

BRB No. 89-3227 BLA

JULIA D. PICKUP)
(Widow of CHARLES PICKUP)

Claimant)

v.)

NORTHERN COAL COMPANY)

DATE ISSUED:

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)
Respondent)

DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Michael J. Rutledge (Judith E. Kramer, Acting 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: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (86-BLA-833) of Administrative Law Judge Thomas M. Burke awarding benefits on a miner's claim and 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).¹ The administrative law judge found that employer was properly designated as the responsible operator herein pursuant to 20 C.F.R. §§725.492 and 725.493, and reviewed these claims pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge credited the miner with sixteen years of qualifying coal mine employment, and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b), total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204, and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded on both the miner's and the survivor's claims. On appeal, employer challenges the administrative law judge's finding that employer is the responsible operator herein pursuant to Sections 725.492 and 725.493, as well as his findings pursuant to Sections 718.202(a)(2), 718.204(b), and 718.205(c). The Director, Office of Workers' Compensation Programs (the Director), responds regarding the issue of responsible operator only, urging affirmance. Claimant, the surviving spouse, has not participated in this appeal.²

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

¹ The miner filed his claim for benefits on October 17, 1984, and claimant, the miner's widow, filed her survivor's claim on September 22, 1985. Director's Exhibit 1.

² The administrative law judge's findings pursuant to Section 718.203(b), and with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer first challenges its designation as the responsible operator herein pursuant to Sections 725.492 and 725.493. Specifically, employer contends that the administrative law judge erred in finding that the miner was engaged in coal mine employment with employer for more than one year, since the miner should not have been credited with any periods of absence due to illnesses which were not job-related. Contrary to employer's arguments, however, the administrative law judge properly found that the miner was regularly employed by employer for more than one year between July 27, 1981, and August 16, 1982, see *Director, OWCP v. Gardner*, 882 F.2d 67, 13 BLR 2-1 (3d Cir. 1989), and permissibly included the miner's periods of excused, paid sick leave in his computation of the length of said employment. Decision and Order at 2, 14; see generally *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd*, Nos. 88-3531, 88-3578 (6th Cir., May 11, 1989)(unpublished); *Elswick v. The New River Co.*, 2 BLR 1-1109 (1980). The Director correctly notes that, inasmuch as the record reflects extensive dust exposure in the miner's usual coal mine employment with employer, the presumptions at 20 C.F.R. §§725.492(c) and 725.493(a)(6) are not rebutted, see *Rowan v. Lewis Coal and Coke Co.*, 12 BLR 1-31 (1988), *Zimmerman v. J. Robert Bazley, Inc.*, 10 BLR 1-75 (1987); and as employer failed to establish that the miner worked less than 125 days pursuant to 20 C.F.R. §725.493(b), see *Gardner, supra*, we affirm the administrative law judge's findings pursuant to Sections 725.492 and 725.493, as supported by substantial evidence.

Turning to the merits, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). Employer maintains that the administrative law judge improperly failed to weigh the x-ray and medical opinion evidence with the autopsy evidence, and treated the opinions of the Drs. Goldblatt, Naeye and Repsher, who reviewed the autopsy protocol and slides, inconsistently. Employer also asserts that Dr. Kirsch's findings in the autopsy protocol do not satisfy the definition of pneumoconiosis at 20 C.F.R. §718.201 or the standards for autopsy proof at 20 C.F.R. §718.106. Employer's arguments lack merit. Section 718.202(a) provides four *alternative* methods of establishing the existence of pneumoconiosis, and the administrative law judge was not required to weigh the x-ray and medical opinion evidence with the autopsy evidence. See *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Further, although Dr. Kirsch, the autopsy prosector, did not mention pneumoconiosis in his macroscopic findings or among the final autopsy diagnoses, his microscopic findings included "mild to moderate anthracosilicosis," which satisfies the definition of pneumoconiosis at Section 718.201, and his autopsy protocol meets the requisite standards at Section 718.106. See Director's Exhibits 7, 25. Contrary to employer's arguments, the administrative law judge permissibly

credited the opinion of Dr. Kirsch over the contrary opinions of Drs. Naeye and Repsher, as Dr. Kirsch performed the autopsy and his opinion was corroborated by Drs. Goldblatt's diagnosis of pneumoconiosis. Decision and Order at 15; see *United States Steel Corp. v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982); *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). We, therefore, affirm the administrative law judge's findings pursuant to Section 718.202(a)(2), as supported by substantial evidence.

Employer next contends that the administrative law judge erred in finding total disability due to pneumoconiosis established at Section 718.204(b), as the record reflects multiple potential causes of disability and no physician linked the miner's disability to his coal mine employment or pneumoconiosis. Employer's contention has merit. Since the administrative law judge acknowledged that none of the medical opinions of record attributed the miner's disability to his coal mine employment exposure, see Decision and Order at 17, claimant has not met her burden of establishing causation pursuant to Section 718.204(b) as a matter of law. See generally *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Cooper v United States Steel Corp.*, 7 BLR 1-842 (1985). Inasmuch as claimant has failed to establish that the miner's disability was due to pneumoconiosis, claimant is precluded from entitlement to benefits on the miner's claim pursuant to Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Consequently, we reverse the administrative law judge's award of benefits on the miner's claim.

Lastly, employer challenges the administrative law judge's finding that the evidence of record is sufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c). Specifically, employer argues that the administrative law judge should have drawn a negative inference from the autopsy prosector's failure to list pneumoconiosis as a cause of death, as well as from the miner's hospital records and death certificate, which did not mention pneumoconiosis. Employer further asserts that the opinion of Dr. Goldblatt is insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c), and that the administrative law judge did not provide a valid reason for discrediting the opinions of Drs. Repsher and Naeye that death was unrelated to pneumoconiosis. Employer's arguments are without merit. Although the hospital records, death certificate and autopsy protocol did not explicitly cite pneumoconiosis as a cause of death, they listed various respiratory conditions among the enumerated causes, without specifying the etiology of such respiratory conditions. The administrative law judge accurately reviewed the medical evidence of record, and permissibly credited the opinion of Dr. Goldblatt that the miner's pneumoconiosis was a substantially contributing cause of his death, see Deposition at 16, 17, 39, *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989), over the contrary opinions of Drs. Naeye and Repsher, as Dr.

Goldblatt's opinion was better supported by the evidence of record, *see generally Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); and the underlying premise of Drs. Naeye and Repsher that the miner did not have pneumoconiosis was against the weight of the evidence. Decision and Order at 18, 19; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Consequently, we affirm the administrative law judge's findings pursuant to Section 718.205(c), as supported by substantial evidence, and we affirm his award of benefits on the survivor's claim.

Accordingly, the Decision and Order of the administrative law judge awarding benefits on the survivor's claim is affirmed, and the administrative law judge's award of benefits on the miner's claim is reversed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge