

BRB No. 99-1320 BLA

| | | |
|-------------------------------|---|--------------------|
| _____ |) | |
| _____ |) | |
| ETHEL V. TENNANT |) | |
| (Widow of WILLIAM E. TENNANT) |) | |
| |) | |
| Claimant-Petitioner |) | DATE ISSUED: |
| |) | |
| v. |) | |
| |) | |
| EASTERN ASSOCIATED COAL |) | |
| CORPORATION |) | |
| |) | |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | DECISION and ORDER |
| Party-in-Interest |) | |

Appeal of the Decision and Order-Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick (Hensley, Muth, Garton & Hayes), Morgantown, West Virginia.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Fairmont, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (98-BLA-0972, 98-BLA-0973) of Administrative Law Judge Daniel L. Leland rendered on a 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). The administrative law judge accepted the parties' stipulation to thirty-eight and one-quarter years of coal mine employment and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but found that a preponderance of the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge failed to consider all of the relevant medical evidence, failed to provide valid reasons for his weighing of the evidence, and failed to resolve true doubt in claimant's favor. Employer responds, urging affirmance, and 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. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered 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)(1), (2), (4). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death in any way. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, BLR (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d

¹ Claimant is Ethel V. Tennant, who filed her claim for survivor's benefits on January 29, 1997. Director's Exhibit 1. At that time, she also filed a miner's claim for benefits. *Id.* On appeal, claimant does not challenge the administrative law judge's finding that the miner's claim could not be considered because the miner was not alive at the time the claim was filed. *See* 20 C.F.R. §725.301(d).

977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). 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).

Pursuant to Section 718.205(c), claimant challenges the administrative law judge's finding that she did not establish that the miner's death was due to or hastened by pneumoconiosis.

Review of the record indicates that in late 1995, the miner, who smoked cigarettes and a pipe, was diagnosed with squamous cell cancer of the larynx. Director's Exhibits 9-12. He underwent several courses of radiation treatment, which appeared to eliminate the tumors in his throat. However, chest x-rays taken shortly thereafter revealed new densities in the miner's lungs. A CT scan of the miner's chest taken on April 12, 1996 indicated that the throat cancer had apparently spread to his lungs. Director's Exhibit 10. The miner became weak and increasingly short of breath, and was admitted to Fairmont General Hospital on July 24, 1996 for further evaluation and treatment. Director's Exhibit 9. At Fairmont, a lung biopsy confirmed the presence of squamous cell carcinoma. *Id.* A consulting oncologist diagnosed metastatic laryngeal cancer and recommended chemotherapy. *Id.* On the tenth day of the miner's hospitalization, he suffered a stroke. *Id.* Thereafter, the miner began to have more trouble breathing and became unable to clear secretions from his lungs. *Id.* The miner's condition steadily worsened and he died on August 11, 1996. *Id.*

Dr. Richard Spencer, the miner's treating physician at Fairmont General Hospital, completed the death certificate. He indicated that the miner died from pneumonia due to a stroke and lung cancer. Director's Exhibit 5. Dr. Spencer also reported that an autopsy was performed but that its results were not available prior to his completion of the death certificate. *Id.*

In an autopsy limited to the lungs, Dr. Fulvio Franyutti described widespread tumor masses and nodules. Director's Exhibit 9. On microscopic examination, Dr. Franyutti detected extensive tumors, as well as anthracotic pigment deposits, nodular fibrosis, and inflammatory changes. *Id.* He diagnosed "mild to moderate anthracosis of the lungs," squamous cell carcinoma with widespread metastasis, and bronchopneumonia. *Id.* Dr. Franyutti did not specify the cause of death.

A claims examiner at the Department of Labor submitted the autopsy report, lung tissue slides, and the miner's medical records to Dr. Joshua Perper for review. Dr. Perper, who the record

indicates is a “Forensic Pathologist and Medicolegal Consultant” and a Clinical Professor of Pathology, diagnosed severe coal workers' pneumoconiosis, emphysema, and lung cancer due to coal dust exposure. Director's Exhibit 15. Dr. Perper cited medical literature which he stated demonstrates a causal link between exposure to silica-containing coal mine dust and the development of lung cancer and centrilobular emphysema. *Id.* Dr. Perper opined that coal workers' pneumoconiosis, lung cancer, and emphysema due to coal dust exposure hastened the miner's death by causing pulmonary hypoxia and by rendering him more susceptible to pneumonia. *Id.*

Employer had the same records, along with Dr. Perper's report, reviewed by Drs. Richard Naeye, Jerome Kleinerman, Raymond Weiss, and Gregory Fino. The record indicates that Drs. Naeye and Kleinerman are Board-certified in Anatomical and Clinical Pathology and are Professors of Pathology. Employer's Exhibits 4-7. Dr. Weiss is Board-certified in Internal Medicine and Medical Oncology and is a Clinical Professor of Medicine at the Lombardi Cancer Center of the Georgetown University School of Medicine. Employer's Exhibit 3. Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease and is an Assistant Clinical Professor of Medicine. Employer's Exhibit 1.

Based on their review, Drs. Naeye and Kleinerman diagnosed mild to moderate simple coal workers' pneumoconiosis and silicosis, which they classified as too mild to have hastened the miner's death due to metastatic cancer of the larynx and lung. Employer's Exhibits 4-9. Additionally, both physicians criticized Dr. Perper's reasoning and identified flaws in the medical studies cited by Dr. Perper. In contrast to Dr. Perper, they stated that current, acceptable medical literature does not establish a causal relationship between exposure to silica-containing coal dust and the development of lung cancer or centrilobular emphysema. Dr. Weiss, the oncologist, concluded that the miner had only one cancer, specifically, a squamous cell carcinoma arising in the larynx which quickly spread to the lungs. Employer's Exhibits 3, 10. Dr. Weiss explained that the etiology of squamous cell laryngeal cancer is almost always smoking, and stated that there is no scientific evidence that squamous cell laryngeal cancer is caused by exposure to silica or coal dust. *Id.* Because Dr. Weiss concluded that the cancer in the miner's lungs was not a primary cancer but was instead a metastatic, smoking-related cancer originating in the larynx, he found that the dispute over whether silica or coal dust causes lung cancer was irrelevant in this case. *Id.* Dr. Weiss opined that the miner died due to smoking-related metastatic squamous cell laryngeal cancer with an associated stroke and bronchopneumonia. *Id.* Dr. Fino opined that the miner's simple pneumoconiosis was too mild to have hastened his death from lung cancer and obstructive lung disease related to smoking and asthma. Employer's Exhibit 1.

After thoroughly discussing the medical reports in light of the physicians' qualifications and medical reasoning, see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998);

Sterling Smokeless Coal Co. v. Akers, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the administrative law judge found that the opinions of Drs. Kleinerman, Naeye, and Weiss were more persuasive than the opinion of Dr. Perper. Consequently, the administrative law judge found that claimant did not meet her burden to establish that the miner's death was due to or hastened by pneumoconiosis.

Claimant first contends that the administrative law judge failed to consider Dr. Perper's supplemental report dated July 28, 1999. Claimant's Brief at 4. Claimant, however, overlooks the administrative law judge's ruling that Dr. Perper's supplemental report was untimely submitted and therefore would not be admitted into the record. Decision and Order-Denying Benefits at 2. The administrative law judge has broad discretion in procedural matters, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*), and substantial evidence supports his finding that Dr. Perper's report was submitted on August 9, 1999, well after the July 26 deadline set by the administrative law judge. Therefore, the administrative law judge did not err in excluding Dr. Perper's supplemental report.

Claimant next contends that the administrative law judge did not provide a valid reason for crediting the opinions of Drs. Kleinerman and Naeye over that of Dr. Perper. Claimant's Brief at 4. Contrary to claimant's contention, the administrative law judge provided a valid reason when he found that Drs. Naeye and Kleinerman have "extensive expertise in the pathology of occupational lung diseases," whereas "Dr. Perper, although an eminent pathologist, is primarily knowledgeable in forensic pathology and lacks the relevant expertise of Drs. Kleinerman and Naeye." Decision and Order-Denying Benefits at 5; *see Hicks, supra; Akers, supra*. Substantial evidence supports the administrative law judge's finding. The *curricula vitae* of Drs. Naeye and Kleinerman indicate that they have researched and published extensively in the field of occupational lung disease. Employer's Exhibits 4, 7. By contrast, Dr. Perper's *curriculum vitae* is not in the record, and he holds himself out as a "Forensic Pathologist." Director's Exhibit 15. Under these circumstances, the administrative law judge reasonably concluded that Drs. Naeye and Kleinerman possessed more relevant expertise. *See Hicks, supra; Akers, supra*. Moreover, claimant does not challenge the administrative law judge's additional decision to defer to Dr. Weiss's expertise in oncology. Decision and Order-Denying Benefits at 5. Consequently, we reject claimant's contention that the administrative law judge erred in weighing the conflicting medical opinions.

Finally, claimant argues that the record established a "true doubt" that the administrative law judge should have resolved in claimant's favor. Claimant's Brief at 5. The Supreme Court has declared that the true doubt rule is not a valid rule of law. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 67, 114 S.Ct. 2251, 18

BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Therefore, we reject claimant's argument.

Substantial evidence supports the administrative law judge's finding pursuant to Section 718.205(c), which we therefore affirm. Because claimant has failed to establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in a survivor's claim, we affirm the denial of benefits.

² Because we affirm the administrative law judge's finding pursuant to Section 718.205(c), we need not address his analysis of the medical evidence pursuant to Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000)

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge