

BRB No. 00-0861 BLA

ROSE PAWLOWSKI)	
(Widow of CASIMER F. PAWLOWSKI))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
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 of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Edward Waldman (Judith E. Kramer, Acting 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (1998-BLA-00944) of Administrative Law Judge Robert D. Kaplan 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

¹Claimant is Rose Pawlowski, the widow of the miner, Casimer F. Pawlowski, who died on March 17, 1997. Director's Exhibit 7. Claimant filed the instant survivor's claim on April 1, 1997. Director's Exhibit 1.

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² This claim is before the Board for the second time. In the initial Decision and Order, the administrative law judge found that the parties stipulated that the miner had eight and one-quarter years of qualifying coal mine employment and that the Director, Office of Workers' Compensation Programs (the Director), conceded that the miner had pneumoconiosis. The administrative law judge further found, however, that claimant failed to establish that the miner's pneumoconiosis arose out of his coal mine employment or that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's determination that the three medical opinions of record were insufficient to prove that the miner's pneumoconiosis arose out of coal mine employment, but remanded the case for the administrative law judge to reconsider whether the record reflects any other dust exposure that could have been the source of the miner's pneumoconiosis and to reconsider whether the opinions of Drs. Bloom and Groblewski are sufficiently reasoned regarding the issue of whether the miner's death was due to pneumoconiosis. *Pawlowski v. Director, OWCP*, BRB No. 99-0501 BLA (Feb. 28, 2000)(unpub.).

In the instant Decision and Order on Remand, the administrative law judge again determined that claimant failed to establish that the miner's pneumoconiosis was caused by his coal mine employment. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in finding that the record was insufficient to establish that the miner's pneumoconiosis was caused by his coal mine employment pursuant to 20 C.F.R. §718.203(c) and in failing to reconsider whether claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Director responds, urging affirmance of the denial of benefits.

²The 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). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

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 9, 2001, to which claimant and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by claimant and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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'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 (2000) 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 2-101 (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, within 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).³ *See Lukosevicz, supra*.

³The instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as the miner's coal mine employment occurred in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12

BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

Pursuant to Section 718.203(c), claimant contends that because the record contains no evidence of other dust exposure, the administrative law judge erred in failing to infer that a causal connection existed between the miner's pneumoconiosis and his coal mine employment. Claimant's Brief at 3-7. We disagree. In our previous Decision and Order, we affirmed the administrative law judge's determination that the medical opinions of record did not support a finding that the miner's pneumoconiosis arose out of coal mine employment. *Pawlowski v. Director, OWCP*, BRB No. 99-0501 BLA (Feb. 28, 2000)(unpub.), slip op. at 3. Moreover, the record in this case does not contain evidence of other potential dust exposure. As a consequence, we affirm the administrative law judge's finding that claimant failed to establish that the miner's pneumoconiosis arose out his coal mine employment pursuant to Section 718.203, as it is rational and supported by substantial evidence.⁴ *See Lukosevicz, supra; Trumbo, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

⁴Inasmuch as we have affirmed the administrative law judge's finding under 20 C.F.R. §718.203(c) on this ground, we need not reach the issue of the propriety of the administrative law judge's determination that the decision of the United States Court of Appeals for the Third Circuit in *Wisniewski v. Director, OWCP*, 929 F.2d 952, 15 BLR 2-57 (3d Cir. 1991) conflicts with the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

Administrative Appeals Judge