

BRB No. 03-0771 BLA

GLORIA MARSILI	)	
(Widow of LEONARD A. MARSILI)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 08/24/2004
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Gloria Marsili, Peckville, Pennsylvania, *pro se*.

Timothy S. Williams (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,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order Denying Benefits (02-BLA-5047) of Administrative Law Judge Janice K. Bullard in this survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine

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<sup>1</sup> Claimant is Gloria Marsili, the widow of the miner, Leonard A. Marsili, who died on March 9, 2001. Director's Exhibit 2. During his life, the miner filed a claim for benefits. The district director conceded the miner's entitlement to benefits on July 31, 1991. Director's Exhibit 13.

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>2</sup> The administrative law judge noted that the Director, Office of Workers' Compensation Programs (the Director), who is the party responsible for the payment of any benefits awarded in this case, conceded the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge found that these concessions were supported by the record. The administrative law judge considered the medical opinion evidence and found it insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

The Director responds to claimant's appeal, urging the Board to affirm the administrative law judge's denial of benefits.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death.<sup>3</sup> 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203,

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<sup>2</sup> The 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). As the instant claim was filed after the effective date of the amended regulations, all citations to the regulations refer to the amended regulations.

<sup>3</sup> 20 C.F.R. §718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. See 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge accorded greatest weight to the opinion of Dr. Sherman.<sup>4</sup> The administrative law judge found Dr. Sherman's opinion to be well-documented, and determined that Dr. Sherman's opinion is the best reasoned and the most consistent with the objective record. Decision and Order at 9-10, 12. The administrative law judge also noted that Dr. Sherman is Board-certified in pulmonary medicine and stated that "[Dr. Sherman's] opinions on medical conditions within the scope of his expertise are credited with greater weight." Decision and Order at 9-10. The administrative law judge found that Dr. Shane's opinion is entitled to less weight as Dr. Shane's opinion is not well-reasoned or consistent with the evidence. The administrative law judge also found Dr. Shane's opinion to be speculative, noting that the

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(3) Where the presumption set forth at §718.304 is applicable.

...

(5) 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)(1)-(3), (5).

<sup>4</sup> Dr. Sherman, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the miner's records in 2001, opined that the miner's death was due to metastatic cancer, and stated that there is "no association between coal dust inhalation and lung cancer (when controlled for the effects of smoking)." Director's Exhibit 8. Dr. Sherman opined that there is no evidence that pneumoconiosis contributed to the miner's death. Dr. Sherman concluded that "pneumoconiosis did not cause or contribute to [the miner's] death, nor did it hasten his death in any way." Director's Exhibit 8. Dr. Sherman reviewed additional evidence, and in his 2003 opinion stated that the additional evidence he considered did not materially change his earlier opinion. He summarized his opinion, stating "In short, I found no evidence to suggest that death was due to anything other than metastatic lung cancer." Director's Exhibit 16.

physician equivocated on the role pneumoconiosis played in the miner's death.<sup>5</sup> Decision and Order at 12. The administrative law judge determined that Dr. Heim's opinion does not "represent a clear medical opinion that the miner's pneumoconiosis hastened his death," Decision and Order at 10, and found that, at best, Dr. Heim's conclusion is equivocal, and therefore accorded it less weight.<sup>6</sup> The administrative law judge also accorded less weight to Dr. Heim's opinion on the ground that it is "inconsistent with the evidence documenting his lengthy treatment of the miner for his cancer." Decision and Order at 11. The administrative law judge noted that Dr. Heim had treated the miner but, nonetheless, found that Dr. Heim's opinion was not entitled to probative weight because the physician was not the miner's treating physician for months before his death. The administrative law judge further found that Dr. Heim's "conclusions are based upon the

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<sup>5</sup> Dr. Shane, who is Board-certified in Anatomy and Clinical Pathology opined that the miner:

died a respiratory death due to pulmonary fibrosis (with most probably anthracosilicotic cavitation) secondary to pneumoconiosis, which was accelerated by his lung cancer therapies. His cancers are unequivocally documented as totally stable and constituted no threat to his immediate survival were it not for the pulmonary fibrosis which was the major contributor to his respiratory arrest. His coal mine employment and in particular his work in rock tunnels were (sic) there is a high concentration of the offending siliceous dust material were the cause of his occupational lung disease.

Claimant's Exhibit 1.

<sup>6</sup> Dr. Heim, who is Board-certified in Internal Medicine, Oncology and Hematology, reviewed the miner's records and stated:

It is my understanding that [the miner] suffered from anthracosilicosis and was declared legally disabled because of that disorder. It is generally accepted that patients with significant comorbid medical conditions do not survive as long as, nor tolerate treatment as well as patients with lung carcinoma who do not have comorbid medical conditions. I did not attend to [the miner] for several months prior to his demise. I cannot say that he did not suffer a shortening of his survival contributed to by his underlying comorbid medical conditions i.e. the anthracosilicosis.

Claimant's Exhibit 3.

miner's reported history, and not on independent diagnosis and treatment, and fall short of fulfilling the factors set forth at [S]ection 718.104(d)(1) that warrant the grant of controlling weight to a [treating] doctor's opinions." Decision and Order at 11. Finally, the administrative law judge found that the signature on the death certificate is indecipherable, and, thus, that she could not accord greater weight to the opinion of a physician whose credentials are not known.<sup>7</sup> The administrative law judge therefore found that the miner's death certificate is not sufficient to establish death due to pneumoconiosis.

Because the medical evidence in this case was developed after January 19, 2001, the criteria for consideration of a treating physician's opinion set forth in 20 C.F.R. §718.104(d)(1)-(4), are applicable. We hold that the administrative law judge rationally determined that Dr. Heim's opinion regarding the cause of the miner's death is not entitled to determinative weight, as Dr. Heim was not the miner's treating physician in the months immediately prior to the miner's death. *See* 20 C.F.R. §718.104(d)(1)-(4). Director's Exhibits 2-6. In addition, we hold that the administrative law judge, who is charged with evaluating the evidence and determining the credibility of the medical opinions, *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), permissibly determined that Dr. Heim's opinion regarding the impact of pneumoconiosis on the miner's death is too equivocal to support claimant's burden of establishing that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant's Exhibit 3; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

We also affirm the administrative law judge's finding that the miner's death certificate is insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c). The administrative law judge was unable to decipher the signature on the death certificate, and there is, therefore, no way to determine the status of the signer, or the basis for his opinion. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Further, we affirm the administrative law judge's finding that Dr. Sherman's opinion is the best reasoned opinion and that it is most consistent with the objective evidence of record as a reasonable exercise of her discretion. Dr. Sherman's opinion is supported by the hospital records which, the administrative law judge reasonably found, indicate that the miner's cancer was worsening toward the end of his life. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghioghny & Ohio Coal Co.*, 7 BLR 1-829 (1985).

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<sup>7</sup> The miner's death certificate, signed by a physician whose name is illegible, indicates that the immediate cause of the miner's death was pneumoconiosis, and it lists "associated lung cancer" as an underlying cause. Director's Exhibit 2.

Moreover, the administrative law judge permissibly found the opinion of Dr. Sherman to be the most rational opinion of record, *see* Director's Exhibits 8, 16; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Finally, we hold that the administrative law judge permissibly found Dr. Shane's opinion entitled to little weight on the basis that it is speculative and not well-supported by the objective evidence of record. *See* Claimant's Exhibit 1; *Clark*, 12 BLR 1-149. Accordingly, we affirm the administrative law judge's finding that the evidence does not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Inasmuch as we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis, pursuant to Section 718.205(c), we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is 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