

BRB No. 01-0477 BLA

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

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Michelle A. Jones (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

Dorothy L. Page (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (00-BLA-0479) of Administrative

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<sup>1</sup>Claimant is the widow of the miner, Gary Collins, who died on October 17, 1999. Director's Exhibits 1, 4. The miner filed a claim on December 3, 1980. Director's Exhibit 12. On March 29, 1984, Administrative Law Judge Rhea M. Burrow issued a Decision and Order denying benefits. *Id.* The miner subsequently filed claims on June 7, 1984 and April 25, 1986. *Id.* The Department of Labor construed the miner's 1984 claim as a request for modification. *Id.* On November 28, 1988, Administrative Law Judge Robert D. Kaplan

Law Judge Ainsworth H. Brown 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,

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issued a Decision and Order denying benefits, *id.*, which the Board affirmed, *Collins v. Director, OWCP*, BRB No. 88-4244 BLA (May 29, 1992)(unpub.). The Board subsequently denied the miner's requests for reconsideration. *Collins v. Director, OWCP*, BRB No. 88-4244 BLA (Feb. 16, 1994); *Collins v. Director, OWCP*, BRB No. 88-4244 BLA (Aug. 11, 1994)(unpub.). The miner filed another request for modification on August 17, 1994. Director's Exhibit 12. On February 7, 1996, Administrative Law Judge Frank D. Marden issued a Decision and Order denying benefits. *Id.* Claimant filed a survivor's claim on November 17, 1999. Director's Exhibit 1.

as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>2</sup> Based upon the parties' stipulation, the

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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 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.

Pursuant to a lawsuit challenging revisions to forty-seven 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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 47 (D.D.C. 2001). The court's decision renders moot those arguments regarding the impact of the challenged regulations made by the Director, Office of Workers' Compensation Programs, in his letter to the Board.

administrative law judge credited the miner with twenty years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.<sup>3</sup> See 20 C.F.R. §§718.1, 718.205(c); *Neeley v.*

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<sup>3</sup>Section 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

*Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §718.203; *Boyd, supra*.

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leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000).<sup>4</sup> Specifically, claimant asserts that the administrative law judge erred in discrediting the opinions of Drs. Scalia and Simelaro. The revised regulations provide that 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)(2), (c)(5). In addition, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has also held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) (2000) in a case in which the disease actually hastens his death. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

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<sup>4</sup>Because there is no medical evidence that pneumoconiosis caused the miner's death, we hold that the evidence is insufficient as a matter of law to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1). Further, because there is no evidence of complicated pneumoconiosis, we hold that the evidence is insufficient as a matter of law to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(3).

The administrative law judge considered the medical reports of Drs. Cander, Scalia and Simelaro.<sup>5</sup> Whereas Drs. Scalia and Simelaro opined that pneumoconiosis contributed to the miner's death, Director's Exhibit 5; Claimant's Exhibit 1, Dr. Cander opined that pneumoconiosis did not contribute to the miner's death, Director's Exhibit 14. The administrative law judge permissibly discredited Dr. Scalia's opinion because he found it to be not reasoned and documented.<sup>6</sup> See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge permissibly discredited Dr. Simelaro's opinion because he found it to be based upon an inaccurate smoking history.<sup>7</sup> See *Maypray*

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<sup>5</sup>The record also contains a death certificate signed by Debra Klinger, RN, Deputy Coroner. Director's Exhibit 4. In the death certificate, Ms. Klinger indicated that the cause of the miner's death was coronary artery disease contributed to by anthracosilicosis and diabetes mellitus. *Id.* The administrative law judge stated that "the Deputy Coroner, Nurse Klinger, was told by the Geisenger Clinic to certify the causes of death." Decision and Order at 14. Further, the administrative law judge stated, "[w]hile I do not find this procedure to be irregular, I do not ascribe independent probative value to this death certificate." *Id.* The record does not indicate that Ms. Klinger is a physician qualified to render a medical opinion with regard to the cause of the miner's death. See Director's Exhibit 4; 20 C.F.R. §718.205(c); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

<sup>6</sup>The administrative law judge stated that "[w]hile the [Geisinger] Clinic records contain the results of numerous blood chemistry tests, x-rays showing chronic obstructive pulmonary disease and scarring, as well as an echocardiogram, it appears that attempts to gather ventilatory and arterial blood gas studies are not in evidence. Decision and Order at 13. The administrative law judge indicated that "[the miner's] treatment with that institution, and with Dr. Scalia, lasted roughly 19 months, and during this period the record documents [the miner's] numerous refusals to undergo pulmonary or cardiac evaluations." *Id.* The administrative law judge also stated that "the documentation proffered by Dr. Scalia, DX 6, does not bear the weight of his conclusions, and the letter opinion which incorporates these conclusions and his experience with [the miner] lacks sufficient explanation for his opinion that pneumoconiosis hastened the [m]iner's death." Decision and Order at 12. The administrative law judge concluded that "Dr. Scalia does not adequately supply a reasoned analysis to show the nexus between the [m]iner's pneumoconiosis and his death." *Id.* at 14.

<sup>7</sup>The administrative law judge stated that "Dr. Simelaro's report emphasizes that 'He [the Miner] never smoked!', CX-1, and proceeds from that premise." Decision and Order at 11. However, the administrative law judge found that "the record suggests that [the miner] smoked at least 1/2 of a pack of cigarettes per day for up to 30 years." *Id.* The administrative law judge stated that "[a]t the formal hearing conducted by Judge Kaplan on

*v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting the opinions of Drs. Scalia and Simelaro.

Further, we reject claimant's assertion that the administrative law judge erred in failing to consider the claimant's testimony. Contrary to claimant's assertion, the administrative law judge adequately explained his consideration of the testimony of the lay witness. *See Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). The administrative law judge stated, "[u]pon careful review of the record from the [m]iner's claim, DX 12, the sincere testimony of [c]laimant regarding [the miner's] breathing problems, and the course of the [m]iner's treatment with the Geisinger Clinic, I am unable to conclude that [c]laimant has met her burden of demonstrating that pneumoconiosis was a 'substantially contributing cause' of death or that it served to hasten the death of this [m]iner in any way." Decision and Order at 14-15. Thus, since the administrative law judge permissibly discredited the only medical opinions of record that could support a finding that pneumoconiosis hastened the miner's death, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(c)(2), (c)(5); *Lukosevicz, supra*.

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *see Trumbo, supra; Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of survivor's benefits.

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

SO ORDERED.

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April 5, 1988, [the miner] testified that he smoked 'a pack or less at times' for 25-30 years." *Id.* The administrative law judge further stated that "[a]lthough [c]laimant testified that her husband was, essentially, a light smoker, I find, as a matter of fact, that [the miner] smoked *at least* one-half pack per day for a minimum of 20 years." Decision and Order at 11.



ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

BETTY JEAN HALL  
Administrative Appeals Judge