

BRB No. 99-0858 BLA

MARY D. LANGO	)	
(Widow of ANDREW F. LANGO)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Lynne G. Bressi, (Law Offices of Charles A. Bressi, Jr.), Pottsville, 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0943) of Administrative Law Judge Ralph A. Romano 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). This case involves a request for

modification and has been before the Board previously.<sup>1</sup> In his Decision and Order, the administrative law judge denied claimant's motion for reconsideration, finding that claimant failed to establish "good cause" or "compelling circumstances" to warrant keeping the record open to submit Dr. DiNicola's deposition. The administrative law judge then considered the evidence submitted on modification,

---

<sup>1</sup>The instant claim, filed in January 1994, merged with claimant's original survivor's claim, filed in 1982, as the original claim was still viable and pending at the time that claimant filed her second claim. The Board affirmed the administrative law judge's findings regarding length of coal mine employment and that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b) as unchallenged on appeal. The Board also affirmed the administrative law judge's weighing of the medical opinions by Drs. Spagnolo and DiNicola and his determination that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Lango v. Director, OWCP*, BRB No. 95-1659 BLA (March 27, 1996) (unpub.). Claimant appealed to the United States Court of Appeals for the Third Circuit, which also affirmed the denial of benefits. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Claimant then requested modification on December 30, 1997, submitted another letter by Dr. DiNicola, dated December 24, 1997, and indicated her intention to depose Dr. DiNicola. Director's Exhibit 39. An updated report by Dr. Spagnolo, dated March 28, 1998, was also submitted to the district director. Director's Exhibit 41. The district director denied the request for modification, and claimant requested a hearing before an administrative law judge. Director's Exhibits 42, 43.

The case was transferred to the Office of Administrative Law Judges on June 5, 1998. Director's Exhibit 44. Subsequent to the transfer of the case, the administrative law judge issued an order directing the parties to show cause why a formal hearing was necessary. Claimant responded to the order on July 10, 1998, indicating that a formal hearing was not necessary, but that claimant would need to provide the deposition of Dr. DiNicola. On July 21, 1998, the administrative law judge issued an order stating that there would be no hearing and directing that all documentary evidence be submitted by August 21, 1998, and closing briefs filed thirty days later. Claimant then requested an extension of time in which to submit Dr. DiNicola's deposition because the deposition was scheduled for September 10, 1998. On July 31, 1998, the administrative law judge denied the request. Claimant filed a motion for reconsideration on August 11, 1998, explaining that due to the convenience of the Director and Dr. DiNicola, the deposition could be scheduled no earlier than September 10, 1998.

found that Dr. DiNicola's medical opinion was unreasoned, undocumented, and based upon incomplete medical records. The administrative law judge also found that Dr. Spagnolo's credentials render him more qualified to interpret the pulmonary function study obtained during the miner's July 1982 hospitalization. Thus, the administrative law judge concluded that claimant failed to establish a mistake in fact and that the miner's pneumoconiosis hastened his death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to permit the submission of Dr. DiNicola's deposition and erred in determining that Dr. DiNicola's opinion was insufficient to establish that pneumoconiosis hastened the miner's death. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, requesting the Board to vacate the administrative law judge's findings and remand the case to the administrative law judge with instructions to admit and consider Dr. DiNicola's deposition.

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 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 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 substantially 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 *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *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, under whose jurisdiction this 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 *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Lukosevicz, supra*. Furthermore, the sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made, since there cannot be a change in the deceased miner's condition. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

On appeal, claimant contends that the administrative law judge erred in refusing to admit the deposition testimony of Dr. DiNicola. We agree. Claimant was entitled to a hearing on modification, and the administrative law judge improperly issued the July 2, 1998 order to show cause why a hearing should be held. See 20 C.F.R. §§725.310(c), 725.421(a), 725.450; *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6<sup>th</sup> Cir. 1998). Moreover, we agree with the Director that to the extent that claimant waived her right to a hearing, it was premised on being able to submit Dr. DiNicola's deposition. Had claimant received the formal hearing she initially requested, she would then have been able to present Dr. DiNicola's testimony by having the physician testify in person. See *Robbins, supra*. We are persuaded by the Director's argument that the administrative law judge was either obliged to accept Dr. DiNicola's deposition or hold a hearing where the physician could testify. Accordingly, we vacate the administrative law judge's denial of benefits and remand the case to the administrative law judge to consider Dr. DiNicola's deposition. On remand, the administrative law judge must discuss the basis for his determination that the hospital records relied upon by Dr. DiNicola are incomplete. In light of this remand, we need not address claimant's contention that Dr. DiNicola's December 24, 1997 medical opinion constituted a well-reasoned and well-documented opinion which should have been accorded determinative weight.

Accordingly, the administrative law judge's Decision and Order- Denial of Benefits is vacated, and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

JAMES F. BROWN  
Administrative Appeals Judge

---

MALCOLM D. NELSON, Acting

Administrative Appeals Judge