

BRB No. 04-0482 BLA

ANN P. KOSICKI)	
(Widow of LEONARD KOSICKI))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 02/10/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Howard Radzely, 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 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 appeals the Decision and Order (2003-BLA-6029) of Administrative Law Judge Ralph A. Romano 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). Based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718.¹ The administrative law judge

¹ The record indicates that the miner filed an application for benefits on September 7, 1979, which was denied by the district director on August 22, 1980, due to the miner's failure to establish any requisite element of entitlement. Director's Exhibit 28. The miner filed a

accepted the parties' agreement that the miner worked for over seven years as a coal miner, and that the miner suffered from the presence of coal workers' pneumoconiosis. Hearing Transcript at 6-7; Director's Exhibit 19. The administrative law judge further found the evidence of record insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the evidence in finding that the miner's death was not due to pneumoconiosis at Section 718.205(c). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

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, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. See 20 C.F.R. §§718.202(a), 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). 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)(2); *Lukosevicz v.*

second application for benefits on November 2, 1992, which was denied by the district director on January 11, 1993, as the miner again failed to establish any required element of entitlement. Director's Exhibit 29. A third application for living miner's benefits was filed by the miner on October 26, 1995, and was denied by Administrative Law Judge Ainsworth H. Brown on June 16, 1998, as the miner failed to establish total respiratory disability, although the existence of coal workers' pneumoconiosis was established. Director's Exhibits 1, 36. On appeal, the Board affirmed the denial of benefits. *Kosicki v. Director, OWCP*, BRB No. 98-1263 BLA (June 23, 1999) (unpub.). The miner subsequently filed a petition for modification, dated July 19, 1999, and benefits were awarded by Administrative Law Judge Robert D. Kaplan on December 29, 2000. Director's Exhibit 44. The miner died on February 25, 2002, Director's Exhibits 4, 5, and claimant filed for survivor's benefits on March 21, 2002. Director's Exhibit 3.

Director, OWCP, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).²

Pursuant to Section 718.205(c), claimant contends that the administrative law judge erred by failing to accord determinative weight to the opinion of Dr. Greenwald, the miner's treating oncologist. The Decision and Order indicates that the administrative law judge accorded less weight to Dr. Greenwald's opinion that pneumoconiosis contributed to the miner's death from prostate cancer by affecting his immune system, and by "limiting his ability to receive aggressive treatment for his prostatic carcinoma". Director's Exhibit 14; Decision and Order at 9. The administrative law judge determined that this opinion was not as well documented and reasoned as the contrary opinion of Dr. Sherman, despite Dr. Greenwald's status as a treating physician, as Dr. Greenwald is not a specialist in pulmonary diseases, and the record does not support his statement that pneumoconiosis contributed to the miner's death by limiting his ability to receive treatment for his cancer, despite the alteration of the miner's pain medication. Director's Exhibit 14; Decision and Order at 9. The administrative law judge is not required to credit the opinion of a treating physician, *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Director, OWCP v. Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994), and it is within the administrative law judge's discretion to determine whether a medical report is adequately documented and reasoned. *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Trumbo*, 17 BLR 1-85; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As the record supports the determination that Dr. Greenwald has no special qualifications in the field of pulmonary medicine, and the administrative law judge has accurately noted that the miner's medical records do not indicate that any medical treatment for the miner's cancer was withheld because of his respiratory condition, we hold that the administrative law judge acted within his discretion as the fact-finder in according less weight to Dr. Greenwald's opinion. *Trumbo*, 17 BLR 1-85; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

We further hold that the administrative law judge permissibly credited the opinion of Dr. Sherman, as supported by that of Dr. DeCurtis, the miner's primary treating physician, that the miner's death was not due to, or hastened by the miner's minimal pneumoconiosis, as the administrative law judge permissibly found that Dr. Sherman's opinion was better documented and reasoned and more persuasive than the other evidence of record, and based on this physician's superior qualifications as a board-certified pulmonologist. Director's Exhibits 4, 11, 12; Decision and Order at 9; *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-85 (3d Cir. 2004); *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d

² Since the miner's last coal mine employment took place in the Commonwealth of Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. Director's Exhibits 2, 10, 28; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Cir. 2002); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon*, 11 BLR 1-113; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We find no merit in claimant's contention that Dr. Sherman failed to consider the evidence of record addressing the miner's breathing difficulties prior to his death, as the record indicates that he accurately noted that this evidence primarily consisted of findings that the miner's lungs were clear, and that he was not in respiratory distress. Director's Exhibits 11, 12. We similarly hold that this physician's description of the miner's final respiratory symptoms as "agonal breathing" which commonly occurs just prior to death, does not indicate that Dr. Sherman is hostile to the intent and purpose of the Act, but indicate that this physician found the miner's symptoms unrelated to his pneumoconiosis. *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989); *Stephens v. Bethlehem Mines Corp.*, 8 BLR 1-350 (1985); *Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985). Because it is within the discretion of the administrative law judge as the trier of fact, to determine whether a medical report is adequately documented and reasoned and the administrative law judge has properly exercised his discretion in this case, we affirm the administrative law judge's finding that the medical reports of record do not support a finding of death due to pneumoconiosis under Section 718.205(c), or entitlement to benefits. *Lukosevich*, 888 F.2d 1001, 13 BLR 2-101; *Fields*, 10 BLR 1-19.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge