

BRB No. 00-1209 BLA

ROSEMARY ZELLI	)	
(Widow of LOUIS M. ZELLI)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: _____
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Barry H. Joyner (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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (00-BLA-0131) 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,

<sup>1</sup>Claimant is the widow of the miner, Louis M. Zelli, who died on May 19, 1998. Director's Exhibits 1, 3. The miner filed a claim on February 22, 1995. Director's Exhibit 13. On April 11, 1996, Administrative Law Judge Ralph A. Romano issued a Decision and Order awarding benefits. *Id.* Claimant filed a survivor's claim on October 30, 1998. Director's Exhibit 1.

30 U.S.C. §901 *et seq.* (the Act). The administrative law judge adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718.<sup>2</sup> The administrative law judge found the evidence insufficient to establish that the miner's death was due to

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<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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2) (2000). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order.

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 survivor's claims filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.<sup>3</sup> See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §718.203; *Boyd, supra*.

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R.

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<sup>3</sup>Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
  - (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
  - (3) Where the presumption set forth at §718.304 is applicable.
- ...
- (5) 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).

§718.205(c)(2) (2000).<sup>4</sup> The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has also held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) (2000) in a case in which the disease actually hastens his death. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *see also* 20 C.F.R. §718.205(c)(2), (c)(5).

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<sup>4</sup>Inasmuch as there is no medical evidence that pneumoconiosis caused the miner's death, we hold as a matter of law that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1). Further, inasmuch as there is no evidence of complicated pneumoconiosis, we hold as a matter of law that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(3).

The administrative law judge considered the opinions of Drs. Cander, Ling and Sherman.<sup>5</sup> Dr. Ling opined that coal workers' pneumoconiosis contributed to the miner's death. Claimant's Exhibit 1. However, Dr. Cander opined that pneumoconiosis did not cause or contribute to the miner's death. Director's Exhibit 16. Similarly, Dr. Sherman opined that the miner's severe disabling lung disease did not contribute in any way to his demise. Director's Exhibit 17. Rather, Dr. Sherman opined that the miner's death was due to cardiovascular causes. *Id.* The administrative law judge permissibly discredited the opinion of Dr. Ling because he found it was not reasoned.<sup>6</sup> *See Clark v. Karst-Robbins Coal*

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<sup>5</sup>The record also contains a death certificate signed by Jeanne Marie Ottinger, RN, Chief Deputy Coroner. Director's Exhibit 3. In the death certificate, Ms. Ottinger indicates that the cause of the miner's death was laparotomy for the repair of a ruptured abdominal aortic aneurysm. *Id.* The record does not indicate that Ms. Ottinger possesses any relevant qualifications from which to assess the cause of the miner's death. *Id.*; *see* 20 C.F.R. §718.205(c); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

<sup>6</sup>The administrative law judge observed that "[i]n an operative report after surgery on May 18, 1998 for a 'graft repair of [an] infrarenal abdominal aortic aneurysm,' Dr. John J. Flanagan, [the miner's] surgeon, reported that [the miner] went into cardiac arrest and expired after surgeons were unable to repair the proximal aorta in three failed attempts to

*Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Ling's opinion.

Further, we reject claimant's assertion that the administrative law judge should have accorded determinative weight to Dr. Ling's opinion due to his status as the miner's treating physician. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Thus, since the administrative law judge permissibly discredited the only medical evidence of record that could support a finding that pneumoconiosis hastened the miner's death, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(c)(2); *Lukosevicz, supra*.

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, *see* 20 C.F.R.

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place a graft on the site of the aneurysm." Decision and Order at 3. The administrative law judge stated that "[a]lthough Dr. Ling treated the [m]iner, he provided no credible explanation why the [m]iner's coal workers' pneumoconiosis hastened his death in assessing that pneumoconiosis prevented the timely recovery from cardiac surgery and the prompt treatment of the [m]iner's aneurysm." *Id.* at 6. The administrative law judge also stated that "Dr. Ling does not point to documentation in the medical record that the [m]iner's coal workers' pneumoconiosis, or even the chronic obstructive lung disease that was derived from the [m]iner's history of smoking, delayed the repair of the aneurysm, or recovery from bypass surgery, so as to have held even a *de minimis* role in the [m]iner's death due to an inability to repair the acute rupture of the aortic aneurysm." *Id.*

§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 affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge