

BRB No. 01-0862 BLA

JANICE B. KEENE	)	
(Widow of DENNIS KEENE)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BUCAR COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order on Remand (91-BLA-1729) of Administrative Law Judge Clement J. Kichuk 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).<sup>2</sup> This case is before the

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<sup>1</sup>Claimant is Janice B. Keene, the widow of the miner, Dennis Keene, who filed her claim for benefits on March 1, 1990. Director's Exhibit 1.

<sup>2</sup>The Department of Labor has amended the regulations implementing the Federal

Board for the fourth time. In the initial Decision and Order, Administrative Law Judge Robert J. Shea, after crediting the miner with at least thirty years of coal mine employment, found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). Accordingly, Judge Shea awarded benefits. By Decision and Order dated November 26, 1993, the Board affirmed Judge Shea's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). *Keene v. Bucar Coal Co.*, BRB No. 92-2307 BLA (Nov. 26, 1993)(unpub.). The Board, therefore, affirmed Judge Shea's award of benefits. *Id.*

Employer subsequently filed a motion for reconsideration. By Decision and Order on Reconsideration dated July 31, 1996, the Board noted that, subsequent to the issuance of its Decision and Order, the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct 2251, 18 BLR 2A-1 (1994), invalidated the "true doubt" rule as contrary to the requirements of the Administrative Procedure Act (APA). *Keene v. Bucar Coal Co.*, BRB No. 92-2307 BLA (July 31, 1996)(unpub.). Because Judge Shea's finding pursuant to 20 C.F.R. §718.205(c)(2) (2000) was based upon his utilization of the subsequently invalidated "true doubt" rule, the Board vacated Judge Shea's finding pursuant to 20 C.F.R. §718.205(c)(2) (2000), and remanded the case for further consideration. *Id.*

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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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Due to Judge Shea's unavailability, Administrative Law Judge Clement J. Kichuk (hereinafter, the administrative law judge) reconsidered the claim on remand. The administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated September 4, 1998, the Board held that the administrative law judge's analysis of the evidence under 20 C.F.R. §718.205(c)(2) (2000) failed to comport with the requirements of the APA. *Keene v. Bucar Coal Co.*, BRB No. 97-1730 BLA (Sept. 4, 1998) (unpub.). The Board, therefore, vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c)(2) (2000) and remanded the case to the administrative law judge with instructions "to provide a more detailed explanation of the respective weight to be accorded the conflicting medical opinions of record."<sup>3</sup> *Id.*

On second remand, the administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated September 26, 2000, the Board held that the administrative law judge's analysis of the evidence under 20 C.F.R. §718.205(c)(2) (2000) again failed to comport with the requirements of the APA. *Keene v. Bucar Coal Co.*, BRB No. 97-1730 BLA (Sept. 26, 2000)(unpub.)(*Keene IV*). The Board specifically held that the opinions of Drs. Stefanini, Medina, and Abrenio were insufficient to support a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). *Keene IV, supra*. Therefore, the Board, vacated the administrative law judge's Section 718.205(c)(2) (2000) finding and remanded the case to the administrative law judge with instructions "to address whether Dr.DeLara's opinion, when considered along with the contrary opinions of Drs. Anderson, Naeye, Fino, Caffrey, Lane, Vuskovich and Chandler, is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2)." *Id.*

On third remand, the administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), (c)(5). Decision and Order on Remand at 8.

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<sup>3</sup>The Board specifically instructed the administrative law judge to reconsider whether the opinions of Drs. Medina, Stefanini, and Abrenio were sufficient to support a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). *Keene v. Bucar Coal Co.*, BRB No. 97-1730 BLA (Sept. 4, 1998) (unpub.).

Accordingly, the administrative law judge denied benefits.

In the current appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>4</sup> Claimant's Brief at 5-9. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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).

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<sup>4</sup>Claimant, who is represented by counsel, also sent a handwritten letter to the Board on August 20, 2001.

Claimant asserts that the administrative law judge erred in failing to find the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) based on the opinions of Dr. Medina, the miner's treating physician, and Dr. Stefanini, the autopsy prosector, and on the opinions of Drs. DeLara, Buddington, and Abrenio. Claimant's Brief at 5-9. In reconsidering the relevant evidence on remand, the administrative law judge found that Dr. DeLara's reasoned opinion "does not outweigh the contrary reasoned opinions of Drs. Anderson, Naeye, Fino, Caffrey, Lane, Vuskovich and Chandler."<sup>5</sup> Decision and Order on Remand at 6. Specifically, the administrative law judge permissibly discredited Dr. DeLara's opinion inasmuch as he found this physician only reviewed the autopsy slides and "[h]is one page report does not indicate he was provided with the autopsy report, medical history, [and] smoking<sup>6</sup> and occupational histories of the miner." *Id.*; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

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<sup>5</sup>Drs. Anderson, Naeye, Fino, Caffrey, Lane, Vuskovich, and Chandler all opined that the miner's pneumoconiosis did not contribute in any way to his death. Director's Exhibits 11, 40 at 28-33; Employer's Exhibits 2, 3, 5-8.

<sup>6</sup>Dr. Medina, the miner's treating physician, characterized the miner as having a "long smoking history." Director's Exhibit 40. Dr. Medina's characterization of the miner's smoking history is supported by the record.

Moreover, in its 2000 Decision and Order, the Board found that the opinions of Drs. Medina, Stefanini, and Abrenio were insufficient to establish that the miner's death was due to pneumoconiosis.<sup>7</sup> See *Keene IV, supra*. Therefore, the administrative law judge on remand properly did not rely on these physicians' opinions pursuant to Section 718.205(c). The administrative law judge, on remand, additionally noted that the Board "also discredited Dr. Buddington's opinion." Decision and Order on Remand at 6. In fact, the Board noted in a footnote Dr. Buddington's finding that although there was extensive coal workers' pneumoconiosis, it "probably was not a major contributor to the [miner's] demise,"<sup>8</sup> Director's Exhibit 39. See *Keene IV, slip op.* at 6 n.4. While the administrative law judge did not specifically address Dr. Buddington's opinion on remand, the opinion is speculative, and thus insufficient to carry claimant's burden of establishing that the miner's death was due to pneumoconiosis because Dr. Buddington did not "give an opinion with any degree of medical certainty that there was some causal relationship

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<sup>7</sup>Inasmuch as the Board has held that the opinions of Drs. Medina and Stefanini are insufficient to establish that the miner's death was due to pneumoconiosis, it was unnecessary for the administrative law judge to consider Dr. Medina's status as the miner's treating physician and Dr. Stefanini's status as the autopsy prosector.

<sup>8</sup>In a report dated October 11, 1990, Dr. Buddington noted that he was in "complete agreement" with Dr. Stefanini's findings. Director's Exhibit 39. Dr. Buddington opined that the miner's poorly differentiated non-small cell carcinoma of the lung was the immediate and primary cause of his death and noted that although there was extensive coal workers' pneumoconiosis, it "probably was not a major contributor to the [miner's] demise." *Id.* Dr. Buddington also stated that "it would appear that [the miner's coal worker's pneumoconiosis] is significant and would have caused some respiratory difficulty prior to the [miner's] demise." *Id.*

between” the miner’s pneumoconiosis and his death. *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 390, 21 BLR 2-639, 2-650 (4th Cir. 1999); *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Inasmuch as the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, where the administrative law judge’s findings are supported by substantial evidence and in accordance with the law, *see Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge’s finding that claimant failed to establish that the miner’s death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(c)(2), (c)(5); *Ondecko, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Because we affirm the administrative law judge’s finding that claimant failed to establish that the miner’s death was due to pneumoconiosis, *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989), an essential element of entitlement in a survivor’s claim, we also affirm his denial of survivor’s benefits under 20 C.F.R. Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*); *see also Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Accordingly, the administrative law judge's Decision and Order on Remand 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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BETTY JEAN HALL  
Administrative Appeals Judge

Judge Dolder:

The following is an answer to your question on how Dr. Buddington's opinion was treated in the previous alj and Board decisions.

In 1992, ALJ Shea considered all the medical opinions, including Dr. Buddington's report, and found claimant had established death due to pn based on the true doubt rule. The Board, on reconsideration, vacated the award and remanded the case back to the alj b/c the true doubt rule had been invalidated.

On first remand, ALJ Kichuk found the opinions of Drs. Stefanini, Medina, DeLara, Abrenio, and Buddington to be sufficient to establish that the miner's death was hastened by pn. The Board remanded this case for the alj to reconsider his 718.205(c)(2) finding b/c the alj failed to provide an adequate rationale for weighing the opinions and b/c the alj failed to comment on the equivocal nature of the reports of Drs. Medina, Stefanini, and Abrenio (the Board did not include Dr. Buddington's report in this discussion).

On second remand, the alj found the miner's death was due to pn. based on the opinions of Drs. Medina, Stefanini, DeLara, and Abrenio as corroborated by the opinion of Dr. Buddington. The Board vacated the alj's 718.205(c)(2) finding, holding that the opinions



of Drs. Medina, Stefanini, and Abrenio are insufficient to support a finding of death due to pn. and including a footnote stating that the record contains Dr. Buddington's opinion and noting this physician's findings.

Please let me know if you have any further questions. Thanks.