

BRB No. 99-0256 BLA

TWILA J. FLEMING	)	
(Widow of JOSEPH E. FLEMING)	)	
	)	
Claimant-Petitioner	)	)
	)	
v.	)	
	)	
NATIONAL MINES 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 Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Twila J. Fleming, Natural Bridge Station, Virginia, *pro se*.

Henry C. Bowen (Steptoe & Johnson), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-0379) of Administrative Law Judge Jeffrey Tureck 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). The administrative law judge adjudicated this claim, filed on April 28, 1997, pursuant to the provisions at 20 C.F.R. Part 718, and noted that the parties did not dispute that the miner had pneumoconiosis arising out of coal mine employment, but found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial

of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.<sup>1</sup> 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).

Turning to the merits, in order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish 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, or that death was caused by complications of pneumoconiosis, and that the miner had pneumoconiosis which arose out of coal mine employment.<sup>2</sup> See 20 C.F.R. §§718.205(c), 718.202(a),

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<sup>1</sup>We note that in her letter dated November 17, 1998, claimant's daughter, Linda Fleming Powers, indicated that she was appealing the administrative law judge's Decision and Order on claimant's behalf, and was basing the appeal on claimant's attorney's negligence, as acknowledged by the administrative law judge. See Decision and Order at 2-3. While we sympathize with claimant, the Board is not empowered on appeal to overturn an administrative law judge's Decision and Order on the ground that claimant's counsel provided inadequate legal representation.

<sup>2</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

718.203; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); *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).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding the evidence insufficient to establish death due to pneumoconiosis at Section 718.205(c), the administrative law judge accurately reviewed the relevant medical evidence of record and the qualifications of the physicians who provided opinions regarding the cause of the miner's death. The administrative law judge determined that the autopsy prosector, Dr. Cook, noted that simple coal workers' pneumoconiosis was identified,<sup>3</sup> but did not state that it was related to the miner's death, which she attributed to respiratory failure due to bilateral bronchopneumonia caused by cytomegalovirus, and chronic obstructive pulmonary disease.<sup>4</sup> Decision and Order at 5; Director's Exhibit 9. The administrative law judge reasonably accorded no weight to Dr. Naeye's original opinion that the miner's death was due to pneumoconiosis, Director's Exhibit 15, because the physician retracted that opinion at his deposition and concluded that death was attributable solely to the effects of the miner's chronic lymphatic leukemia.<sup>5</sup> Decision and Order at 6-7; Employer's

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<sup>3</sup>Dr. Cook's final anatomic diagnoses were: (1) cytomegalovirus pneumonia; (2) emphysema, centrilobular and panacinar; (3) cardiomegaly with left ventricular hypertrophy; (4) moderate to severe atherosclerotic coronary artery disease; (5) status post coronary artery bypass graft, remote; (6) simple coal workers' pneumoconiosis, mild to moderate. Director's Exhibit 9.

<sup>4</sup>Because Dr. Cook did not specify whether any of these diagnosed causes of death arise out of dust exposure in coal mine employment, they do not satisfy the regulatory definition of pneumoconiosis. 20 C.F.R. §718.201; see generally *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988).

<sup>5</sup>The administrative law judge also gave no weight to Dr. Naeye's revised opinion because he found that it was not credible. Decision and Order at 6-7. Although employer asserts that the administrative law judge should have credited Dr. Naeye's revised opinion, employer concedes that the error, if any, is harmless in light of the administrative law judge's remaining credibility determinations. Employer's Brief at 7; see generally *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Because the administrative law judge could not rely on Dr. Naeye's original opinion which was recanted, and the administrative law judge ultimately found that the weight of the evidence was insufficient to establish death due to pneumoconiosis

Exhibit 6. Although the administrative law judge found that the death certificate signed by Dr. Jereza, who treated the miner from 1991 until his death in 1996, was probative evidence that pneumoconiosis contributed to the miner's death, the administrative law judge permissibly accorded it little weight because no explanation was provided for the conclusions reached and Dr. Jereza's expertise was unknown. Decision and Order at 5, 8; Director's Exhibits 12-14; Employer's Exhibit 3; see generally *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730 (1983). Lastly, the administrative law judge acted within his discretion in according determinative weight to the contrary opinion of Dr. Kleinerman, buttressed by the opinion of Dr. Caffrey, a highly qualified pathologist who reviewed the entire medical record, because the administrative law judge found that Dr. Kleinerman possessed superior qualifications as an outstanding expert in the pathology of occupational lung diseases and persuasively explained his reasons for concluding that the miner's pneumoconiosis did not cause, contribute to, or hasten death. Decision and Order at 7-8; Employer's Exhibits 4, 5; see generally *Akers, supra*; *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge's finding that the weight of the evidence of record was insufficient to establish death due to pneumoconiosis at Section 718.205(c) is supported by substantial evidence, in accordance with law, see *Shuff, supra*, and thus is affirmed. Consequently, we affirm his finding that claimant is not entitled to benefits in this survivor's claim.

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pursuant to Section 718.205(c), his failure to credit Dr. Naeye's revised opinion, which was adverse to claimant, did not affect the disposition of this case and thus we need not address employer's allegations of error. *Larioni, supra*.

Accordingly, the administrative law judge's Decision and Order 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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JAMES F. BROWN  
Administrative Appeals Judge