

BRB No. 07-0832 BLA

M.L.	)	
(Disabled Adult Child of G.L.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING	)	DATE ISSUED: 05/21/2008
CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2006-BLA-5616) of Administrative Law Judge Michael P. Lesniak rendered 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).<sup>1</sup> The administrative law judge credited the miner with twenty-seven years of coal mine employment, found that employer is the responsible operator, and determined that claimant established dependency and is an eligible survivor of the miner. 20 C.F.R. §§725-212 - 725.233. The administrative law judge found that the biopsy and medical report evidence, when weighed against the x-ray evidence, establishes that the miner suffered from coal workers' pneumoconiosis, 20 C.F.R. §718.202(a), that claimant did not establish that the miner suffered from complicated pneumoconiosis, 20 C.F.R. §718.304, and that the miner, by virtue of his having in excess of ten years of coal mine employment, was entitled to the presumption, which the employer in the instant case did not rebut, that his pneumoconiosis arose out of his coal mine employment.<sup>2</sup> 20 C.F.R. §718.203(b). The administrative law judge found, however, that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive response brief on the merits of this appeal.

The Board must affirm the findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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

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<sup>1</sup> The miner died on October 21, 2001. Director's Exhibits 2, 12. On April 1, 2005, claimant filed an application for benefits under the Act, contending that she was the dependent daughter of the miner. Director's Exhibit 2. On January 9, 2006, the district director issued a Proposed Decision and Order awarding benefits on this claim. Director's Exhibit 28. Employer requested a hearing before the Office of Administrative Law Judges, and a formal hearing was held on November 1, 2006.

<sup>2</sup> These findings have not been challenged on appeal and are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>3</sup> See 20 C.F.R. §§718.1, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of the miner's death, death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3<sup>d</sup> Cir. 1989).<sup>4</sup> Failure to establish any one of these elements precludes entitlement to benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant argues that the administrative law judge erred in failing to find that Dr. Begley's opinion establishes that the miner's death was due to pneumoconiosis. Dr. Begley reviewed the miner's medical records and, in a report dated April 25, 2005,

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<sup>3</sup> Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications or pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- 5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

<sup>4</sup> The record indicates that the miner's coal mine employment occurred in Pennsylvania. Director's Exhibits 3, 4, 5, 7. Accordingly, the law of the United States Court of Appeals for the Third Circuit is applicable in this case. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

opined that the miner's pneumoconiosis was a substantial contributing factor in his death, which Dr. Begley stated was due to respiratory failure.<sup>5</sup> Director's Exhibit 14. In a deposition dated December 7, 2006, Dr. Begley reiterated this opinion; specifically, Dr. Begley opined that the miner had a significant pulmonary impairment and that his chronic work-related respiratory problem significantly and substantially contributed to his death.<sup>6</sup> Claimant's Exhibit 11.

In contrast, Dr. Fino reviewed the miner's medical records and concluded in a report dated December 19, 2005, that there is no objective evidence that the miner had a respiratory impairment at the time of his demise, that no pulmonary function study of the miner established the existence of a chronic pulmonary disease, and that, because no autopsy was performed it is not known what caused the miner's death. Employer's Exhibit 1. Moreover, Dr. Fino stated that the miner's records contained no evidence to suggest that his death was due to respiratory failure, and that it was his opinion that the miner's exposure to coal mine dust did not play a contributing or hastening role in his demise.<sup>7</sup> *Id.* Dr. Fino was deposed on January 16, 2007, and he stated with a reasonable degree of medical certainty that his review of the miner's medical records revealed no evidence that coal workers' pneumoconiosis contributed to or hastened the miner's death, as the miner's pulmonary function studies and blood gas studies did not demonstrate pulmonary impairment. He stated that because no specific evidence existed to establish the cause of the miner's death there would be no reasonable certainty that pneumoconiosis did, in fact, cause, hasten or contribute to the miner's demise. Employer's Exhibit 16.

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<sup>5</sup> The death certificate, signed by the miner's treating physician Dr. Salahudeen, lists respiratory failure as the immediate cause of the miner's demise, and notes that chronic pulmonary disease and coal workers' pneumoconiosis were underlying causes of the miner's death. Director's Exhibit 12.

<sup>6</sup> While characterizing the miner's death as a cardio-respiratory failure, Dr. Begley acknowledged that, as the miner's collapse was unwitnessed, a specific determination as to whether the miner's breathing or heart stopped first could not be made. Additionally, Dr. Begley could not rule out either a heart attack or stroke as the cause of the miner's death. Claimant's Exhibit 11 at 26-27.

<sup>7</sup> Dr. Fino specifically stated that it is pure speculation whether the miner's lung disease did or did not play a role in his demise. In support of this statement, Dr. Fino noted that there was insufficient evidence in this case to determine the cause of the miner's death and that, because no autopsy had been performed, a stroke, aneurysm or heart attack could not be ruled out. Employer's Exhibit 1 at 14-15.

In a September 11, 2006, report, Dr. Tuteur, who also reviewed the miner's medical records, opined that the miner's simple coal workers' pneumoconiosis was too mild and insufficiently profuse to produce clinical symptoms, physical examination abnormalities, impairment of pulmonary function or radiographic change. Employer's Exhibit 3. Dr. Tuteur further opined that the miner's death was in no way related to, aggravated by, hastened or caused by his pneumoconiosis; rather, he stated that the miner died suddenly when his multiple non-work related conditions superimposed on his obesity, and sleep apnea overwhelmed his ability to respond to aspiration. On deposition, Dr. Tuteur explained that because an autopsy had not been performed, the cause of the miner's sudden collapse and death is unknown.<sup>8</sup> Employer's Exhibit 15. Dr. Tuteur stated, however, that he found no evidence that the miner's pneumoconiosis contributed to his death.

In determining whether the evidence of record established that the miner's death was due to pneumoconiosis, the administrative law judge considered the miner's death certificate and the three medical opinions of record which addressed the cause of the miner's death, Drs. Begley, Fino and Tuteur. Decision and Order at 22-23. The administrative law judge properly found that the miner's death certificate, in and of itself, is an unreliable report of the miner's condition since it contained no reasoned opinion in support of its conclusion as to the cause of the miner's death. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3<sup>d</sup> Cir. 1997). The administrative law judge found that each of the aforementioned three physicians agreed that an autopsy would have been helpful in determining the miner's cause of death, that the miner's death was sudden, and that there was no way to be sure what caused him to collapse.<sup>9</sup> The administrative law judge found the opinion of Dr. Fino, that it cannot be known what caused the miner's death, to be the best reasoned opinion and the one that best reflects all of the evidence of record, including the presence of pneumoconiosis and the miner's non-work related general poor health. Decision and Order at 23. The administrative law judge, therefore, concluded that the claimant did not meet her burden of establishing that the miner's death was due to pneumoconiosis. *Id.*

In his decision, the administrative law judge addressed the totality of the evidence and rationally found Dr. Fino's opinion to be entitled to the greatest weight. The administrative law judge is afforded broad discretion in determining the weight to be

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<sup>8</sup> In stating the possibilities for the miner's sudden collapse and death, Dr. Tuteur listed an acute myocardial infarction, pulmonary embolism, stroke, and asphyxia associated with obstructive sleep apnea. Employer's Exhibit 15 at 21.

<sup>9</sup> The miner collapsed at home on October 21, 2001. The ambulance attendants commenced resuscitative procedures, but the miner was pronounced deceased within two minutes of his arrival at the hospital emergency room. Employer's Exhibit 13. No autopsy was performed.

accorded to the doctors' opinions, and is not required to accept the opinion or theory of any particular expert. *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3<sup>d</sup> Cir. 2002). Thus, the administrative law judge permissibly credited Dr. Fino's opinion and discounted that of Dr. Begley, which is the only opinion of record that could support a finding that pneumoconiosis substantially contributed to or hastened the miner's death. Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 18 BLR 2A-1 (1994). As claimant failed to establish an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeal Judge

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BETTY JEAN HALL  
Administrative Appeals Judge