

BRB No. 03-0628 BLA

CATHERINE CHERRYBON )  
(Widow of PAUL CHERRYBON) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 KOCHER COAL COMPANY )  
 )  
 and )  
 ) DATE ISSUED: 03/31/2004  
 LACKAWANNA CASUALTY COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

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

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

William E. Wyatt, Jr. (Fine, Wyatt & Carey) and Maureen E. Herron  
(Marshall, Dennehey, Warner, Coleman & Goggin), Scranton,  
Pennsylvania, for employer/carrier.<sup>1</sup>

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

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<sup>1</sup> After filing Employer's Brief in Support of Petition for Review, the firm of Fine, Wyatt & Carey withdrew as counsel for employer/carrier in this case.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (02-BLA-0211) of Administrative Law Judge Gerald M. Tierney (the administrative law judge) on a survivor's claim<sup>2</sup> filed on September 2, 1999 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>3</sup> Director's Exhibit 1. The administrative law judge found that this case presented a request for modification<sup>4</sup> and concluded that the previous administrative law judge "made a mistake in a determination of fact in finding the opinions of Drs. Dittman and Sherman sufficient to preclude entitlement." Decision and Order at 3; *see* 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and awarded benefits. Decision and Order at 3-5. On appeal, employer challenges the administrative law judge's finding that pneumoconiosis hastened the miner's death. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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

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<sup>2</sup> Claimant, Catherine Cherrybon, is the widow of Paul Cherrybon who was awarded benefits payable from June 1, 1988 until his death in 1999. Director's Exhibits 3, 25.

<sup>3</sup> 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>4</sup> On May 25, 2001, Administrative Law Judge Ainsworth H. Brown issued a decision denying benefits. Director's Exhibit 32. Claimant appealed Judge Brown's decision to the Board, but later filed a Motion to Remand the case to the district director to submit additional evidence and request modification of the prior denial. Director's Exhibit 40. The Board dismissed claimant's appeal and remanded the case to the district director. *Cherrybon v. Kocher Coal Co.*, BRB No. 01-0748 BLA (Oct. 15, 2001) (unpublished Order). On January 28, 2002, the district director transferred the claim to the Office of Administrative Law Judges.

may not be disturbed. 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 in a survivor’s claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. Pneumoconiosis is a “substantially contributing cause” of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Employer contends that the administrative law judge erred in crediting the opinions of Drs. Kraynak and Munir, that the miner’s death was due to pneumoconiosis, over the contrary opinions of Drs. Dittman and Sherman. Employer alleges that the administrative law judge failed to discuss the contrary opinions of Drs. Dittman and Sherman, and failed to properly weigh their qualifications. We reject employer’s contentions. The administrative law judge discussed the opinions of Drs. Dittman and Sherman. The administrative law judge found that Dr. Sherman’s opinion, stating the cause of the miner’s death was “most likely related to the miner’s underlying cardiac condition, not pneumoconiosis,” was equivocal and based on “a limited review of the record.”<sup>5</sup> Decision and Order at 3. Further, the administrative law judge found Dr. Dittman’s opinion, that “simple coal workers’ pneumoconiosis is not a fatal illness” and not a disease that “will cause death,” is hostile to the Act.” The administrative law judge stated:

This view is contrary to the regulations and case law...the regulations provide for entitlement not only in cases where pneumoconiosis was the cause of the miner’s death, but also, where pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death; where the miner’s death was caused by complications of pneumoconiosis; or where pneumoconiosis hastened the miners’ death.

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<sup>5</sup> The administrative law judge found that Dr. Sherman based his opinion on the miner’s death certificate, the June 8, 1999 Discharge Summary from Good Samaritan Regional Medical Center and the September 1999 letters from Drs. Kraynak and Munir. Decision and Order at 3

Decision and Order at 3. These specific findings are not challenged on appeal and are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In addition, it is clear from the administrative law judge's Decision and Order that as a result of his consideration of these opinions, he accorded less weight to Dr. Dittman and Sherman and found the opinions of Drs. Kraynak, Sherman and Munir sufficient to satisfy claimant's burden.

The administrative law judge acknowledged Dr. Kraynak's status as treating physician and that he was only a Board-eligible family physician. Decision and Order at 3. However, contrary to employer's contention, the administrative law judge is not required to give greater weight to the opinions of Drs Dittman and Sherman based on their superior qualifications. *Scott v. Mason Co.*, 14 BLR 1-37 (1990) (*en banc recon.*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). The administrative law judge found that Dr. Kraynak explained that the miner's pneumoconiosis "lead [sic] to stress on other bodily systems, primarily his cardiovascular system, and that the miner would have been in a much better position to fight off his other disease entities had he not had coal workers' pneumoconiosis." Decision and Order at 4; Director's Exhibits 6, 29. The administrative law judge further found that Dr. Kraynak outlined the miner's respiratory complaints, noted that the miner's respiratory impairment worsened in the last year of his life and that Proventil Inhaler and Theodur were prescribed for the miner's breathing impairment. *Id.*

Moreover, the administrative law judge found that Dr. Munir, who is Board-certified in internal medicine and cardiovascular disease, and who was the miner's treating physician since 1995, corroborated Dr. Kraynak's findings. The administrative law judge found that Dr. Munir opined that, "anthracosilicosis with interstitial lung disease and chronic obstructive disease was a major contributing factor in the miner's death." Decision and Order at 4; Director's Exhibits 4, 5. The administrative law judge further found that Dr. Munir determined, *inter alia*, that during the miner's last hospitalization the blood gas results indicated hypoxemia and that Dr. Kraynak opined that the "miner's ventricular tachycardia was aggravated by the hypoxemic condition." *Id.*

The administrative law judge recognized that there is no evidence regarding the miner's last month of care. However, the administrative law judge found that Dr. Schaeffer, the treating physician during that period, certified on the death certificate that chronic obstructive pulmonary disease and coal workers' pneumoconiosis were "other significant conditions contributing to the miner's death." Decision and Order at 5; Director's Exhibit 3. The administrative law judge permissibly found that the opinions of Drs. Kraynak and Munir supported that assertion. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997). We therefore affirm the administrative law judge's finding that the opinions of Drs. Kraynak, Munir and Schaeffer are sufficient to meet

claimant's burden of proof that the miner's death was due to pneumoconiosis as it is supported by substantial evidence. 20 C.F.R. §718.205(c)(5); *Lukosevic*, 888 F.2d 1001, 13 BLR 2-100.

Accordingly, the administrative law judge's Decision and Order Awarding 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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REGINA C. McGRANERY  
Administrative Appeals Judge