

BRB No. 99-0345 BLA

VIOLET F. RUDLER	)	
(Widow of MELFORD RUDLER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C & K COAL COMPANY	)	DATE ISSUED:
	)	
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 on Remand - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Phillip L. Wein, Clarion, Pennsylvania, for claimant.

Raymond F. Keisling (Keisling and Associates), Carnegie, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand (96-BLA-0842) of Administrative Law Judge Daniel L. Leland 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 is on appeal before the Board for a second time. In his initial Decision and Order issued on August 29, 1997, the administrative law judge credited the miner with twenty-eight and one-half years of qualifying coal mine employment, and adjudicated this survivor's claim, filed on March 13, 1995, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), but insufficient to establish

death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1)-(3), and thus denied benefits.

On appeal, the Board affirmed the administrative law judge's findings regarding the length of coal mine employment and his findings pursuant to Sections 718.202(a)(2), 718.203(b), and 718.205(c)(1), (3), but vacated his findings at Section 718.205(c)(2) and remanded this case for the administrative law judge to provide a sufficient analysis of the evidence in considering whether the miner's death was hastened by pneumoconiosis thereunder. The Board instructed the administrative law judge to consider claimant's hearing testimony in conjunction with the medical records and the opinions of Drs. Fee, Levine and Schaaf, and to weigh this evidence with the opinions of the pathologists, Drs. Shonnard, Oesterling and Puckett, and provide an adequate rationale for his credibility determinations. *Rudler v. C & K Coal Co.*, BRB No. 97-1841 BLA (Sept. 25, 1998)(unpub.).

In his Decision and Order on Remand issued on December 11, 1998, the administrative law judge again found the evidence insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c)(2). Accordingly, benefits were denied.

In the present appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.205(c)(2). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established. *See* 20 C.F.R. §§718.1, 718.205(c)(1)-(3); *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 the instant case arises, has held that, for purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantially contributing cause of the miner's death "where pneumoconiosis actually hastens death." *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

Claimant contends that the administrative law judge erred in finding that the weight of

the evidence was insufficient to establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2). Specifically, claimant asserts that the administrative law judge irrationally accorded greater weight to the opinions of the pathologists of record, and failed to adequately consider claimant's testimony and the opinions of Drs. Fee, Levine and Schaaf that pneumoconiosis hastened the miner's death.<sup>1</sup> Claimant's arguments are without merit. The administrative law judge considered claimant's testimony regarding the miner's respiratory symptoms, and determined that the medical evidence established that the miner's death was caused by a respiratory impairment, but properly concluded that claimant's testimony was insufficient to establish that the respiratory impairment in question was pneumoconiosis. Decision and Order on Remand at 2-3; *see generally Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). The administrative law judge accurately reviewed the medical opinions of record and the qualifications of the physicians, and reasonably determined that the opinions of the Board-certified pathologists of record, who performed the autopsy and/or examined the autopsy slides, were more probative at Section 718.205(c)(2) than the opinions of the remaining physicians because pathologists are trained to ascertain the cause of death, while non-pathologists have no such training and thus possess less expertise than pathologists in pinpointing the causes of death. Decision and Order at 4-5; Decision and Order on Remand at 2; *see generally Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). While acknowledging that Dr. Fee was the miner's treating physician, and that Drs. Levine and Schaaf reviewed the relevant medical records and were well qualified in their fields, the administrative law judge permissibly gave less weight to their opinions that pneumoconiosis hastened the miner's death because Dr. Fee only examined the miner during his lifetime; Drs. Levine and Schaaf never examined the miner; and the three physicians neither made a gross examination of the miner's lungs on autopsy, as Dr. Shonnard did, nor evaluated the autopsy slides, as was done by pathologists Drs. Oesterling and Puckett. Decision and Order on Remand at 3. The administrative law judge then acted within his discretion in according greatest weight to the opinion of the autopsy prosecutor, Dr. Shonnard, who reported the presence of anthracosilicosis but opined that death was caused by cardiorespiratory failure due to acute and chronic bronchopneumonia and acute respiratory distress syndrome, Director's Exhibits 9-11; Claimant's Exhibit 6. The administrative law judge further found that Dr. Shonnard's opinion was corroborated by the opinion of Dr. Oesterling that pneumoconiosis did not

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<sup>1</sup> Claimant additionally argues that the administrative law judge misconstrued the opinion of Dr. Shonnard and failed to consider evidence of total disability due to pneumoconiosis and evidence of cor pulmonale with right-sided congestive heart failure in determining whether the miner's death was hastened by pneumoconiosis. Claimant's Brief at 3-5. Inasmuch as the Board previously considered and rejected claimant's arguments, *see Rudler, supra*, slip op. at 4-5, and no exception to the law of the case doctrine has been demonstrated, we decline to readdress these arguments. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-148 (1990).

hasten the miner's death, Director's Exhibit 22; Employer's Exhibit 1. Decision and Order at 5; Decision and Order on Remand at 3; *see United States Steel Corp. v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982). Inasmuch as Dr. Puckett was the only pathologist who concluded that pneumoconiosis was a substantially contributing cause of death, Claimant's Exhibit 4, the administrative law judge permissibly found that the weight of the evidence did not establish death due to pneumoconiosis pursuant to *Lukosevicz, supra*. The administrative law judge's findings at Section 718.205(c)(2) are supported by substantial evidence and thus are affirmed. Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits 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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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge