BRB Nos. 00-1059 BLA
and 00-1059 BLA-A

TRESSIE L. DOTSON (Surviving Spouse of LEVI DOTSON) Claimant-Petitioner Cross-Respondent	)	
v.	)	DATE ISSUED:
ISLAND CREEK COAL COMPANY Employer-Respondent Cross-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Mary Rich Maloy (Jackson & Kelley), Charleston, West Virginia, for employer.

Timothy S. Williams (Howard M. Radzely, 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: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals and employer cross-appeals the Decision and Order (1999-BLA-1069) of Administrative Law Judge Robert J. Lesnick 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, based on a stipulation by the parties, credited the miner with thirty-three years of qualifying coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge found that the miner suffered from pneumoconiosis arising out of coal mine employment, *see* 20 C.F.R. §§718.202(a), 718.203(b) (2000), but found that the evidence of record failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, benefits were denied. On appeal, claimant asserts that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.205(c)(2) (2000). Employer responds, urging affirmance of the denial of benefits, and cross-appeals, contending that the administrative law judge erred in finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief on the merits in this appeal.

The Board's scope of review is defined by statute. We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 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 under 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that the miner's death was due to, or hastened by, pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. Failure to establish any element

[1] Claimant is the surviving spouse of the miner, Levi Dotson, who died on May 14, 1998. *See* Decision and Order at 2; Director's Exhibits 1, 8. The miner's widow filed a claim for survivor's benefits on June 16, 1998. *See* Decision and Order at 2; Director's Exhibit 1.

[2] 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.

precludes entitlement. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993) ; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

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 and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on May 16, 2001, to which claimant, employer and the Director have responded. Claimant, employer and the Director assert that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by claimant, employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. In adjudicating this claim which was filed after January 1, 1982, the administrative law judge properly required claimant to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000) in order to establish entitlement to survivor's benefits. *See* 20 C.F.R. §§718.1, 718.205(c) (2000); *Neeley*; *supra*. In finding that the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c)(2) (2000), the administrative law judge permissibly relied upon the medical reports of Drs. Gaziano, Bush, Caffrey, Spagnolo and Zaldivar, which found that pneumoconiosis did not play a role in or hasten the miner's death, since the administrative law judge found that these opinions were better reasoned and better supported by the objective evidence of record than the contrary opinions of Drs. Racadag and Green. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 3-5, 7-8; Director's Exhibits 9-10; Claimant's Exhibit 1; Employer's Exhibits 4, 6, 8. Specifically, the administrative law judge rationally concluded that the opinions of Drs. Racadag and Green, that pneumoconiosis contributed to the miner's death, were less persuasive as Dr. Racadag's opinion was conclusory and the administrative law judge found that neither physician referred to any laboratory

studies to support their conclusions.[3] *Clark*, *supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Lucostic*, *supra*; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); Decision and Order at 3-4; Director's Exhibit 9; Claimant's Exhibit 1.

We also reject claimant's assertion that the administrative law judge erred in giving greater weight to Drs. Bush, Caffrey, Spagnolo and Zaldivar regarding the cause of the miner's death since these physicians did not diagnose pneumoconiosis. In the instant case, the administrative law judge noted that Drs. Bush, Caffrey, Spagnolo and Zaldivar opined that even if pneumoconiosis was present, it was mild and did not contribute to or hasten death. Decision and Order at 8; *see Toler v. Eastern Asso. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Moreover, claimant's assertion that the administrative law judge should have acknowledged the progressive nature of pneumoconiosis and given less weight to the opinions that relied, in part, on older objective studies is without merit as the administrative law judge credited opinions that were based on the only available medical evidence of record. *Clark*, *supra*; *Lucostic*, *supra*.

The administrative law judge has broad discretion in weighing and assessing the evidence of record in determining whether a party has met its burden of proof and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000). Claimant's failure to establish death due to pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718 (2000) in this survivor's claim, precludes entitlement thereunder, *Shuff*, *supra*; *Trent*, *supra*, and we need not address employer's arguments on cross-appeal on whether or not the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a) (2000).

[3] The record is devoid of evidence that would establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000) and, thus, is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3) (2000). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge