

BRB No. 97-0545 BLA

BARBARA ANN MENSER	)	
(Widow of NORMAN MENSER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEBSTER COUNTY COAL CORPORATION	)	DATE ISSUED:
	)	
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 Upon Remand of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Eric P. Allen (O'Connor, Acciani & Levy), Cincinnati, Ohio, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., 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 Upon Remand (90-BLA-1931) of Administrative Law Judge Robert D. Kaplan 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, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. In the initial Decision and Order, Administrative Law Judge Bernard J. Gilday, Jr. found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Gilday denied benefits. Judge Gilday likewise denied claimant's subsequent motion for reconsideration.

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<sup>1</sup>Claimant is the surviving spouse of the deceased miner who died on July 17, 1989. Director's Exhibit 7. Claimant filed her application for survivor's benefits on August 7, 1989. Director's Exhibit 1.

On appeal, the Board vacated Judge Gilday's finding under 20 C.F.R. §718.205(c), and remanded the case for further consideration. *Menser v. Webster County Coal Corp.*, BRB No. 92-1030 BLA (Mar. 28, 1995)(unpub.). The Board also instructed Judge Gilday to initially consider whether the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. *Id.* On remand, Administrative Law Judge Robert D. Kaplan<sup>2</sup> (the administrative law judge) found that while the record supported a finding of the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), the record failed to demonstrate 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 appeal, claimant contends that the record establishes that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c)(2). Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has filed a letter indicating his intention not to participate in this appeal.<sup>3</sup>

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>2</sup>Due to Judge Gilday's unavailability, the case was reassigned to Administrative Law Judge Robert D. Kaplan on remand.

<sup>3</sup>We affirm the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.203 inasmuch as these findings are unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant argues that the opinions of Drs. Taylor and Pitzer are sufficient to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c)(2).<sup>4</sup> The United States Court of Appeals for the Sixth Circuit, wherein appellate jurisdiction of this case arises, has held that pneumoconiosis will be found to be a substantially contributing cause or factor of a miner's death in a case in which it actually hastened the miner's death. *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 816, 17 BLR 2-135, 2-140 (6th Cir. 1993). While the opinions of Drs. Taylor and Pitzer ostensibly satisfy the requirements set forth in *Brown*, the administrative law judge found these reports outweighed by the contrary opinions of Drs. Anderson, Broudy, Caffrey, Fino, Lane and Naeye. Decision and Order Upon Remand at 5-6.

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<sup>4</sup>Dr. Taylor, the miner's treating physician, completed the death certificate, which is dated July 17, 1989, and listed pulmonary fibrosis, mucus plugging, and coal worker's pneumoconiosis as immediate causes of death. Director's Exhibit 7. In a letter to employer's counsel dated January 31, 1990, Dr. Taylor recanted his opinion that coal worker's pneumoconiosis was a principal cause of death and stated that "the diagnosis of coal worker's pneumoconiosis should have been placed in Part II- other significant conditions contributing to death [on the death certificate] but not resulting in the underlying cause on Part I." Director's Exhibit 22.

Dr. Pitzer performed the autopsy wherein he opined that the miner's cause of death was severe coal workers' pneumoconiosis with interstitial fibrosis and respiratory failure. Claimant's Exhibit 1. Dr. Pitzer reiterated his findings during his deposition on June 13, 1990, and despite the contrary opinions of several reviewing pathologists, emphasized his opinion that the miner's demise was a direct result of severe pneumoconiosis. *Id.*

Claimant argues that as the miner's treating physician, Dr. Taylor's opinion should be accorded determinative weight. Claimant also argues that as the autopsy prosector, Dr. Pitzer's findings should be accorded greater weight than the opinions provided by reviewing physicians. While the administrative law judge has discretion to accord greater weight to the autopsy prosector's findings, the administrative law judge permissibly found that Dr. Pitzer had no advantage over the reviewing physicians of record than is usual where the prosector's opinion is evaluated and weighed in conjunction with the contrary opinions of consulting physicians. See *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992); Decision and Order Upon Remand at 6. With respect to Dr. Taylor's opinion, the administrative law judge questioned the doctor's findings inasmuch as it was not clear from the death certificate whether Dr. Taylor had access to the autopsy report prior to issuing the death certificate.<sup>5</sup> Decision and Order Upon Remand at 4. While the administrative law judge apparently erred in this regard,<sup>6</sup> his decision to discredit Dr. Pitzer's autopsy findings also calls into question the reliability of Dr. Taylor's findings to the extent that Dr. Taylor relied on the autopsy report. Moreover, the administrative law judge properly noted that Dr. Taylor had not previously diagnosed pneumoconiosis. See *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988)(administrative law judge may not "accept at face value" miner's death certificate without considering underlying basis for physician's conclusions as to cause of death); Decision and Order Upon Remand at 4.

The administrative law judge, within a proper exercise of his discretion, accorded determinative weight to the opinions of Drs. Anderson, Broudy, Caffrey, Fino, Lane and Naeye, that pneumoconiosis did not cause the miner's demise, because he found these opinions to be reasoned. See *Addison, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Director's Exhibits 9, 16, 17, 23; Employer's Exhibits 2, 3, 4, 6. Claimant also avers that inasmuch as the administrative law judge found that the miner had pneumoconiosis, it was irrational for him to rely upon the opinions of physicians who found that the miner did not have pneumoconiosis; namely, Drs. Broudy, Fino and Anderson. Contrary to claimant's contention, Drs. Broudy and Fino did not specifically conclude that the miner did not have pneumoconiosis, Employer's Exhibits 2, 3, and Dr. Anderson opined that the amount of pneumoconiosis in the miner's lung was insufficient to contribute to his death, Employer's Exhibit 4. Hence, we reject claimant's contention.

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<sup>5</sup>The administrative law judge noted that Dr. Taylor's reference to "post mortem" may have indicated the autopsy report, but Dr. Taylor signed the death certificate on July 21, 1989, and Dr. Pitzer dictated and transcribed the autopsy report on August 3, 1989, two weeks after Dr. Taylor completed the death certificate. Decision and Order Upon Remand at 4. The administrative law judge determined that Dr. Pitzer may have discussed his findings with Dr. Taylor prior to Dr. Taylor completing the death certificate, but that the term "post mortem" is still unclear.

<sup>6</sup>A review of the death certificate reveals that Dr. Taylor answered both questions 28(a) and 28(b) in the affirmative: "Was an autopsy performed?" and "Were autopsy findings available prior to completion of cause of death?" Director's Exhibit 7.

Claimant further asserts that where the evidence is equally balanced with respect to whether the miner's death was due to pneumoconiosis, doubt must be resolved in her favor. To the contrary, the United States Supreme Court has held that the "true doubt" rule is inapplicable under the Act. *Director, OWCP v. Greenwich Collieries* [Ondecko], 114 S. Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We, therefore, reject claimant's argument.

Inasmuch as claimant failed to satisfy her burden of establishing that the miner's pneumoconiosis was a substantially contributing cause or factor leading to his death, see *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988), we affirm the administrative law judge's finding under 20 C.F.R. §718.205(c)(2). See *Brown, supra*.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge