

BRB No. 01-0346 BLA

LEONA DALLAGO)
(Widow of LOUIS DALLAGO))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
)
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand-Denying Benefits of Ainsworth H. Brown, United States Department of Labor.

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

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (00-BLA-00704) 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 The administrative law judge found that while the

¹ Claimant, Leona Dallago, is the widow of the miner, Louis Dallago, who died on October 8, 1999. The death certificate listed the immediate cause of death as probable brain and lung carcinoma. "Black lung" was listed as another significant condition at the time of death. Director's Exhibit 6. The miner was receiving benefits at the time of his death. Because the award of benefits on the miner's claim was for a claim filed subsequent to January 1, 1982, however, claimant is not eligible for derivative benefits based on the miner's award. *See* 30 U.S.C. §901(a); 20 C.F.R. §725.212; *Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-18-22 (1989); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

² 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

evidence of record established the presence of pneumoconiosis, it failed to establish that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that pneumoconiosis hastened the miner's death in any way. Decision and Order at 3-12. Accordingly, survivor's benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that pneumoconiosis contributed to the miner's death. The Director, Office of Workers' Compensation Programs (the Director), as respondent, has not filed a brief in this appeal.³

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.

³ Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the

Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). By motion dated March 26, 2001, the Director, Office of Workers' Compensation Programs (the Director), requested additional time to file a response brief in this instant case due to the unexpected volume of work created by the court's order. By order dated April 10, 2001, the Board granted the Director's request for additional time to file a response brief and also granted him the opportunity along with claimant to address whether the regulations at issue in the court's order would affect the outcome of this case. The Board also stated in its order, that no further enlargement of time would be granted to the Director to file a response brief. On April 30, 2001, the Director responded, stating that the challenged regulations would not affect the outcome of this case, but requested additional time to file a response brief with respect to the merits of this case. *Dallago v. Director, OWCP*, BRB No. 01-0346 BLA. By order dated May 21, 2001, the Board denied this request. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 1-39 (1988). 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)-(3). Pneumoconiosis is a substantially contributing cause of death if it hasten's the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant contends that the medical opinions of the miner's treating physicians, Dr. Russ, Claimant's Exhibit 1, and Dr. Kraynak, Claimant's Exhibits 2, 5, as well as the opinion of the reviewing physician, Dr. Simelaro, Claimant's Exhibit 3, and the death certificate establish that pneumoconiosis was a substantially contributing cause of the miner's death.

In finding that claimant failed to establish that the miner's death was due to pneumoconiosis, the administrative law judge, in a permissible exercise of her discretion, accorded little weight to the medical opinion of Dr. Russ as he found that the doctor failed to provide a well-documented and well-reasoned medical opinion because she provided no medical evidence establishing a causal connection between the miner's death from pneumonia and his pneumoconiosis. Decision and Order at 5. Contrary to the claimant's assertion, the determination as to whether an opinion is sufficiently reasoned to support claimant's burden is soundly within the administrative law judge's discretion and will not be disturbed by the Board absent a showing of abuse of that discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8

47 (D.D.C. 2001). Thus, the court's decision renders moot any arguments made by the parties regarding the impact of the challenged regulations.

BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Here, the administrative law judge rationally concluded that Dr. Russ's statements were conclusory, see *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). We are thus unable to say that the administrative law judge's determination to discredit the opinion of Dr. Russ constitutes an abuse of discretion. Further, we reject claimant's assertion that Dr. Russ's status as a treating physician would entitle her opinion to greater weight. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

The administrative also rationally rejected the opinion of Dr. Kraynak as he failed to offer any "documentation or reasoning" to support his conclusion that, but for miner's pneumoconiosis, he would have lived longer "despite terminal adenocarcinoma of the lung and the brain." Decision and Order at 7. As with Dr. Russ's opinion, the administrative law judge, in a permissible exercise of his discretion as trier-of-fact, concluded that Dr. Kraynak failed to explain his conclusions in a manner sufficient to affirmatively establish that the miner's death was due to pneumoconiosis. See *York, supra*; *Oggero, supra*; *White, supra*.

Likewise, the administrative law judge also permissibly accorded less weight to the opinion of Dr. Simelaro because that doctor failed to provide reasoning sufficient to support his conclusion that the miner's death was hastened by pneumoconiosis. See *Clark, supra*; *Peskie, supra*; *Lucostic, supra*. The administrative law judge recognized that, unlike the other doctors' opinions offered in support of claimant's burden, although Dr. Simelaro's opinion appeared to be well-documented, it was not well-reasoned because underlying documentation and data did not adequately support its conclusions. Specifically, the administrative law judge noted that the pulmonary function study data did not support the conclusion Dr. Simelaro drew from them; that Dr. Simelaro's opinion that the miner was impaired from anthracosilicosis as far back as the early 1980's was tainted because Dr. Simelaro mischaracterized the findings of Dr. Cable upon which he relied as to the results of the miner's blood gas study and pulmonary function study; and the fact that Dr. Cable concluded that the miner was disabled from other diseases in addition to chronic obstructive pulmonary disease. Further, the administrative law judge found that Dr. Simelaro's opinion was entitled to little weight because he failed to address adequately the impact of the miner's smoking history on his respiratory condition. See *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Thus, the administrative law judge determined that these problems in Dr. Simelaro's opinion rendered it unreasoned as a whole on the issue of death due to pneumoconiosis. Accordingly, the administrative law judge provided rational bases for discrediting the medical opinions which could support a finding of death due to pneumoconiosis. Further, because the medical opinions supportive of a finding that pneumoconiosis played a role in the miner's death were not found to be credible, errors, if

any, in the administrative law judge's analysis of Dr. Michos' opinions, who opined that pneumoconiosis played no role in the miner's death, are harmless and need not be addressed. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). In addition, contrary to claimant's argument, because the administrative law judge has found that the medical evidence supportive of claimant's burden is not credible, the death certificate cannot be used as corroborative evidence. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *see also Lukosevicz, supra*; *Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991).

We, therefore, affirm the administrative law judge's finding that the medical evidence failed to establish that pneumoconiosis caused, contributed to or hastened the miner's death. 20 C.F.R. §718.205(c); *see Lukosevicz, supra*. Because claimant has failed to establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in a survivor's claim, we must affirm the denial of benefits. 20 C.F.R. §718.205(c); *see Lukosevicz, supra*; *Trumbo, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge