

BRB No. 05-0401 BLA

ANGELA A. CONSAGRA )  
(Widow of CHARLES L. CONSAGRA) )  
 )  
 Claimant-Petitioner )  
 )  
 v. ) DATE ISSUED: 01/30/2006  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

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

Charles L. Consagra (Needle, Goldenziel & Pascale, PC), Scranton,  
Pennsylvania, for claimant.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H.  
Feldman, 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  
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, appeals the Decision and Order Denying Benefits (04-BLA-6208) of  
Administrative Law Judge Robert D. Kaplan rendered on a survivor's claim<sup>1</sup> filed

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<sup>1</sup>The miner's three claims were denied and are all closed. Director's Exhibit 1.  
Claimant is the widow of Charles L. Consagra, the miner, who died on April 12, 2003.  
Director's Exhibit 8. Claimant filed her survivor's claim for benefits on June 18, 2003.  
Director's Exhibit 3. The district director denied benefits in a Proposed Decision and  
Order on January 16, 2004. Director's Exhibit 14. Claimant submitted a "request for a

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). The parties stipulated to, and the administrative law judge found, that the miner had eight and one-half years of coal mine employment. Decision and Order at 2. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge initially noted that the Director, Office of Workers' Compensation Programs (the Director), conceded the existence of pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.202(a), 718.203(c). 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). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge committed reversible error in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Claimant urges the Board to vacate the administrative law judge's denial of benefits and to award benefits. Alternatively, claimant requests a remand of the case for further consideration at 20 C.F.R. §718.205(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. 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).

To establish entitlement to survivor's benefits, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see 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). In a survivor's claim filed on or after January 1, 1982, as in the instant claim, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the irrebuttable presumption provided at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing

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revision and/or request for formal hearing" on January 26, 2004, contending that the miner's death was due to pneumoconiosis. The request for revision was denied by the district director on February 9, 2004. Director's Exhibits 15, 17, 18. Claimant requested a formal hearing on February 16, 2004. Director's Exhibit 19. A hearing was held before the administrative law judge on September 1, 2004.

cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant contends that “the record as a whole clearly indicates” that the miner’s death was hastened by black lung disease which caused breathing problems “and therefore caused the deceased miner’s fall from a top flight of steps on February 27, 2003 resulting in his ultimate death on April 12, 2003.”<sup>2</sup> Claimant’s Brief at 4. The evidence relevant to the miner’s death consists of the following: The miner’s death certificate, completed by Dr. Adamo, lists the immediate cause of death as pneumonia due to anthrasicosis, due to non q wave myocardial infarction, due to intracranial hemorrhage. Coronary artery disease and leukocytosis are listed as “other significant conditions” contributing to death but not resulting in the cause given in Part 1. Director’s Exhibit 8. Dr. Sherman, in his report dated June 26, 2004, based on medical records, examination notes of Dr. Adamo, pulmonary function study and blood gas study results, found no evidence to suggest that pneumoconiosis caused or hastened the miner’s death. Director’s Exhibit 26. Dr. Sherman noted that the pulmonary function and blood gas studies did not meet disability standards, and opined that while the miner had a history of chronic obstructive pulmonary disease, there was no evidence that he was treated for it. *Id.* Dr. Sherman also stated that the x-ray findings showing pulmonary fibrosis in the left base of the lung “may have been caused by aspiration into the left base and is not specific for pneumoconiosis” and that “no nodular infiltrates [were] reported.” *Id.* Dr. Sherman concluded that the miner “died of complications of vascular disease” and his “swallowing dysfunction was likely the cause of his pneumonia.” *Id.* In his September 1, 2004 response to interrogatories, Dr. Sherman found that, based on the pulmonary function and blood gas results, “the Miner should not have had shortness of breath from a pulmonary impairment when walking up 26 steps,” but that he may have had shortness of breath from another non-pulmonary cause. Claimant’s Exhibit 1. Dr. Sherman also found that, “Based on the pulmonary function tests above, I don’t see how [chronic obstructive pulmonary disease], or any other coal-dust related lung disease, could have contributed to the [February 27, 2003] fall.” *Id.* Dr. Sherman concluded, “Based on the medical records available to me, I can neither rule out nor confirm the possibility that the Miner’s fall February 27, 2003 may have contributed to his depressed mental status, and thus

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<sup>2</sup>Medical records dated February 27, 2003 indicate that the miner fell down thirteen steps at home and lost consciousness for about three minutes; a CAT scan taken on March 1, 2003 showed a right-sided hemorrhage around the miner’s brain stem. Director’s Exhibit 9.

caused an aspiration pneumonia. However, a myocardial infarction with pneumonia could have resulted in the same outcome even absent the effects of his earlier fall.” *Id*<sup>3</sup>

Claimant contends that the miner’s death was hastened by pneumoconiosis. Claimant’s contention lacks merit. The administrative law judge rationally found that the medical records do not establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Thus, the administrative law judge properly found that Dr. Sherman’s opinion, that pneumoconiosis did not cause or hasten the miner’s death, is reasoned and well-documented. *Barren Creek Coal Co .v. Witmer*,111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, the administrative law judge properly found that the death certificate, listing pneumonia due to anthrasilicosis as the immediate cause of death, *see* Director’s Exhibit 8, by itself, without additional explanation, is insufficient to establish death due to pneumoconiosis.<sup>4</sup> *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Addison v. Peabody Coal Co.*, 11 BLR 1-68 (1988).<sup>5</sup>

Claimant contends that the administrative law judge erred by not “utilizing” her lay testimony “to establish that the symptoms and pertinent behavior and quality of life issue, more specifically the deceased miner’s difficulty in breathing in ascending steps, ultimately caused the miner’s death. *See* Footnote 11 *Sobick [sic] v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004).” Claimant’s Brief at 4. Claimant thereby relies on the

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<sup>3</sup>Claimant testified that the miner experienced breathing problems when walking on level ground and going up and down stairs. Hearing Transcript at 9-10.

<sup>4</sup>Claimant contends that the administrative law judge “misrepresented the substantial evidence of record” when he found that no physician expressed an opinion that the miner’s February 27, 2003 fall did contribute to his death. Contrary to claimant’s contention, the record supports the administrative law judge’s finding that “no physician expressed an opinion that the fall did contribute to the miner’s death.” Decision and Order at 6. Moreover, the record supports the administrative law judge’s finding that although x-rays indicate that the miner had pulmonary fibrosis, there is no documented treatment for pneumoconiosis, pulmonary fibrosis, or chronic obstructive pulmonary disease. *Id.*

<sup>5</sup>Given the administrative law judge’s proper treatment of the death certificate, claimant cannot establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1).

indication of the United States Court of Appeals for the Third Circuit, in *Soubik v. Director, OWCP*, 366 F.3d 226, 233 n.11, 23 BLR 2-82 n.11, 2-98 n.11 (3d Cir. 2004), that:

The [administrative law judge] could hardly expect lay testimony to establish causation or etiology. That is beyond the purview or the competence of lay witnesses. Such testimony can only be expected to corroborate certain symptoms and establish pertinent behavior or quality of life issues. Expert testimony will usually be required to establish the necessary relationship between such observed indicia of pneumoconiosis and any underlying pathology.

*Soubik*, 366 F.3d at 233 n.11, 23 BLR at 2-98 n.11.

Claimant's contention lacks merit. It was permissible for the administrative law judge to determine that, given the other evidence before him, expert (i.e. medical) testimony was necessary for claimant to prevail regarding causation and that there was no such testimony in the record. We therefore agree with the Director's position that claimant's reliance on *Soubik* is unavailing. See Director's Brief at 4, n.4. Claimant must thus meet her burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c) by credible medical evidence, and the administrative law judge found that claimant has not met her burden in this case.

Based on the foregoing, we affirm the administrative law judge's finding that the evidence of record does not meet claimant's burden to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), as it is supported by substantial evidence and is in accordance with law. We thus affirm the administrative law judge's denial of benefits in this survivor's claim.<sup>6</sup>

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<sup>6</sup>We affirm the administrative law judge's finding that the evidence does not establish death due to pneumoconiosis at 20 C.F.R. §718.205(c)(3) as it is unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order Denying 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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JUDITH S. BOGGS  
Administrative Appeals Judge