

BRB No. 99-0833 BLA

CYPERSINA SEMENZA)		
(Widow of PHILIP SEMENZA))		
)		
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand (94-BLA-01095) of Administrative Law Judge Ralph A. Romano denying benefits on claims¹ filed by the miner and the survivor pursuant to the provisions of Title IV of

¹Claimant is Cypersina Semenza, the miner's widow. The miner, Philip Semenza, filed his most recent application for benefits on May 29, 1992. Director's Exhibit 25. The miner died on April 2, 1993 and claimant filed a survivor's claim on April 10, 1993. Director's Exhibits 1, 4.

the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the fourth time.² In the most recent prior appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge to reweigh the relevant medical evidence pursuant 20 C.F.R. §718.202(a)(4). See *Semenza v. Director, OWCP*, BRB No. 97-1743 BLA (Sep. 8, 1998)(unpub.). On remand, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order on Remand at 5-6. Accordingly, benefits were denied in both the miner's and survivor's claims. In the instant appeal, claimant contends that the administrative law judge erred in weighing the evidence of record pursuant to Section 718.202(a)(4) and asserts that the administrative law judge erred in failing to consider if a causal relationship was established pursuant to 20 C.F.R. §718.203, if total disability was established pursuant to 20 C.F.R. §718.204(c) and if the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.

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).

²The procedural history of this case has been set forth in detail in the Board's prior decisions in *Semenza v. Director, OWCP*, BRB No. 95-0952 BLA (Jul. 12, 1995)(unpub.), *Semenza v. Director, OWCP*, BRB No. 96-1544 BLA (Apr. 29, 1997)(unpub.) and *Semenza v. Director, OWCP*, BRB No. 97-1743 BLA (Sep. 8, 1998)(unpub.), which are incorporated herein by reference.

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any of these requisite elements compels a denial of benefits. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, 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 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). The United States Court of Appeals for the Third Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death.³ See *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After consideration of the administrative law judge's Decision and Order on Remand, 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 properly determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) in accordance with the holding of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), requiring that all types of evidence enumerated by the four distinct methods of Section 718.202(a) be weighed together to determine if the miner suffers from the disease. Decision and Order on Remand at 6.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence in determining that pneumoconiosis was not established.⁴ Claimant's Brief at 8-13. The administrative law judge considered the

³This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴The administrative law judge's determination that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (2) and (3) has previously been affirmed. See *Semenza, supra*.

entirety of the medical opinion evidence of record and properly noted that Drs. Aquilina, Fasciana and Peters had treated the miner and diagnosed the existence of pneumoconiosis, but concluded that the opinions of Drs. Sahillioglu, Levinson and Talati, who opined that the miner did not have pneumoconiosis and that his pulmonary problems are unrelated to coal dust exposure, were entitled to greater weight. Decision and Order on Remand at 5-6; Director' s Exhibits 8, 11, 12, 25.

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). 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 Coal Co.*, 12 BLR 1-111 (1988). In the instant case, the administrative law judge considered the relevant evidence of record and permissibly relied on the opinions of Drs. Sahillioglu, Levinson and Talati, opining that the miner did not suffer from pneumoconiosis. Decision and Order on Remand at 6; Director' s Exhibit 25. In so finding, the administrative law judge, within his discretion as fact-finder, rationally accorded significant weight to the opinions of Drs. Sahillioglu, Levinson and Talati on the basis of the documentation and reasoning contained in their reports and as supported by the objective evidence of record. See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 6. In addition, the administrative law judge also acted within his discretion in according less weight to the opinion of Dr. Aquilina, the miner' s treating physician, as the physician' s opinion is not well reasoned since Dr. Aquilina does not adequately address the miner' s significant smoking history, cardiac problems and obesity and the impact that these might have upon the miner' s pulmonary condition.⁵ See *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark, supra*;

⁵The administrative law judge also permissibly accorded less weight to the opinions of Drs. Fasciana and Peters since the credibility of these opinions was undermined as Dr. Fasciana failed to discuss the impact of the miner' s significant smoking history and relied on an inaccurate coal mine employment history and Dr. Peters mischaracterized the miner' s smoking history. See *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order on Remand at 5-6; Director' s Exhibits 12, 25.

Fields, supra; Wetzel, supra; Lucostic, supra; Hutchens v. Director, OWCP, 8 BLR 1-16 (1985); Decision and Order on Remand at 5; Director' s Exhibits 8, 11.

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 the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by the evidence and is in accordance with law.⁶ *Williams, supra*.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in both a miner's claim and a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Lukosevich, supra; Trumbo, supra; Kneel v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Trent, supra; Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

⁶On appeal, claimant contends that the administrative law judge erred in failing to make findings pursuant to 20 C.F.R. §§718.203, 718.204 and 718.205. Claimant's Brief at 13-20. As the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) is affirmed, we need not address claimant's other arguments. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge