

BRB No. 06-0311 BLA

CONSTANCE M. COLEMAN )  
(Widow of JAMES R. COLEMAN) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
DIRECTOR, OFFICE OF WORKERS' ) DATE ISSUED: 12/18/2006  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Respondent ) DECISION and ORDER

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

Scott E. Schermerhorn, Scranton, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, the miner's widow, appeals the Decision and Order Upon Remand (2004-BLA-05531) of Administrative Law Judge Robert D. Kaplan denying benefits 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). This case has previously been before the Board. In a Decision and Order dated September 21, 2004, the administrative law judge found, and the Director, Office of Workers' Compensation Programs (the Director), conceded three years of qualifying coal mine employment,<sup>1</sup> and, based on the date of filing, adjudicated the claim pursuant to 20

---

<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in

C.F.R. Part 718.<sup>2</sup> Decision and Order at 2-4; Director's Brief at 2. The administrative law judge found, and the parties stipulated to, the existence of pneumoconiosis. Decision and Order at 2-3; Hearing Transcript at 10. Considering the evidence of record, the administrative law judge concluded that it did not establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Decision and Order at 4-6. Accordingly, benefits were denied.

On appeal, the Board initially affirmed, as supported by substantial evidence, the administrative law judge's finding that claimant's lay testimony concerning the miner's smoking history was not credible in light of the medical opinion evidence indicating that the miner had a significant smoking history of at least 150 pack-years. *Coleman v. Director, OWCP*, BRB No. 05-0133 BLA (Jun. 20, 2005)(unpublished), slip op. at 3. The Board further found, however, that the administrative law judge "erred in denying benefits on the grounds that Drs. Conaboy and Levinson failed to consider the miner's smoking history in addressing the cause of his pneumoconiosis" at Section 718.203(c). The Board noted that the Director had conceded, and the Third Circuit Court has held, that "smoking cannot cause the radiologic impressions characteristic of pneumoconiosis," and therefore, "it is not an alternative exposure capable of contributing to a miner's clinical pneumoconiosis." *Coleman*, slip op. at 4; citing *Wisniewski v. Director, OWCP*, 929 F.2d 952, 959, 15 BLR 2-57, 2-70 (3d Cir. 1991). Therefore, the Board vacated the administrative law judge's finding pursuant to Section 718.203(c) and remanded the case for him to reconsider the evidence consistent with *Wisniewski* and determine whether the miner's pneumoconiosis arose out of his coal mine employment. *Coleman*, slip op. at 4-5.

In a Decision and Order Upon Remand dated December 6, 2005, the administrative law judge again found that the medical evidence of record was insufficient to establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). Decision and Order Upon Remand 3. Accordingly, the administrative law judge denied benefits.

---

Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1-4, 7.

<sup>2</sup> Claimant is the miner's widow. The miner filed claims for benefits in 1972, 1989, 1995, and 2000, with the last claim being denied on August 8, 2000. Director's Exhibits 1-4. The miner died on September 16, 2002 and claimant filed a survivor's claim, the subject of the instant appeal, on November 15, 2002, which was denied by the district director on October 1, 2003. Director's Exhibits 6, 9, 21. Claimant subsequently requested a hearing on October 6, 2003. Director's Exhibit 22.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence in finding that the miner's pneumoconiosis did not arise out of coal mine employment pursuant to Section 718.203(c). The Director responds, urging affirmance of the administrative law judge's denial of benefits.

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 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 benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed on or 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. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Pursuant to Section 718.203(c), claimant contends that the administrative law judge erred in discrediting the opinions of Drs. Levinson and Conaboy. Claimant's Brief at 4-6. We disagree. In evaluating the medical evidence of record, the administrative law judge initially accorded little weight to the opinions of Drs. Conaboy and Levinson, on the grounds that Dr. Conaboy did not address the issue of whether the miner's pneumoconiosis arose out of his coal mine employment, and Dr. Levinson did not provide any basis or explanation for his conclusory opinion that he is "certain" that the miner's prior mining history was the primary contributing factor to his pneumoconiosis. *Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12. 2-21 (3d Cir. 1997); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Decision and Order Upon Remand at 2-3. We note that the Director now concedes that Dr. Conaboy did, in fact, address the issue of whether the miner's pneumoconiosis arose out of his coal mine employment. Director's Brief at 6-7. However, the administrative law judge additionally found the opinions of Drs. Conaboy and Levinson entitled to little weight because neither physician discussed the possible effects of the miner's occupational dust exposure at his employment in a bakery for fifteen years, or explained why they believed his pneumoconiosis was caused by his three years of coal mine employment rather than by exposure to dust in his baking job. See *Wisniewski*, 929 F.2d at 959, 15 BLR at 2-57, 2-71; *Crow v. Peabody Coal Co.*, 11 BLR 1-54 (1988)(Ramsey, CJ., concurring); Decision and Order Upon Remand at 3-4 n.3. The administrative law judge properly

found that such an explanation is warranted in light of the opinion of Dr. Sherman, who examined the miner on behalf of the Director, that the miner may have had a component of pulmonary obstructive disease due to his occupational exposure as a baker.<sup>3</sup> Director's Exhibit 16; Decision and Order Upon Remand at 3-4 n.3. As the administrative law judge provided a valid, alternative reason for his determination that Dr. Conaboy's opinion is entitled to little weight, the administrative law judge's characterization of Dr. Conaboy's opinion as failing to address the pertinent issue at Section 718.203(c), is, if error, harmless. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Finally, as the administrative law judge acted within his discretion in finding the opinions of Drs. Conaboy and Levinson to be unpersuasive, we reject claimant's assertion that the administrative law judge was required to accord determinative weight to their opinions simply because they had treated the miner.<sup>4</sup> *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82 (3d Cir. 2004). Substantial evidence supports the administrative law judge's finding that claimant did not establish that the miner's pneumoconiosis arose out of his coal mine employment. Accordingly, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.203(c).

Because claimant has failed to establish that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c), a necessary element of entitlement, we affirm the denial of benefits. *See Anderson, supra; Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

---

<sup>3</sup> The record indicates that the miner worked as a baker for more than fifteen years. Director's Exhibit 7. At the hearing, claimant testified that during the miner's employment as a baker, "the dust was bothering him." Hearing Transcript at 34.

<sup>4</sup> We further note claimant's assertion that the administrative law judge erred in allowing the Director, Office of Workers' Compensation Programs, to argue for the first time on remand, that Dr. Conaboy did not provide an opinion as to whether the miner's pneumoconiosis arose out of his coal mine employment, and that there was no basis for Dr. Levinson's conclusion that the miner's pneumoconiosis arose out of his coal mine employment. Claimant's Brief at 4. However, as we have affirmed the administrative law judge's valid, alternative reason for according no weight to the opinions of Drs. Conaboy and Levinson, namely that they failed to address the potential impact of claimant's occupational dust exposure as a baker on his pulmonary disease, claimant's argument is moot and need not be addressed. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Accordingly, the administrative law judge's Decision and Order Upon Remand denying benefits is affirmed.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge