

BRB No. 99-0831 BLA

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

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Daniel J. Iler (Richman & Smith), Washington, Pennsylvania, for claimant.

Rita A. Roppolo (Henry L. Solano, 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 McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-1109, 98-BLA-1110) of Administrative Law Judge Michael P. Lesniak 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).¹ Based on the date of

¹ Claimant is the surviving spouse of the miner, Henry McFarland, who died on August 20, 1997. The immediate cause of death was metastatic colon cancer, as listed on the death certificate. Director's Exhibit 5. Claimant filed her claim for survivor's benefits on September 15, 1997 Director's Exhibit 1.

filing of this claim, the administrative law judge considered the claim under the regulations set forth in 20 C.F.R. Part 718. After noting that the parties stipulated that the miner had suffered from totally disabling pneumoconiosis arising out of coal mine employment, the administrative law judge considered the medical evidence of record, and concluded that it was insufficient to establish that pneumoconiosis substantially contributed to the miner's death pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his consideration of the evidence and should have determined that Dr. Levine's opinion established that pneumoconiosis hastened the miner's death. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the decision.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantial contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *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). The United States Court of Appeals for the Third Circuit, within whose jurisdiction the present case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). See *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

The administrative law judge considered the hospital records, notes by Dr. Adler, the miner's family physician, and a July 16, 1997 report by Dr. Pfrimmer, the miner's treating physician for his cancer.² Regarding the issue of whether

² The administrative law judge found that the hospital records indicate that the miner was admitted to the hospital periodically from 1992 to 1997 and was diagnosed and treated for colon cancer beginning in 1993. At that time, the miner

pneumoconiosis contributed to the miner's death, the administrative law judge considered the February 20, 1998 opinion by Dr. Levine³ and the death certificate prepared by Dr. Pfrimmer. Dr. Pfrimmer identified metastatic colon cancer as the sole cause of death. Director's Exhibit 5. The administrative law judge found that although a death certificate is not always completely reliable evidence, in the present case, it constituted probative evidence because it was prepared by Dr. Pfrimmer, who treated the miner for approximately four years and had extensive medical knowledge of the miner from which to assess the cause of death. Decision and Order at 6. With respect to Dr. Levine's report, the administrative law judge accorded no weight to the opinion for several reasons. First, the administrative law judge found that Dr. Levine's theory on the role of pneumoconiosis in a miner's death would require that in every situation where a miner has any degree of pneumoconiosis but dies of a non-pulmonary disease, pneumoconiosis would be deemed a contributing cause of death. Second, the administrative law judge found that because Dr. Levine only examined the miner once, nine years prior to the miner's death, he was not the physician in the best position to determine the cause

was noted to suffer from other conditions such as asymptomatic chronic pneumoconiosis, hypertension, degenerative joint disease and obesity. Decision and Order at 4. The administrative law judge found that the hospital notes indicate that the miner underwent right total hip replacement in May 1996, that a June 1997 x-ray report indicated that the miner's cancer had metastasized to his liver, and that the miner underwent his last gastrointestinal endoscopy in July 1997, at which time it was also noted that the miner suffered from arthritis, hypertension, blood loss anemia, and chronic obstructive lung disease. *Id.* The administrative law judge found that Dr. Adler's notes were "extensive and often illegible," but indicate that the miner was prescribed breathing medication as early as 1983. Decision and Order at 4; Director's Exhibit 8. The administrative law judge also found that Dr. Adler's notes indicate that in January 1997 and on May 12, 1997, the date of the last chart, the miner's chest was clear. The administrative law judge next considered a July 16, 1997 report by Dr. Pfrimmer, the miner's treating physician for cancer, which noted the miner's "far advanced metastatic cancer" and recommended a hospice referral. Decision and Order at 4; Director's Exhibit 9.

³ Dr. Levine's opinion was based upon a review of the record and his previous examination of the miner in 1989. Director's Exhibit 22. Dr. Levine stated that the miner's respiratory condition was a major factor in his death in that the pneumoconiosis produced significant worsening of the miner's shortness of breath in the last months of his life. The physician concluded that the increased trouble in breathing combined with the further weakening of the miner's general health caused a hastening of death.

of death. Third, the administrative law judge found that Dr. Levine does not cite any medical literature supporting his findings nor does he possess special qualifications in pathology or pulmonary medicine. Lastly, the administrative law judge found that Dr. Levine does not refer to specific studies or suggest which medical records support his theory. The administrative law judge thus found that Dr. Levine's opinion was unreasoned and unsupported, and entitled to no weight. Weighing all of the relevant evidence, the administrative law judge found that claimant did not establish that the miner's death from colon cancer was in any way due to or hastened by pneumoconiosis.

On appeal, claimant contends that the administrative law judge erred in rejecting Dr. Levine's opinion. Claimant contends that Dr. Levine's opinion was based upon his review of the record and his own examination of the miner. Claimant further contends that Dr. Levine, as a board-certified internist, was in a better position to discuss the role of pneumoconiosis in the miner's death than Dr. Pfrimmer, an oncologist. Claimant next contends that the physician was not required to support his findings based on medical literature, and that since the miner's only pulmonary diagnosis was pneumoconiosis, and the miner was on oxygen and taking breathing medications at the end of his life, Dr. Levine had a factual basis on which to base his opinion. We disagree with claimant's contentions. In determining that Dr. Levine failed to offer a reasoned and documented opinion, the administrative law judge acted within his discretion in finding that the physician provided no basis, either by referring to the miner's specific records or medical literature in general, for his conclusion that the miner's shortness of breath was due to his pneumoconiosis, which in turn, weakened the miner, and contributed to his death. See *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Risher v. Director, OWCP*, 940 F.2d 327, 331, 15 BLR 2-186 (8th Cir. 1991); *Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259 (3d Cir. 1990). Moreover, although the administrative law judge did not acknowledge Dr. Levine's credentials as a physician who is board-certified in internal medicine, the administrative law judge permissibly found that Dr. Levine's examination of the miner was too remote in time, and therefore, he was not in a good position to determine the cause of the miner's death. See generally *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, we hold that the administrative law judge properly found that the physician's opinion was based on generalities, was unsupported and unreasoned, and we affirm his weighing of Dr. Levine's opinion.

Claimant next contends that the administrative law judge erred in according controlling weight to the death certificate.⁴ This contention is without merit. The Decision and Order indicates that the administrative law judge accorded “probative weight” to the death certificate because he found that it was completed by the physician who treated the miner for his cancer for four years prior to his death. Hence, the administrative law judge found claimant failed to sustain her burden of proof in presenting credible evidence which establishes a link between the miner’s pneumoconiosis and his death due to cancer. Decision and Order at 6-7. Inasmuch as the administrative law judge properly considered the evidence and rationally discredited Dr. Levine’s opinion, we affirm his finding pursuant to Section 718.205(c)(2). *See Lukosevicz, supra.*

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

⁴The death certificate listed metastatic colon cancer as the sole cause of the miner’s death. Decision and Order at 6; Director’s Exhibit 5.