

BRB No. 00-0531 BLA

MAUREEN HARTMAN)
(Widow of DARYL HARTMAN))

Claimant-)
Petitioner)

v.)

KOCHER COAL COMPANY,)
INCORPORATED/LACKAWANNA)
CASUALTY COMPANY)

Employer/Carrier -)
Respondents)

DIRECTOR, OFFICE OF)
WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)

DATE ISSUED:

DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order upon Remand by the Benefits Review Board of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

George E. Mehalchick (Lenahan & Dempsey), Scranton, Pennsylvania, for employer.

Sarah M. Hurley (Judith E. Kramer, 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, the United States Department of Labor.

Before: SMITH, McGRANERY, and NELSON, Acting Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's¹ widow, appeals the Decision and Order upon Remand by the Benefits Review Board (97-BLA-0932) of Administrative Law Judge Ainsworth H. Brown 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).² In our previous decision in this case, we remanded the case to the

¹The miner filed his first claim for benefits on January 18, 1984. Director's Exhibit 22. After a denial by an administrative law judge, claimant filed, without the assistance of counsel, an appeal with the Board, which affirmed the denial of benefits on the basis that the administrative law judge properly determined that the evidence did not establish the existence of pneumoconiosis. *Hartman v. Kocher Coal Co.*, BRB No. 88-0973 BLA (Feb. 27, 1990)(unpub.). The miner filed a second claim on December 24, 1991. Director's Exhibit 22. On August 7, 1993, the miner filed a Motion to Withdraw his claim, which was approved by Administrative Law Judge Frank D. Marden on May 10, 1993. *Id.*

²The 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.

administrative law judge to reconsider the opinion of Dr. Miller and properly weigh the medical opinions relevant to 20 C.F.R. §718.205(c)(2) (2000). See *Hartman v. Kocher Coal Co.*, BRB No. 99-0130 BLA (Oct. 28, 1999)(unpub.). On remand, the administrative law judge found the evidence insufficient to establish that pneumoconiosis contributed to the miner's death pursuant to Section 718.205(c)(2) (2000). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in rejecting Dr. Miller's opinion. Employer/carrier responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that she will not participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all Black Lung claims pending on appeal before the Board, except for those cases where the Board determines, after briefing by the parties, that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which claimant, employer and the Director have responded, asserting that the regulations at issue would not alter the outcome of the case. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 applicable law. 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).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304 (2000); see *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 careful consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. On remand, the the administrative law judge reconsidered Dr. Miller's medical notes, deposition testimony and opinion that anthracosilicosis hastened the miner's death.³ The administrative law judge, citing to *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997), determined that he was required to consider a number of factors, including the "instinct" of an attending physician. The administrative law judge noted that Dr. Miller began his care of the miner "upon the discovery of the cancer that later extended itself to the lungs and this condition proved to be fatal" and further found that "[t]he fairest reading of Dr. Miller's testimony is that his awareness of [coal workers' pneumoconiosis] came late in his patient's life so that consideration of instinct would seem to be a marginal factor at best." Decision and Order on Remand at 4.

The administrative law judge accorded determinative weight to Dr. Oesterling's opinion, that emphysema found in the miner's lungs is commonly associated with cigarette smoking, and that the onset and progressive nature of respiratory symptoms found in the miner occurred when the tumor process extended to the miner's lungs, and found that these findings by the physician were consistent with the plain language of the hospital records. The administrative law judge

³On September 4, 1996, Dr. Miller submitted a letter to claimant's counsel indicating that he had seen the miner in August 1995 and May 1996, and that during that time, it was determined that the miner was suffering from colon cancer which, in spite of chemotherapy, developed into widespread metastatic disease to the miner's lungs, leading to worsening respiratory distress. Director's Exhibit 10. The physician stated that at the initial visit in August 1995, the miner had no symptoms of dyspnea and the miner's lungs were clear without wheezes, rales, or rhonchi, but over the following year, the miner developed marked increased dyspnea on exertion. Dr. Miller stated that the most important diagnostic study performed was a lung biopsy on a limited autopsy, which revealed the presence of anthracosilicosis, which, in the physician's opinion, lead to the hastening of the miner's death. *Id.* At his deposition on August 21, 1997, Dr. Miller stated that his opinion was additionally based upon the autopsy findings which revealed the presence of right ventricular hypertrophy, a condition which does not develop quickly, but is a chronic, slowly developing condition. Dr. Miller stated that the increased pressure in the miner's lungs was multi-factorial, due in part to the miner's smoking-related emphysema and his coal workers' pneumoconiosis. Claimant's Exhibit 5 at 11-12.

concluded that Dr. Miller's opinion is not as probative as the opinions by Drs. Naeye and Oesterling because the physician did not provide a rationale "that would permit one to ignore or depreciate the probative value of the Naeye-Oesterling analysis of the pathology findings in the record."⁴ Decision and Order at 4.

⁴On November 27, 1996, Dr. Naeye submitted his opinion on the basis of a review of an autopsy report, death certificate, medical information from Drs. Miller and Dittman, and a review of autopsy slides of lung tissue. Dr. Naeye opined that the slides revealed mild simple coal workers' pneumoconiosis. The physician stated that although the pneumoconiosis is moderately severe by microscopic criteria, it is clearly mild overall because of normal pulmonary function and blood gas study results obtained in 1992, despite the miner working in the mines for twenty-five years. Dr. Naeye explained the discrepancy between post-mortem and clinical

findings as being the result of the autopsy prosector taking tissue from the most abnormal parts of the lungs. In his opinion, the miner's pneumoconiosis was too mild to have produced impairments in the miner's lungs which would have hastened his death. Director's Exhibit 11.

On June 20, 1997, Dr. Oesterling conducted a similar record and slide review. Dr. Oesterling opined that the slides indicate that the miner suffered from micronodular with macular coal workers' pneumoconiosis, and that the miner's tumor destroyed large portions of the lung tissue and partially occluded significant airways. The physician also opined that the tumor produced secondary effects such as passive congestion and pulmonary atelectasis, in addition to producing bronchopneumonia. Dr. Oesterling further stated that the slides reveal that the miner was additionally suffering from centrilobular pulmonary emphysema due to his thirty year smoking history, unrelated to coal dust exposure. With regard to the role of the miner's pneumoconiosis in his death, Dr. Oesterling opined that the limited changes due to dust deposition appear insufficient to have altered pulmonary function and thus did not contribute to the miner's death. He agreed with Dr. Naeye's opinion in this regard, as supported by Dr. Dittman's March 1993 findings, and found that the marked dyspnea on exertion observed by Dr. Miller between August 1995 and May 1996 "obviously" was due to the progressive metastatic disease involving the lungs during that period. Employer's Exhibit 1.

In making this determination, the administrative law judge permissibly found that the opinions by Drs. Naeye and Oesterling were entitled to greater weight than Dr. Miller's opinion, although Dr. Miller was the attending physician, as the determination of the existence of pneumoconiosis and the role of the disease in the miner's death was based upon the autopsy slides, which the pathologists possessed the expertise to read. See generally *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, claimant failed to meet her burden of proof in establishing entitlement to benefits. See *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Risher v. Director, OWCP*, 940 F.2d 327, 331, 15 BLR 2-186 (8th Cir. 1991); *Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259 (3d Cir. 1990). We therefore affirm the administrative law judge's determination that claimant failed to establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2)(2000).⁵

⁵We decline to address claimant's contention that the administrative law judge erred in rejecting the opinion by Dr. Bindie, as we have previously affirmed the administrative law judge's weighing of this opinion. See *Hartman v. Kocher Coal Co.*, BRB No. 99-0130 BLA (Oct. 28, 1999)(unpub.).

Accordingly, the administrative law judge's Decision and Order upon Remand by the Benefits Review Board is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge