

BRB No. 02-0884 BLA

DARLENE A. COUTTS)
(Widow of WARD J. COUTTS, Jr.))
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 Claimant-Respondent)
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 v.) DATE ISSUED: 09/26/2003
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 LION MINING COMPANY)
)
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 Employer-Petitioner)
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)
 DIRECTOR, OFFICE OF WORKERS=)
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

James M. Poerio (Tucker Arensberg, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2002-BLA-0121) of Administrative Law Judge Richard A. Morgan awarding 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).¹ Based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718.² The administrative law judge accepted the parties= stipulation that employer is the responsible operator and found that claimant established twenty-one years of coal mine employment. Decision and Order at 3. The parties also agreed that the miner suffered from coal workers= pneumoconiosis, and the administrative law judge found the evidence of record sufficient to establish the existence of clinical and legal coal workers= pneumoconiosis arising out of coal mine employment at 20 C.F.R. ' ' 718.202(a)(2), 718.203(b). Decision and Order at 21-22. The administrative law judge further found that the evidence of record established that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c). Accordingly, benefits were awarded.

¹The 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. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²The record indicates that the miner, Ward J. Coutts, Jr., filed applications for benefits on October 8, 1991, and June 11, 1993. These claims were finally denied and are not at issue herein. Director=s Exhibit 39. The miner died on March 17, 2000, and claimant, Darlene A. Coutts, the miner=s widow, filed a claim for survivor=s benefits on May 31, 2000. Director=s Exhibits 1, 8. This claim was denied by the district director on August 22, 2000, due to the claimant=s failure to establish that the miner=s death was due to pneumoconiosis. Director=s Exhibit 13. Claimant subsequently requested a formal hearing on September 18, 2000. Director=s Exhibit 14.

On appeal, employer challenges the administrative law judge's weighing of the evidence in finding that the miner's death was due to pneumoconiosis at Section 718.205(c), and argues that the administrative law judge erred in failing to admit relevant evidence into the record. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.³

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 by 30 U.S.C. ' 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

³We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. ' ' 718.202(a)(2), 718.203(b), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a survivor=s claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, and that the miner=s death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death. See 20 C.F.R. ' ' 718.201, 718.202(a), 718.203, 718.205(c); *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). 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)(2); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).⁴

Respecting the procedural issue, employer argues that the administrative law judge erred by failing to admit into evidence the June 27, 2002 supplemental report and photomicrographs of employer=s expert pathologist, Dr. Oesterling. Employer maintains that this evidence was submitted at the post-hearing deposition of Dr. Oesterling in rebuttal to the deposition testimony, on April 11, 2002, of Dr. Goldblatt, the physician who performed the miner=s autopsy.⁵ While claimant objected to the admission into evidence of this report

⁴Since the miner=s last coal mine employment took place in the Commonwealth of Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. Director=s Exhibit 36; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁵The formal hearing was held before the administrative law judge on May 17, 2002, at which time Dr. Oesterling=s initial report, dated July 3, 2001, was admitted into evidence. The record was left open at the conclusion of the hearing for the parties to depose Drs. Oesterling and Perper, and post-hearing briefs were to be submitted by July 31, 2002. Dr. Oesterling=s supplemental report of June 27, 2002 was received by claimant on July 1, 2002, and claimant objected to the introduction of this report at Dr.

and any reference to the substance of the report in Dr. Oesterling=s deposition, on the basis of the 20-day rule pursuant to 20 C.F.R. ' 725.456 (2000), employer asserts that this evidence was necessitated by claimant=s surprise evidence obtained shortly before the hearing, and that due process requires that employer be allowed to respond to Dr. Goldblatt=s testimony. Employer=s Brief at 3-8; *see North American Coal Company v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989).

In his Decision and Order, the administrative law judge indicated that the post-hearing evidence consisted of the depositions of Drs. Perper and Oesterling. *See* Decision and Order at 3. Although the administrative law judge noted claimant=s objections to Dr. Oesterling=s supplemental report with photomicrographs and any reference in the physician=s deposition to its substance, *see* Decision and Order at 15-16, he did not rule on the objections or provide any reason for excluding this evidence. Further, while the administrative law judge described Dr. Oesterling=s testimony concerning the contents of his report and its attachments, *id.*, it is not clear whether he personally reviewed this evidence and considered it in rendering his credibility determinations. Consequently, we must vacate the administrative law judge=s award of benefits and his findings pursuant to Section 718.205(c), and remand this case for the administrative law judge to rule on the admissibility of employer=s evidence. *See Miller*, 870 F.2d 948, 12 BLR 2-222. If, on remand, the administrative law judge finds that Dr. Oesterling=s supplemental report with attachments is admissible, this evidence must be evaluated and weighed with the other relevant evidence of record pursuant to Section 718.205(c), consistent with the standards enunciated by the United States Court of Appeals for the Third Circuit in *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

Oesterling=s July 9, 2002 deposition, and in subsequent communications between the parties and the administrative law judge.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge