson v. Valley Camp of Utah Inc.*, 12 BLR 1-111 (1989), determined that Dr. Gabrawy's signature on the death certificate was not an endorsement of the corner's findings inasmuch as there was a significant unexplained discrepancy between Dr. Gabrawy's own anatomical diagnosis of "pulmonary anthracosilicosis, mild" on autopsy, and the death certificate finding that "coal miner's pneumoconiosis, mild" was a condition contributing to death. The administrative law judge was not compelled to find the discrepancy in language between the two documents insignificant. Nor was he compelled to infer that the death certificate reflected Dr. Gabrawy's opinion as to the cause of death merely because he signed as the "coroner's physician" on that document, especially in view of the fact, pointed out by the administrative law judge, that Gabrawy's own autopsy report contained no opinion as to the cause of death.

Inasmuch as all the other evidence of record is insufficient, as a matter of law, to meet claimant's burden to establish that pneumoconiosis substantially contributed to, or hastened, the miner's death pursuant to Section 718.205(c)(2), *see Railey, supra*, we further affirm the administrative law judge's finding that the evidence is insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).³

³ Claimant also argues that the administrative law judge's reliance on the opinions of two physicians who never examined the miner is unwarranted. Inasmuch as we have held that the administrative law judge permissibly discredited the only evidence which would, if credited, support a finding of death due to pneumoconiosis at 20 C.F.R. §718.205(c)(2), we need not address claimant's argument.

Claimant additionally argues that the administrative law judge should have considered the opinion of Dr. Rosecan, the miner's primary physician. Inasmuch as the issue in this case is the cause of the miner's death at Section 718.205(c), Dr. Rosecan's opinion regarding the

health of the miner during his lifetime is not relevant.

Finally, claimant argues that “doubts about medical conclusions should be resolved in favor of the disabled miner or survivor.” There has been no assertion that the evidence in this case presents a “true doubt” situation. Moreover, the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), invalidated the true doubt rule.

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *see Trumbo, supra; Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we further affirm the administrative law judge's denial of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order on Remand No. II-Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge