

BRB No. 01-0494 BLA

PHYLLIS ANN JACKSON)
(Widow of ROGER JAMES JACKSON))
Claimant-Petitioner)
v.)
CHEYENNE COAL COMPANY) DATE ISSUED:
and)
UNDERWRITERS SAFETY AND CLAIMS)
Employer/Carrier-Respondents)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Michelle S. Gerdano (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ the miner's widow, appeals the Decision and Order (2000-BLA-0349) of Administrative Law Judge Stuart A. Levin 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).² The administrative law judge found, and the parties stipulated to, the existence of pneumoconiosis, that employer is the proper responsible operator and to twenty years of coal mine employment. Decision and Order at 2-3; Director's Exhibit 19; Hearing Transcript at 15. Considering entitlement in this survivor's claim pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the only issue to be resolved was whether the miner's death was due to pneumoconiosis. Decision and Order at 2-3. The administrative law judge, after reviewing all of the relevant evidence of record, concluded that claimant failed to establish that the miner's death was due to pneumoconiosis. Decision and Order at 6-7. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find that the death certificate and autopsy report established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2000). Employer responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial

¹Claimant is Phyllis Ann Jackson, the miner's widow. The miner, Roger James Jackson died on November 2, 1997, and claimant filed her survivor's claim, the subject of the instant appeal, on January 8, 1998. Director's Exhibits 1, 6.

²The 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 (2001).

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). The Board issued an order on February 28, 2001 requesting supplemental briefing in the instance 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.³

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).

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. 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) (2001); see also *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).⁴

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that it contains no reversible error. The administrative law judge

³The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. See Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

rationality found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 (2000). *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Claimant initially argues that the administrative law judge erred in failing to find the death certificate and autopsy report sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2000). Claimant's Brief at 2-5. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Claimant contends that the diagnosis of chronic obstructive pulmonary disease by Dr. Modi on the death certificate, as well as Dr. Harrison's findings of moderate to severe emphysematous changes, chronic passive congestion of the lungs and fibrous adhesions on the autopsy establish the existence of pneumoconiosis which significantly contributed to the miner's death. Claimant's Brief at 4. Claimant's contention lacks merit in this instance. Although, Drs. Modi and Harrison list conditions that could establish legal pneumoconiosis, if caused by coal dust exposure the physicians in this instance do not relate these conditions to coal dust exposure. *See Director's Exhibits 6, 8*. Absent an affirmative opinion linking the conditions to the miner's coal mine employment and death, a diagnosis of chronic obstructive pulmonary disease and moderate to severe emphysematous changes, chronic passive congestion of the lungs and fibrous adhesions are insufficient to establish that the miner's death was due to pneumoconiosis. *See 30 U.S.C. §902(b); 20 C.F.R. §§718.201, 718.205, 725.101(a)(25) (2001); Shuff, supra; Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986).

Claimant also argues that, in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 (2000), the administrative law judge failed to properly consider the autopsy evidence. Claimant's Brief at 3-4. Dr. Harrison, the autopsy prosector, opined that the peripheral lymph nodes were enlarged and showed marked anthracotic pigmentation. On microscopic examination, the physician found that the lungs showed fairly predominant chronic passive congestion and moderate to severe emphysematous changes. Dr. Harrison concluded that the miner suffered from atherosclerosis, severe, of the coronary arteries, patchy myocardial fibrosis, cardiomegaly with biventricular hypertrophy, fibrosis and moderate thickening, moderate to severe emphysematous changes, chronic passive congestion of the lungs, moderate simple coal workers' pneumoconiosis, chronic bronchitis and fibrous adhesions. Director's Exhibit 8. The administrative law judge acted within his discretion in finding that Dr. Harrison's opinion is entitled to great weight because the physician actually conducted the autopsy and because his report was well-documented and well-reasoned. Decision and Order at 6;

Urgolites v. BethEnergy Mines, Inc., 17 BLR 1-20 (1992); *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also rationally found that the autopsy evidence failed to carry claimant's burden of proof as Dr. Harrison did not opine that pneumoconiosis, or any other dust related condition, played a role in the miner's death. Decision and Order at 6; Director's Exhibit 8; *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR 2- (4th Cir. 2000); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, we reject claimant's contentions regarding Dr. Harrison's opinion.

Claimant further contends that the administrative law judge erred in failing to find that the miner's death was due to pneumoconiosis based upon the death certificate. The death certificate, signed by Dr. V. Modi, the miner's treating physician, listed the cause of death as acute cardio-respiratory arrest (acute myocardial infarction) due to chronic obstructive lung disease with coal workers' pneumoconiosis as a contributing condition to death. Director's Exhibit 6. The administrative law judge properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205 (2000) as it was unreliable since there was no explanation provided for the finding that complications from black lung disease contributed to death. Director's Exhibit 6; Employer's Exhibits 7-10; Decision and Order at 6; *Sparks, supra*; *Shuff, supra*; *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Clark, supra*; *Tackett v. Cargo Mining Coal Co.*, 12 BLR 1-11 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Piccin, supra*. Contrary to claimant's assertion, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Sparks, supra*; *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark, supra*; *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Claimant's reliance upon 20 C.F.R. §718.104(d) (2001) is misplaced in this instance. Although an administrative law judge may give a treating physician's opinion controlling weight, the weight that is to be given to the treating physician must also be based on the credibility of the physician's opinion in light of its reasoning and documentation. *See* 20 C.F.R. §718.104(d)(5) (2001); *Sparks, supra*; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo, supra*; *Clark, supra*. In the instant case, the administrative law judge permissibly determined that the death certificate was an unreliable report of the miner's condition. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with respect to the death certificate, we affirm the administrative law judge's finding that the death certificate is insufficient to establish that the miner's death was due to pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant additionally contends that the administrative law judge erred in failing to determine if complicated pneumoconiosis was established pursuant to 20 C.F.R. §718.304 (2000). Claimant's Brief at 4. Although the administrative law judge did not specifically discuss the applicability of Section 718.304 (2000) other than stating that the presumption is not applicable, a remand is not required as the irrebuttable presumption is not available in the instant case. Decision and Order at 6. There is no x-ray evidence of record indicating an opacity greater than one centimeter in diameter and Dr. Harrison's statement that the autopsy showed "nodule measuring 1 centimeter", without equating this finding with the size of x-ray opacities, is insufficient to trigger the presumption. *See* 20 C.F.R. §718.304(a) (2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR 2- (4th Cir. 1999); *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984); *see also Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); Director's Exhibit 8. Additionally, no physician characterized the autopsy as revealing "massive lesions" and there is no other evidence of complicated pneumoconiosis in the record. *See* 20 C.F.R. §718.304(b), (c) (2000); Employer's Exhibits 1-12, 14; Director's Exhibits 6, 8, 9. Thus, based on the before us record, we hold that the medical evidence is insufficient to establish entitlement to the irrebuttable presumption at Section 718.304 (2000). *See* 20 C.F.R. §718.304 (2000); *Blankenship, supra*; *Gray, supra*; *Smith v. Island Creek Coal Co.*, 7 BLR 1-734 (1985); *Lohr, supra*.

Claimant finally contends that the administrative law judge erred in his weighing of the medical opinion evidence. Claimant's Brief at 4-7. We disagree. The administrative law judge properly considered the entirety of the medical opinion evidence of record and rationally concluded that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis. *Kuchwara, supra*; *Piccin, supra*; Decision and Order at 6-7. The relevant evidence of record concerning the cause of death consists of the autopsy report, six medical opinions and the death certificate. Dr. Harrison, who performed the autopsy, did not offer an opinion as to whether the miner's death was due to pneumoconiosis. Director's Exhibit 8. Dr. Jones, who conducted a pathology consultation, opined that the miner died suddenly and that such deaths are usually cardiac related and can be precipitated or aggravated by hypoxia, a condition associated with pneumoconiosis and that in this case it was impossible that pneumoconiosis did not play a significant, aggravating and hastening role in the miner's death from coronary artery disease. Claimant's Exhibit 1. Drs. Castle, Kleinerman, Renn, Naeye and Harnsberger stated that the miner suffered from coal workers' pneumoconiosis but opined that the condition was too mild to have contributed to his death and that the miner's death was due to cardiac arrhythmia due to coronary artery disease and that pneumoconiosis did not cause or hasten the miner's death. Director's Exhibits 8, 9; Employer's Exhibits 1-12, 14. The death certificate, signed by Dr. V. Modi, listed the cause of death as acute cardio-respiratory arrest (acute myocardial infarction) due to chronic obstructive lung disease with coal workers' pneumoconiosis as a contributing condition to death. Director's Exhibit 6. The administrative law judge properly considered this evidence

and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205 (2000) as the administrative law judge permissibly determined that the relevant affirmative evidence was unreliable as the physicians did not explain the basis for their conclusions, particularly in light of the objective evidence and well-reasoned and documented contrary medical opinions of record. *Sparks, supra; Clark, supra; Lafferty, supra; Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Perry, supra; King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara, supra*; Decision and Order at 5-7.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Trumbo, supra; Haduck, supra; Boyd, supra; Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found the evidence indicating that the miner's death was due to pneumoconiosis unreliable, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo, supra; Haduck, supra; Boyd, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson, supra; Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 (2000) as it is supported by substantial evidence and is in accordance with law.⁵ *See Shuff, supra; Neeley, supra; Trumbo, supra*.

Because claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Shuff, supra; Trumbo, supra; Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

⁵Claimant erroneously relies on the deposition testimony of Dr. Hansbarger from another black lung claim to attempt to discredit the physician's opinion in the instant case. Claimant's Brief at 7. The administrative law judge, and the Board as a review tribunal, cannot consider evidence that is not in the record. *Fetterman v. Director, OWCP*, 7 BLR 1-688.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge