

BRB No. 00-0717 BLA

JANET R. ELKINS	)	
(o/b/o and Widow of BOBBY L. ELKINS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order On Remand - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr., (Wolfe and Farmer), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, the miner's widow,<sup>1</sup> appeals the Decision and Order On Remand - Denying

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<sup>1</sup> Claimant, Janet R. Elkins, is the widow of Bobby L. Elkins, the miner, who died on May 28, 1996. Director's Exhibit 7 [survivor's exhibit (S)]. As we noted in our previous Decision and Order, the exhibits for both claims were apparently placed in the same file but were not consolidated into one entire evidentiary record. For purposes of this decision, therefore, the exhibits associated with the miner's claim are noted by "M" and those associated with the survivor's claim are noted by "S"). The miner filed his application for

Benefits (97-BLA-1531) of Administrative Law Judge Clement J. Kichuk on both a miner and 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).<sup>2</sup> This case is before the Board for the fourth time. In its most recent Decision and Order, *Elkins v. Clinchfield Coal Co.*, BRB No. 98-1518 BLA (Aug. 25, 1999)(unpub.) the Board explained fully the lengthy procedural history of this case, which at the point had been considered by three administrative law judges. Further, the Board vacated Administrative Law Judge Murty's determinations that claimant failed to demonstrate that the miner's total disability was due to pneumoconiosis and that his death was due to pneumoconiosis and remanded the case for the administrative law judge to reconsider and weigh all the evidence of record, and render separate, specific findings of fact on those issues. Additionally, as the miner had filed a petition for modification on his claim prior to his death, the Board directed the administrative law judge to consider whether modification had been established on the miner's claim.

On remand, after considering all the evidence of record, Administrative Law Judge Kichuk (the administrative law judge) found that claimant failed to establish that the miner was totally disabled due to pneumoconiosis or that the miner's death was due to pneumoconiosis. The administrative law judge further found that claimant had failed to establish a basis for modification on the miner's claim. Accordingly, benefits were denied on both claims.

On appeal, claimant contends that the administrative law judge erred in failing to find that total disability due to pneumoconiosis and death due to pneumoconiosis were

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benefits on May 12, 1987. M-Director's Exhibit 1. The widow filed her application for benefits on July 24, 1996. S-Director's Exhibit 1. Both claims are presently pending.

<sup>2</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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

established. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which the parties have responded, asserting that the regulations at issue will not affect the outcome of this case. Based on the responses of the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, rational and 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence, the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment and that pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

To establish entitlement to survivor's benefits, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a); 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). In a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at Section 718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Bill Branch Coal Corp.*

*v. Sparks*, 213 F.3d 186, BLR 2- (2000 4th Cir.); *Piney Mountain Coal Co., Inc. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Kirk v. Director, OWCP*, 86 F.3d 1151, 20 BLR 2-276 (4th Cir. 1996); *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

First, claimant contends that the administrative law judge failed to consider fully the autopsy findings of Dr. Abrenio in determining whether the miner's disability and death were due to pneumoconiosis. Dr. Abrenio found that the miner died from acute bronchopneumonia. He also noted the presence of simple coal workers' pneumoconiosis on the left lung,<sup>3</sup> and stated that he believed that the "presence of this mild simple coal workers' pneumoconiosis was not, in any way, responsible for the immediate cause of death of the [miner]." S-Director's Exhibit 9 at 4. Dr. Abrenio went on to state, however, that "[i]t has been reported that miners with simple coal workers' pneumoconiosis have demonstrated several abnormalities of pulmonary function, namely reduction of ventilatory capacity and small increases in residual volume which may not be associated with clinical symptoms. This becomes even more significant considering that the [miner] had only one functioning lung." S-Director's Exhibit 9 at 4.

The administrative law judge found that Dr. Abrenio's statements were "equivocal on the issue of death due to pneumoconiosis." Decision and Order on Remand at 34. The administrative law judge inferred from Dr. Abrenio's statements that he felt that although the miner's pneumoconiosis appeared mild, "it may have had a more detrimental effect on the [miner's] condition than the clinical data suggest given that he had only one remaining lung...." "[W]ithout further elaboration by Dr. Abrenio to clarify his position, it is mere speculation as to what role he actually believed CWP played in this miner's death." Decision and Order at 35. The administrative law judge, therefore, rationally accorded "diminished weight" to Dr. Abrenio's opinion on disability and death causation. Decision and Order on Remand at 34-35; *Sparks, supra*; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Mays, supra*; *Underwood v. Elkay Mining, Inc.*, 94 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Kirk, supra*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Rinkes v. Consolidation Coal Co.*, 6 BLR 1-826 (1984).

Claimant next contends that the administrative law judge erred in according little weight to the opinion of the miner's treating physician, Dr. Robinette, on disability and death causation. Specifically, claimant contends that, contrary to the administrative law judge's findings, Dr. Robinette explained fully the reasoning behind his diagnosis of

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<sup>3</sup> The miner's right lung was removed during prior lung cancer surgery. Decision and Order at 29; Director's Exhibit 9.

pneumoconiosis. Further, claimant contends that the administrative law judge should have accorded more weight to Dr. Robinette's opinion, that the miner was more susceptible to pneumonia because of his pneumoconiosis, inasmuch as Dr. Abrenio found, on autopsy, that pneumonia was one of the primary causes of death.<sup>4</sup>

The administrative law judge accorded little weight to Dr. Robinette's opinion, as his conclusion that the miner had severe coal workers' pneumoconiosis was not supported by the clinical data, was unsupported by his findings, and was substantially weakened by his failure to address the miner's significant smoking history, *i.e.*, fifty to seventy years. Further, the administrative law judge noted that Dr. Robinette's opinion was weakened by his omission of any discussion of how the miner's moderate centrilobular emphysema contributed to his worsening condition, and by his reliance on medical literature that was found to be flawed. Decision and Order at 36-37. In addition, the administrative law judge found that review of the totality of the evidence showed that both the miner's disability and death were caused by smoking. He further found persuasive the opinions of Drs. Fino, Naeye and Caffrey, that the miner's death was not "caused, contributed to, nor accelerated by his coal workers' pneumoconiosis, but was the result of diminished lung function due to loss of one lung and continued smoking damage to the remaining lung which was already compromised by emphysema." Decision and Order at 37. Thus, the administrative law judge concluded that, "[c]laimant's evidence does not establish by a preponderance that coal workers' pneumoconiosis played any role in this miner's death or disability[.]" Decision and Order at 37. This was rational. *Hicks, supra; Trumbo, supra; see also Browning v. New Elk Coal Co.*, 16 F.3d 408, 18 BLR 2-123 (4th Cir. 1994); *Beatty v. Danri Corp. & Triangle Enterprises*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'd* 16 BLR 1-11 (1991); *Hutchens, supra; Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Accordingly, we reject claimant's argument regarding Dr. Robinette's opinion as the administrative law judge gave valid reasons for his analysis of the evidence on disability and death causation. Moreover, contrary to claimant's argument, Dr. Robinette's opinion was not entitled to greater weight solely because he was the miner's treating physician. *See Hicks, supra; Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). The administrative law judge, therefore, in light of all the evidence, rationally found that Dr. Robinette's opinion was

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<sup>4</sup> Dr. Robinette diagnosed coal workers' pneumoconiosis in the miner, and stated "that [he] suffered as a result of complications from his pulmonary disease and coal workers' pneumoconiosis with associated emphysematous change contributing significantly to his demise." S-Director's Exhibit 12 at 6.

insufficient to establish that the miner's disability or death were due to pneumoconiosis.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge