BRB Nos. 03-0248 BLA
and 03-0248 BLA-A

SYLVIA KULKUSKY (Widow of EDWARD KULKUSKY) Claimant-Respondent Cross-Petitioner v. JEDDO-HIGHLAND COAL COMPANY and LACKAWANNA CASUALTY COMPANY Employer/Carrier-Petitioners Cross-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/24/2003 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

William E. Wyatt, Jr. and John J. Notarianni (Fine, Wyatt and Carey, P.C.), Scranton, Pennsylvania, for employer/carrier.[1]

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY,

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[1] By letter to the Board dated October 10, 2003, the firm of Fine, Wyatt & Carey withdrew as counsel for employer/carrier in this case.

Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (01-BLA-0679) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) on a survivor's claim[2] 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).[3] The administrative law judge found that claimant established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), which he determined to be the only issue in this case.[4] Specifically, the administrative law judge found that claimant established, by a preponderance of the relevant evidence, that pneumoconiosis was a "substantial contributor to the miner's death" at 20 C.F.R. §718.205(c)(2). Decision and Order at 9. On appeal, employer contends that the administrative law judge erred in finding that Dr. Levinson's opinion was entitled to little, if any, probative weight due to the physician's reliance on the results of an arterial blood gas study performed on the miner within eight hours of his death. Employer also asserts that the administrative law judge erred in failing to weigh the relative qualifications of the physicians who rendered relevant opinions in this case. Claimant responds in favor of the decision below. Claimant has filed a cross-appeal of the decision below, asserting that the administrative law judge erred in finding Dr. Simelaro's opinion to be conclusory and Dr. Kelly's opinion to be entitled to no weight. In the event that the Board finds merit in employer's appeal and remands the case, claimant urges the Board to instruct the administrative law judge to reconsider the medical opinions of Drs. Simelaro and Kelly. Employer responds in opposition to claimant's cross-appeal, and argues that the administrative law judge properly discredited the opinions of Drs.

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[2] Claimant, the miner's widow, filed the instant claim on November 13, 2000. Director's Exhibit 1. The death certificate indicates that the miner died on October 7, 2000 at 4:13 p.m., and that the immediate cause of death was metastatic lung cancer. Director's Exhibit 3. Anthrasilicosis is listed as a condition leading to the immediate cause of death, and atherosclerotic cardiovascular disease and diabetes mellitus are listed as other significant conditions contributing to death but not resulting in the underlying cause of death. *Id.*

[3] 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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4] The administrative law judge noted employer's concession to the existence of pneumoconiosis that arose out of the miner's coal mine employment. Decision and Order at 2.

Kelly and Simelaro. The Director, Office of Workers' Compensation Programs, has not filed a brief in either appeal.

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 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 benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *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). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Employer alleges error in the administrative law judge's weighing of Dr. Levinson's opinion. Dr. Levinson stated, in his consulting opinion dated August 6, 2001, that the miner's death was in no way related to his coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Levinson explained:

> It does not appear from the objective medical records that the patient died as a result of progressive respiratory failure or indeed due to a complication or hastening by way of coal workers' pneumoconiosis. It is clear from his blood gases on his final admission that his PCO2 was normal at 40.2. This indicates that his ventilation overall was normal and adequate to supply the needs of his body. He did not die from the hypoxemia since also there is evidence that his oxygenation was normal. I feel that he died as a result of vascular compromise initially responding to fluids but than (sic) failing after a short period of time. This was related to his progressive lung cancer as well as known arteriosclerotic heart disease with history of prior myocardial infarction. This has no relationship to his previous work in the coal mining industry.

Id.

In his September 5, 2001 deposition, Dr. Levinson addressed the fact that at some point in time during the miner's October 7, 2000 hospitalization, prior to his death at 4:13 p.m., the miner was administered oxygen by nasal cannula, as reflected in the records from

the blood gas study performed that morning at 9:10 a.m. Employer's Exhibit 3 at 9-14, 32, 38; *see* Director's Exhibit 21. Dr. Levinson testified that the October 7, 2000 blood gas study showed that the miner had adequate oxygenation, that the miner's oxygen level was 74.9 while receiving supplemental oxygen by cannula at three liters, and that his carbon dioxide level, at 40.2, was "perfectly normal." Employer's Exhibit 3 at 9-10. Asked whether the blood gas study results would have been affected if the nasal cannula had been in place at the time the blood sample was drawn, Dr. Levinson testified:

> The only thing that a cannula might have affected was the oxygen level depending on how long he was on the cannula. You would have to be on a cannula for at least 30 minutes to reach a steady state with that level of oxygen. And I can't confirm by the records that I have available to me how long he was on oxygen, or, if actually, [he] was on oxygen at the time the blood gas was drawn, aside from the comments that I've given you, because it seems to be (sic) there is some contradiction in the blood gas report itself.

Id. at 11. Dr. Levinson explained that while the blood gas study notes the administration of oxygen by nasal cannula at three liters, it also indicates "Patient on room air." *Id.* at 12; *see* Director's Exhibit 21.

Asked the significance of the October 7, 2000 blood gas study in light of reports from Drs. Prince and Lobitz that the miner experienced respiratory failure and/or respiratory arrest, Dr. Levinson replied:

> Well, this blood gas study would certainly be inconsistent with someone who was experiencing any degree of respiratory failure or heading into any respiratory arrest as a result of any respiratory failure. This certainly would be quite inconsistent and impossible for a patient that had this particular blood gas to develop a respiratory failure from a chronic condition, such as pneumoconiosis, since that would be a slow and exrable (sic) [ph] progression, and certainly if that person was going to be in respiratory failure several hours thereafter from such a condition like that, there would be at least an indicator that the alveolar ventilation would have been impaired at 9:24 that morning. And there's certainly no indication from this blood gas that there was any impairment of this man's alveolar ventilation at 9:24 a.m. on the date of death.

Employer's Exhibit 3 at 13. Dr. Levinson added that he did not think that the miner could have gone into respiratory failure or arrest between the time the blood sample was drawn in the morning and the time of death at 4:13 p.m. that afternoon. *Id.* at 14.

The administrative law judge, in considering Dr. Levinson's opinion on the issue of death due to pneumoconiosis at 20 C.F.R. §718.205(c), characterized Dr. Levinson's

deposition testimony as including the physician's acknowledgment that the administration of oxygen to the miner on the morning of October 7, 2000 "could have improved the values obtained" in the blood gas study performed that afternoon. Decision and Order at 8. The administrative law judge, in weighing Dr. Levinson's opinion, stated:

> Although Dr. Levinson more or less agreed that he could not tell how much of an effect the administration of oxygen on October 7, 2000 had on the blood gas study's results, he nevertheless relied on the blood gas study's values in stating that the study contradicts the opinion of Dr. Prince and Dr. Lobitz that the miner suffered from respiratory failure or respiratory arrest on the date of his death. It is clear that Dr. Levinson placed substantial reliance on the "normal" blood gas study of October 7, 2000 in concluding that pneumoconiosis did not contribute to or hasten the miner's death. However, I find that the values obtained in the blood gas study could very well have been improved by the administration of oxygen at that time, as suggested by Dr. Raymond Kraynak in his review of Dr. Levinson's report. (CX 13) Consequently, I find that the opinion of Dr. Levinson that pneumoconiosis did not contribute to death is entitled to little, if any, weight.

Id.

Employer argues that, contrary to the administrative law judge's finding, Dr. Levinson did not testify on deposition that the administration of oxygen to the miner on October 7, 2000 could have improved the values obtained on the blood gas study performed that morning. *See* Decision and Order at 8. Employer asserts that Dr. Levinson did not acknowledge that the administration of oxygen to the miner would have affected the blood gas study results. Employer argues that rather, Dr. Levinson unequivocally testified that the blood gas study results were reliable and contraindicated any respiratory failure or respiratory arrest such as that found by Drs. Prince and Lobitz. Employer thus contends that the administrative law judge improperly accorded diminished weight to Dr. Levinson's opinion based on his reliance on the October 7, 2000 blood gas study.

Employer's contention that the administrative law judge erred in according less weight to Dr. Levinson's opinion lacks merit. The administrative law judge properly found that Dr. Levinson's opinion, that the miner's death was in no way related to his coal workers' pneumoconiosis, Employer's Exhibit 1, was entitled to little weight, if any, because Dr. Levinson relied on the non-qualifying or normal results of the October 7, 2000 blood gas study.[5] Specifically, Dr. Levinson, when asked whether the results from this blood gas study

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[5] The October 7, 2000 blood gas study resulted in non-qualifying values, namely a PCO2 of 40.2 with a PO2 of 74.9. 20 C.F.R. §718.204(b)(2)(ii); Director's Exhibit 21.

would have been affected if the miner's nasal cannula had been in place at the time the blood sample was drawn, responded, "The only thing that a cannula might have affected was the oxygen level depending on how long he was on the cannula." Employer's Exhibit 3 at 11. Dr. Levinson testified that he could not confirm by the records he reviewed how long the miner was on oxygen or if he was on oxygen at the time the blood sample was drawn. Given Dr. Levinson's testimony that the administration of oxygen might have affected the miner's oxygen level, we hold that it was reasonable for the administrative law judge to interpret Dr. Levinson as testifying that the administration of oxygen could have improved the values obtained in the blood gas study. *Barren Creek Coal Co. v. Witmer,* 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Director, OWCP v. Siwiec,* 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990), citing *Markus v. Old Ben Coal Co.,* 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983); Decision and Order at 8; Employer's Exhibit 3 at 11. Furthermore, the administrative law judge permissibly determined that Dr. Raymond Kraynak suggested that the values of the October 7, 2000 blood gas study could have been improved by the administration of oxygen to the miner.[6] *Director, OWCP v. Siwiec,* 894 F.2d at 639, 13 BLR at 2-267; Decision and Order at 8; Claimant's Exhibit 13. Based on the foregoing, we hold that the administrative law judge provided a valid reason for according little weight to Dr. Levinson's opinion at 20 C.F.R. §718.205(c) and we thus reject employer's arguments to the contrary.

Employer next contends that the administrative law judge erred in failing to weigh the relative credentials of the medical experts. Specifically, employer contends that the administrative law judge did not specify the qualifications of the physicians upon whose opinions he relied, namely those of Dr. Raymond Kraynak, Dr. Matthew Kraynak, Dr. Prince and Dr. Lobitz. Employer asserts that of these four physicians, only Dr. Prince is Board-certified in Internal Medicine and Pulmonary Diseases, and that Dr. Levinson "is likewise Board Certified." Employer's Brief at 7. Employer asserts that because Drs. Prince and

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[6] Dr. Raymond Kraynak reviewed Dr. Levinson's findings, and in his opinion dated August 14, 2001 stated, in pertinent part:

> [Dr. Levinson] indicates that the PO2 was normal at [the miner's] final admission. However, the PO2 was reduced to 74.9 while he was on oxygen at three liters a minute. Therefore, it is clear that Mr. Kulkusky's respiratory condition was not normal. It is clear from reviewing the records, particularly Dr. Lobitz's, who personally took care of Mr. Kulkusky immediately prior to his death, that Coal Workers' Pneumoconiosis was a substantial contributing factor in Mr. Kulkusky's death.

Claimant's Exhibit 13.

Levinson have similar credentials and submitted competing opinions regarding the issue of whether the miner's death was due to pneumoconiosis, "a more complete discussion of why Dr. Prince's opinion is more credible than that of Dr. Levinson needs to be provided. For the failure of Judge Kaplan to do so in his Decision, the Employer asserts constitutes error and fails to comply with applicable law." *Id.*

Employer's contention that the administrative law judge committed reversible error by failing to specify and weigh the relative qualifications of the physicians of record lacks merit. An administrative law judge may, but is not required to, weigh the relative credentials of the physicians of record. *Martinez v. Clayton Coal Co.,* 10 BLR 1-24 (1987). In the instant case, employer advances no persuasive argument in support of its assertion that the administrative law judge needs to provide "a more complete discussion" of his credibility findings regarding the opinions by Drs. Prince and Levinson. We, therefore, reject employer's assertion that the administrative law judge committed reversible error by failing to consider the relative qualifications of the medical experts.

Based on the foregoing, we affirm the administrative law judge's finding of death due to pneumoconiosis at 20 C.F.R. §718.205(c) as it is supported by substantial evidence. We further affirm the administrative law judge's award of benefits in the instant survivor's claim.[7]

[7] Because we affirm the administrative law judge's award of benefits, we need not reach the issues raised by claimant's cross-appeal. *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding 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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REGINA C. McGRANERY
Administrative Appeals Judge