BRB Nos. 04-0617 BLA
and 04-0617 BLA-A

RUBY JEAN CHURCH (Widow of CALVIN C. CHURCH) Claimant-Petitioner v. KENTLAND-ELKHORN COAL CORPORATION and THE PITTSTON COMPANY Employer/Carrier- Respondent/Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/08/2005 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States of Department of Labor.

Ruby Jean Church, Mouthcard, Kentucky, *pro se*.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky for employer/carrier.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation,[1] appeals the Decision and Order – Denial of Benefits (03-BLA-5484) of Administrative Law Judge Robert L. Hillyard 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] The district director issued a Proposed Decision and Order Awarding Benefits on November 1, 2002. Director's Exhibit 26. Employer requested a hearing, which was held on October 28, 2003. Employer conceded at the hearing that the miner suffered from coal worker's pneumoconiosis and that the miner was totally disabled prior to his death. The administrative law judge, however, 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, the administrative law judge denied benefits with respect to the survivor's claim.

Employer responds to claimant's appeal, arguing in support of the denial of benefits. Employer has also filed a cross-appeal, alleging that the administrative law judge erred in excluding Employer's Exhibits 7-9 because they were proffered in excess of the evidentiary limitations at 20 C.F.R. §725.414. Employer specifically challenges the validity of the regulation at 20 C.F.R. §725.414, and maintains that all of its evidence should have been admitted based on relevancy alone. Employer's Brief at 23-25. The Director, Office of Workers' Compensation Programs, (the Director) filed a consolidated response brief, alleging that employer submitted reports from several physicians, who reviewed evidence from the miner's lifetime claim, which had not been properly admitted into evidence in the survivor's claim. The Director points out that 20 C.F.R.

[1] Susie Davis, the President of the Kentucky Black Lung Coalminers & Widows Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision. Ms. Davis is not, however, representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Because the miner's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

[2] Prior to his death, the miner filed a claim on March 16, 1983, which was denied by the district director on July 19, 1983 because the evidence failed to establish the existence of pneumoconiosis, that the disease arose out of coal mine employment, and total disability due to pneumoconiosis. Director's Exhibit 1. The miner took no further action with respect to his claim during his lifetime.

§725.414(a)(3)(i) requires that "[a] medical report must generally be based on evidence which is itself admissible."[3] Director's Brief at 2. The Director asserts that since no party introduced the prior miner's claim into evidence, it was error for the administrative law judge to consider those medical reports, which contained a review of the evidence in the lifetime miner's claim, without first addressing the impact of 20 C.F.R. §725.414(a)(3)(i). *Id*. Notwithstanding, the Director also maintains that the error committed by the administrative law judge with respect to Section 725.414(a)(2)(i) was harmless as the evidence in the miner's claim predates his death by 20 years and "[t]hus, it appears to have little if any relevance to the only disputed issue here, the cause of [the miner's] death." *Id*. The Director takes no position on the ultimate issue of entitlement.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

To establish entitlement to survivors' benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

After consideration of the issues and arguments raised on appeal, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence. We first address the merits of entitlement and then reach the issue raised by the Director's Brief.

[3] The Director cites 20 C.F.R. §725.414(a)(2)(i), which contains an identical provision applicable to claimant's evidence. Since the Director's argument pertains to employer's evidence we reference 20 C.F.R. §725.414(a)(3)(i).

In considering the issue in the survivors' claim, the administrative law judge first noted that the death certificate, prepared by Dr. Leedhanachoke, listed the cause of the miner's death as multi-organ system failure as a consequence of acute renal failure and aspiration pneumonia. Director's Exhibit 17; Decision and Order at 11. Although Dr. Leedhanachoke was the miner's treating physician, the administrative law judge properly found that Dr. Leedhanachoke offered no opinion either in his written reports or on the death certificate as to whether the miner's death was caused or hastened by pneumoconiosis. *Id.*

With respect to the autopsy evidence, the administrative law judge correctly noted that an autopsy was performed by Dr. Dennis, who identified the cause of the miner's death as acute myocardial infarction with findings of significant chronic obstructive pulmonary disease and significant anthracosilicosis. Decision and Order at 8; Director's Exhibit 16. Dr. Dennis specifically opined that anthracosilicosis was a contributing factor to the miner's death as it caused the miner a significant degree of hypoxemia. Director's Exhibit 16.

The administrative law judge correctly weighed Dr. Dennis's opinion against the contrary opinions of Drs. Caffrey, Repsher and Naeye, who agreed that the degree of pneumoconiosis demonstrated on the autopsy slides was too mild to have produced clinical symptoms prior to the miner's death, and that his pneumoconiosis was too mild to have caused or hastened death. Director's Exhibit 18; Employer's Exhibits 1, 2, 3, 5, 6. The administrative law judge permissibly credited the opinions Drs. Caffrey, Naeye and Repsher as he found that they were supported by the objective medical evidence, including the normal pulmonary function studies and multiple negative x-rays obtained immediately prior to the miner's death, which seemed to corroborate that the miner suffered from only mild pneumoconiosis and not "severe" pneumoconiosis as diagnosed by Dr. Dennis.[4] *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 14. The administrative law judge also noted Dr. Naeye's comment that "all of the lesions seen in the pathology slides combined occupied less that 10 [percent] of the lung tissues available for review." Decision and Order at 14. Thus, because the administrative law judge found that Dr. Dennis's opinion overstated the degree of pneumoconiosis found on autopsy, he reasonably questioned the veracity of Dr. Dennis's opinion that the miner's severe

[4] The administrative law judge also properly rejected Dr. Raschella's opinion, noting that while Dr. Raschella opined during his deposition that the miner's death was not hastened by pneumoconiosis, he failed to adequately explain the basis for his diagnosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Director's Exhibit 18; Employer's Exhibit 4; Decision and Order at 13.

pneumoconiosis caused a significant degree of hypoxemia and therefore would have hastened his death due to aspiration pneumonia. Thus, because the administrative law judge had discretion to assign Dr. Dennis' opinion less weight, we affirm his finding at 20 C.F.R. §718.205(c) as supported by substantial evidence.

We next address the Director's contention that the administrative law judge failed to consider whether any of the physicians reviewed evidence that had not been properly admitted in the survivor's claim. As noted by the Director, when a living miner files a subsequent claim, all the evidence from the first miner's claim is specifically made part of the record. *See* 20 C.F.R. §725.309(d). Such an inclusion is not automatically available in a survivor's claim filed pursuant to the revised regulations. As this case involves a survivor's claim, the medical evidence from the prior living miner's claim must have been designated as evidence by one of the parties in order for it to have been included in the record relevant to the survivors' claim. Furthermore, 20 C.F.R. §725.414(a)(3)(i) provides:

> Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible….

20 C.F.R. §725.414(a)(3)(i). Thus, if any of the medical reports are based on evidence in the record that was not properly admitted into the survivor's claim, the administrative law judge was required to address the implication of Section 725.414(a)(3)(i).

Although the administrative law judge's analysis of the medical opinion evidence did not take into consideration Section 725.414(a)(3)(i), this error is harmless as the Director suggests. S*ee Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We agree that since evidence from the prior miner's claim predates the survivor's claim by twenty years, it was of no particular relevance to the cause of the miner's death. We further note that while Drs. Naeye and Repsher apparently reviewed some evidence from the prior miner's claim, they specifically based their opinions, that the miner had no respiratory symptoms prior to death, on objective evidence dating from 1991 up to the miner's last hospitalization, which was properly admitted in the survivor's claim, and demonstrated that the miner had no significant respiratory symptoms. Thus, the administrative law judge's finding that the opinions of Drs. Naeye and Repsher, overall, were better supported by the objective evidence remains intact. Additionally, we affirm the administrative law judge's denial of benefits based solely on his decision to credit Dr. Caffrey's well reasoned opinion as to the cause of the miner's death. Dr. Caffrey's opinion was based on a review of only the medical evidence properly admitted in the survivor's claim and was not subject to consideration pursuant to Section 725.414(a)(3)(i).

In conclusion, as it is the function of the administrative law judge to resolve the conflicts in the medical evidence, his findings will not be disturbed on appeal if supported by substantial evidence. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge properly weighed the conflicting medical evidence relevant to the cause of the miner's death, we affirm as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[5]

[5] We reject employer's contention that 20 C.F.R. §725.414 is an invalid regulation. *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004)(*en banc*). Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties may submit into the record. *See* 20 C.F.R. §§725.414; 725.456(b)(1). The applicable provision states that employer is entitled to "obtain and submit, in support of its affirmative case, no more than two chest X-ray interpretations, … and no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i). In accordance with Section 725.414(a)(3)(i), we affirm the administrative law judge's decision to exclude Employer's Exhibits 7-9, consisting of the medical reports of Drs. Tomashefski, Roggli, and Jarboe, as that evidence was proffered in excess of the evidentiary limitations. Hearing Transcript at 6-7.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is hereby affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge