

BRB No. 00-0659 BLA

DAWN KIMMEL)
(Widow of GUY KIMMEL))

Claimant-Respondent)

v.)

DATE ISSUED: _____

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

Petitioner)

DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Paul H. Teitler,
Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Timothy S. Williams (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, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits (99-BLA-1187) of Administrative Law Judge Paul H. Teitler 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 The administrative law judge accepted the parties' stipulation that the miner

¹The Department of Labor has amended the regulations implementing the

had been employed in the coal mines for nine and one-half years and determined that the record established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2)(2000).² Accordingly, benefits were awarded. On appeal, the Director contends that the administrative law judge applied the incorrect legal standard in assessing the evidence, and therefore, erred in determining that claimant established entitlement to survivor's benefits.³ Claimant responds, urging affirmance of the decision.

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

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.

²The death certificate, dated March 29, 1998, lists the immediate cause of death as multiple myeloma and chronic myelomonocytic leukemia, with anthracosis listed as a significant condition. Director's Exhibit 5.

³The Director's petition for review indicates that the parties stipulated to the existence of pneumoconiosis arising out of coal mine employment. Director's Brief at 2.

injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which both claimant and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. 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'Keefe 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 (2000) 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); *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).

The administrative law judge found that the miner had simple pneumoconiosis based on Dr. Bindie's autopsy report.⁴ Director's Exhibit 6; Decision and Order at 7. The administrative law judge then found that Dr. Spagnolo, a reviewing physician, opined that pneumoconiosis was far too minimal to have contributed to the miner's death. The administrative law judge noted that the miner's family physician, Dr. Nasuti, prescribed an inhaler, reported a chronic cough and shortness of breath, and concluded that the miner's breathing was compromised by his pneumoconiosis and emphysema. Decision and Order at 7 - 8. The administrative further found that Dr. Bindie, a board-certified pathologist, concluded that the miner's death was due to respiratory insufficiency and failure secondary to the combination of leukemic infiltration, leukemic intravascular leukostasis, pneumonitis with focal necrotizing pneumonitis, tracheobronchitis, pulmonary emphysema, simple coal workers' pneumoconiosis, and the

⁴The Final Memorandum of Informal Conference, dated May 12, 1999, indicates that the presence of pneumoconiosis was found at autopsy and is conceded. The senior claim examiner further found that as there is no responsible operator to contest this finding, the issue of the existence of pneumoconiosis was determined to be resolved. Director's Exhibit 17.

immunocompromised state secondary to multiple myeloma and chronic myelomonocytic leukemia. Director's Exhibit 6. The administrative law judge found that Dr. Bindie's conclusions are consistent with Dr. Nasuti's findings of shortness of breath, chronic cough and death due to multiple causes. Decision and Order at 8. The administrative law judge determined that since the miner had died of multiple causes, had pneumoconiosis, and was being treated for respiratory disease, and it was not medically feasible to determine the extent to which pneumoconiosis contributed to the cause of death, benefits should be granted to claimant. Decision and Order at 8.

Initially, the Director asserts that the administrative law judge erred in determining that Dr. Nasuti, the miner's family physician, opined that the miner suffered from pneumoconiosis. We agree. Dr. Nasuti's medical notes indicate that he diagnosed breathing problems and chronic obstructive pulmonary disease, but do not include a diagnosis of coal workers's pneumoconiosis or state that the miner's chronic obstructive pulmonary disease arose from his coal mine employment. Thus, we vacate the administrative law judge's determination that Dr. Nasuti opined that the miner's breathing was compromised by his pneumoconiosis and emphysema.⁵ Decision and Order at 8; Director's Exhibit 7.

The Director also contends that the administrative law judge utilized an incorrect legal standard in determining that claimant established her entitlement to benefits. The administrative law judge, citing to *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989) and 20 C.F.R. §718.205(b), determined that the United States Court of Appeals for the Third Circuit "has stated that benefits could be awarded where the miner died of multiple causes and it was not medically feasible to determine the extent to which pneumoconiosis contributed to the cause of death." Decision and Order at 7. The administrative law judge also stated that the Third Circuit held in *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997), that where the evidence establishes that the deceased miner suffered from pneumoconiosis or a respirable disease and death may have been due to multiple causes, death will be found to be due to pneumoconiosis if it is not medically feasible to distinguish which diseases caused death or specifically how

⁵The Director states in her brief that although Dr. Nasuti's records may bolster Dr. Bindie's general finding that the miner had pulmonary disease, they do not support a finding that the simple clinical pneumoconiosis Dr. Bindie diagnosed on autopsy contributed to the miner's death. Director's Brief at 8 - 9.

much each disease contributed to causing death. Decision and Order at 8. We agree with the Director that the language relied upon by the administrative law judge is contained in 20 C.F.R. §718.205(b) (2000), and is applicable only to claims filed prior to January 1, 1982.

The instant claim was filed on September 17, 1998. Director's Exhibit 1. In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, a claimant must prove that pneumoconiosis actually hastened the miner's death.⁶ See 20 C.F.R. §718.205(c)(2); *Mancia, supra*; *Lukosevicz, supra*. Therefore, we vacate the administrative law judge's finding that claimant is entitled to benefits and remand the case for further consideration of the evidence consistent with the appropriate legal standard in the Third Circuit and pursuant to Section 718.205(c)(2) (2000). On remand, the administrative law judge must consider whether Dr. Bindie's opinion is reasoned prior to according weight to the opinion, and provide an adequate rationale for his findings on the issue of whether the miner's pneumoconiosis actually hastened the miner's death.⁷ See *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Director, OWCP v. Siwec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is vacated and the case remanded for further consideration of the evidence consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

⁶Contrary to the administrative law judge's statements, neither *Lukosevicz* nor *Mancia* has held that a claimant must prevail if it is not medically feasible to determine to what extent pneumoconiosis contributed to a miner's death.

⁷The Director noted that the administrative law judge found that Dr. Bindie has impressive credentials and that his autopsy was thorough but failed to expressly determine whether the physician's opinion is reasoned.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge