

BRB No. 96-0892 BLA

MARY MONTGOMERY	)	
(Widow of CLYDE MONTGOMERY)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
BETHENERGY MINES INCORPORATED	)	
	)	
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 of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Paul Kullen (Mekler, Nolish, Riedman & Saperstein), Southfield, Michigan, for claimant.

Carl J. Smith, Jr. (Ceisler Richman Smith Law Firm), Washington, Pennsylvania, for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (93-BLA-1094) of Administrative Law

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<sup>1</sup> Claimant is Mary Montgomery, widow of Clyde Montgomery, the miner, who died on May 31, 1990. Director's Exhibit 21. Mrs. Montgomery filed this application for survivor's benefits on June 11, 1992. Director's Exhibit 20. A claim filed by the miner on March 2, 1989 was pending when he died and was consolidated with the survivor's claim.

Judge Mollie W. Neal 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). Initially, the administrative law judge overruled claimant's objections to the admission of certain exhibits submitted by employer. The administrative law judge then credited

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Director's Exhibits 1, 19.

the miner with eight years of coal mine employment,<sup>2</sup> accepted the parties' stipulation to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and found that the pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). The administrative law judge also found employer to be the responsible operator, and determined that the miner had a thirty to forty pack-year smoking history. The administrative law judge concluded that the evidence failed to establish that the miner suffered from a totally disabling respiratory impairment pursuant to Section 718.204(c) or that his death was due to pneumoconiosis pursuant to Section 718.205(c) and, accordingly, denied both the miner's and the survivor's claims.

On appeal, claimant contends that the evidence establishes that the miner was totally disabled at the time of his death and asserts that the administrative law judge erred in her weighing of the evidence pursuant to Section 718.205(c)(1) and (2). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.<sup>3</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30

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<sup>2</sup> The administrative law judge originally found 6.28 years of coal mine employment established. Decision and Order at 7. Subsequent to the issuance of her Decision and Order, she issued an order crediting the miner for additional time not worked due to mining-related injuries. Order Amending Decision and Order Denying Benefits at 1-2.

<sup>3</sup> We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, smoking history, responsible operator status, and pursuant to 20 C.F.R. §§718.202(a), 718.203(c), and 718.205(c)(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Regarding the administrative law judge's denial of the miner's claim for benefits, claimant avers generally that the miner was totally disabled. Claimant's Brief at 3. The Board is not authorized to undertake a *de novo* adjudication of the miner's claim. To do so would upset the carefully allocated division of authority between the administrative law judge as trier-of-fact, and the Board as a reviewing tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). As we have emphasized previously, the Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order with specificity and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox, supra*; *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish, supra*; *Sarf, supra*. A petitioner who fails to comply with the requisite regulations provides the Board with no basis to reach the merits of an appeal. *See Cox, supra*. In the instant case, claimant generally asserts that the miner was entitled to benefits. Claimant's Brief at 3. Claimant, however, fails to identify any error made by the administrative law judge in her evaluation of the evidence or in her application of law pursuant to 20 C.F.R. Part 718. Thus, as claimant's counsel has failed to adequately raise or brief any issues arising from the administrative law judge's denial of the miner's claim for benefits, the Board has no basis upon which to review the decision. Thus, we decline to review the Decision and Order of the administrative law judge insofar as it relates to the miner's entitlement to benefits and affirm the administrative law judge's denial of the miner's claim. *See Sarf, supra*; *Cox, supra*.

Regarding the survivor's claim, claimant contends initially that the administrative law judge erred by admitting cumulative evidence submitted by employer. Claimant's Brief at 8. Specifically, claimant asserts that the reports of Drs. Reger and Reasor constituted "objectionable cumulative evidence."<sup>4</sup> *Id.*

Relevancy is the critical issue in determining the admissibility of evidence, and the administrative law judge exercises discretion in determining the probative value of the evidence submitted. *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136, 1-139 (1989). Contrary to claimant's contention, the administrative law judge, within her discretion, found the opinions of Drs. Reger and Reasor to be relevant because they addressed the opinion of Dr. Kelly, claimant's medical expert, that the miner's fatal lung cancer was caused in part by

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<sup>4</sup> Claimant objected to the admission of these exhibits at the hearing. Hearing Transcript at 15-17.

his exposure to silica during his coal mine employment. Decision and Order at 3-4; Claimant's Exhibits 1, 2; Employer's Exhibits JJ, NN, O, OO. Therefore, we reject claimant's contention and hold that the administrative law judge properly admitted the opinions of Drs. Reger and Reasor. *See Cochran, supra; see also Underwood v. Elkay Mining, Inc.*, F.3d , No. 95-2717 (4th Cir. February 4, 1997).

To establish entitlement to benefits under Section 718.205(c), claimant must prove that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a). For survivor's claims filed after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes 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. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

The miner's death certificate listed acute leukemia as the immediate cause and lung cancer as a contributing cause of death. Director's Exhibit 21. Dr. Palutke, who performed the autopsy, diagnosed lung cancer, leukemia, cardiovascular disease, interstitial fibrosis, and emphysema. Director's Exhibit 22. Dr. Palutke opined that the miner's death "was most likely due to metastatic carcinoma causing respiratory failure," but did not address whether any other factors contributed to death. Director's Exhibit 22. Dr. Kelly, board-certified in occupational medicine, reviewed the autopsy report and slides and the miner's hospital records and diagnosed lung cancer and coal workers' pneumoconiosis. Claimant's Exhibits 1, 2. Dr. Kelly opined that the miner's death was due directly to lung cancer, which in turn was due in part to the miner's inhalation of coal dust and silica. *Id.* Dr. Kelly cited medical literature that he claimed supported this aspect of his diagnosis. *Id.* Dr. Kelly also opined that the pulmonary interstitial fibrosis he detected indicated the presence of coal workers' pneumoconiosis that was sufficiently advanced to have hastened the miner's demise from lung cancer. *Id.*

Drs. Kleinerman, Naeye, and Conway reviewed the miner's medical records, death certificate, autopsy report and slides, and Dr. Kelly's opinion, and they all disagreed with Dr. Kelly's conclusions. All three physicians stated that current medical research shows no causal link between coal dust or silica exposure and lung cancer. Employer's Exhibits LL, N, TT. Dr. Kleinerman, board-certified in anatomical and clinical pathology, concluded that "except for a single solitary and atypical macule of simple coal workers' pneumoconiosis," he found no evidence of pneumoconiosis and opined that death was due to leukemia and cancer.<sup>5</sup> Employer's Exhibits LL, MM. Dr. Naeye, board-certified in anatomical and clinical

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<sup>5</sup> Dr. Kleinerman attributed the lung cancer to smoking. Employer's Exhibit LL.

pathology, diagnosed "very mild" simple pneumoconiosis that was "too mild to have hastened [the miner's] death" due to lung cancer and leukemia. Employer's Exhibits K, SS. Dr. Naeye added that, contrary to Dr. Kelly's opinion, the miner's interstitial fibrosis resulted from radiation therapy, and was not diagnostic of significant coal workers' pneumoconiosis. Employer's Exhibit Q. Dr. Conway, board-certified in internal and pulmonary medicine, concluded that the miner had "very mild" simple pneumoconiosis that did not contribute to or aggravate the effect of the lung cancer and leukemia that caused his death.<sup>6</sup> Director's Exhibit 17 at 22; Employer's Exhibit N.

Pursuant to Section 718.205(c)(1), the administrative law judge permissibly credited the opinions of Drs. Kleinerman, Naeye, and Conway that the miner's cancer was not caused by silica or coal dust exposure, based on their documented qualifications and expertise in pathology and pulmonary medicine. Decision and Order at 20-21; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Inasmuch as the Board is not empowered to reweigh the evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), we reject claimant's contention that Dr. Kelly's opinion should have been credited because he is board-certified in occupational medicine. Claimant's Brief at 9. We also reject claimant's assertion that the opinions of Drs. Kleinerman and Naeye merited no weight because the physicians gave different answers regarding how many lung tissue slides there were.<sup>7</sup> Claimant's Brief at 7. We see no indication in the record that claimant raised this issue before the administrative law judge, nor does claimant explain how this discrepancy casts "serious doubt" on the competence of these two physicians. Claimant's Brief at 7. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.205(c)(1).

Pursuant to Section 718.205(c)(2), the administrative law judge permissibly concluded that the opinions of Drs. Naeye, Kleinerman, and Conway that the miner's simple pneumoconiosis was too mild to have contributed in any way to his death from lung cancer outweighed the contrary opinion of Dr. Kelly, based on their qualifications in pathology and

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<sup>6</sup> Dr. Reger, an epidemiologist, and Dr. Reasor, a board-certified toxicologist, reviewed the medical research literature and reported that there is no association between coal dust or silica exposure and lung cancer. Employer's Exhibits JJ, NN, O, OO. Ultimately, the administrative law judge chose to rely primarily on the pathology and pulmonology opinions by Drs. Kleinerman, Naeye, and Conway. Decision and Order at 21.

<sup>7</sup> Dr. Kleinerman stated that eight slides contained lung tissue, while Dr. Naeye stated that there were five lung tissue slides. Employer's Exhibits K, LL.

pulmonary medicine. Decision and Order at 22-23; *see Clark, supra; Wetzel, supra*. Claimant contends that the opinion of the autopsy prosector should have been credited, Claimant's Brief at 9, but Dr. Palutke did not address whether pneumoconiosis caused or hastened the miner's death. Director's Exhibit 22. Inasmuch as the administrative law judge considered all of the relevant evidence under the applicable legal standard and provided a valid reason for her weighing of the medical opinions, we affirm the administrative law judge's finding pursuant to Section 718.205(c)(2). *See Lukosevicz, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

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Administrative Appeals Judge