

BRB No. 02-0112 BLA

JENNIE F. ZAMUSHINSKI)
(Widow of JOSEPH ZAMUSHINSKI))
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

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

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

Mary Forrest-Doyle (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ the miner's widow, appeals the Decision and Order (2001-BLA-00014) of Administrative Law Judge Robert D. Kaplan denying benefits on a survivor's claim filed

¹Claimant is Jennie F. Zamushinski, the miner's widow. The miner, Joseph Zamushinski, filed a claim for benefits on February 27, 1995 and subsequently died on September 29, 1999. Director's Exhibits 3, 8. Benefits were awarded in the miner's claim on March 22, 2000. Director's Exhibit 8. Claimant filed her survivor's claim, the subject of the instant

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 found, and the parties stipulated to, five and one-half years of coal mine employment and to the existence of pneumoconiosis arising out of coal mine employment. Decision and Order at 2; Hearing Transcript at 5. Considering entitlement in this survivor's claim pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the only issue to be resolved was whether the miner's death was due to pneumoconiosis. Decision and Order at 2-3. The administrative law judge, after reviewing all of the relevant evidence of record, concluded that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205.³ Decision and Order at 3-5. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to properly review all the evidence of record which would establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. The Director, Office of Workers' Compensation Programs, responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence.⁴

appeal, on April 21, 2000. Director's Exhibit 1.

²The 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 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³Claimant, in the instant case, conceded that the record was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 3; Claimant's Brief at 8.

⁴The administrative law judge's length of coal mine employment determination as well as

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).

his findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.304 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 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 and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *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). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).⁵

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 Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge rationally found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205. *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Claimant argues that the administrative law judge erred in failing to find the death certificate and lay testimony sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Claimant's Brief at 4-6, 9-10. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

⁵This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 8.

Claimant initially contends that the death certificate, as well as the medical opinion evidence submitted in the living miner's claim, indicating that the miner was totally disabled due to pneumoconiosis, establish that pneumoconiosis contributed to the miner's death. Claimant's Brief at 9-10. Claimant's contention lacks merit in this instance. The relevant evidence of record concerning the cause of death consists of the death certificate. The death certificate, signed by Dr. Thomas F. Clauss, who was the miner's treating physician, listed the cause of death as "inanition"⁶ due to metastatic carcinoma of the lung with other conditions contributing to death as ASCVD, non-insulin dependent diabetes mellitus and COPD. Director's Exhibit 3. The administrative law judge, in the instant case, properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*; Decision and Order at 4-5.

⁶Inanition is a condition characterized by marked weakness, extreme weight loss, and a decrease in metabolism resulting from prolonged (usually weeks to months) and severe insufficiency of food. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 829 (28th ed. 1994).

In adjudicating this claim which was filed by the survivor 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) in order to establish entitlement to survivor's benefits. *See* 20 C.F.R. §§718.1, 718.205(c); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988). The pertinent issue in a survivor's claim is whether the miner's death was due to pneumoconiosis and not whether the miner was totally disabled by pneumoconiosis during his lifetime. *See* 20 C.F.R. §§718.1, 718.205(c); *Sumner, supra*. In finding that the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge permissibly found that pneumoconiosis did not play a role in the miner's death since he rationally concluded that the notation of chronic obstructive lung disease in the death certificate signed by Dr. Clauss was insufficient to establish that pneumoconiosis was a contributing cause of the miner's death inasmuch as Dr. Clauss did not relate the condition to the miner's coal mine employment.⁷ *See* 20 C.F.R. §718.201; *Boyd, supra*; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); Decision and Order at 4; Director's Exhibit 3. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with respect to the weighing of the medical opinion evidence, we affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant further contends that the administrative law judge erred by failing to consider the lay testimony of record at Section 718.205(c). We disagree. The administrative law judge, in the instant case, considered all the relevant evidence with respect to the cause of the miner's death and properly concluded that claimant failed to carry her burden of proof. Decision and Order at 4-5. Contrary to claimant's contention, the regulations clearly state that as the cause of the miner's death is a medical determination, "competent medical evidence" is required to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). *See* 20 C.F.R. §718.205(c), (d). We reject, therefore, claimant's

⁷Moreover, based upon the circumstances of the instant case, the opinion of Dr. Clauss is insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205 as this opinion is unreasoned since the physician did not explain the basis for his conclusion. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Director's Exhibit 3.

contention that the administrative law judge erred in failing to consider the lay testimony of record.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Trumbo, supra; Haduck, supra; Boyd, supra; Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found the evidence submitted in the survivor's claim failed to indicate that the miner's death was due to pneumoconiosis, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo, supra; Haduck, supra; Boyd, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson, supra; Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 as it is supported by substantial evidence and is in accordance with law. *See Lukosevicz, supra; Neeley, supra; Trumbo, supra*.

Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Lukosevicz, supra; Trumbo, supra; Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge