BRB Nos. 98-1623 BLA
and 99-1119 BLA

CATHERINE HARTZ (Widow of HARRY HARTZ)	)	
Claimant-Petitioner	)	
v.	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Decision and Order on Modification-Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Helen H. Cox (Henry L. Solano, 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:

Claimant[1] appeals the Decision and Order Denying Benefits (97-BLA-1446) and the

[1] Claimant, Catherine Hartz, is the widow of the miner, Harry Hartz, who died on January 26, 1997. The death certificate lists the immediate causes of death as acute MCI and coronary artery disease. Anthracosilicosis was listed as an "other significant condition". Director's Exhibit 2. The miner filed a claim on May 18, 1983. On September 22, 1983, the district director awarded benefits on this claim with such benefits to be paid by the Black Lung Disability Trust Fund. Claimant is not eligible for benefits on a derivative basis, based on the filing date of the miner's claim. *See Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-18-

Decision and Order on Modification-Denying Benefits (99-BLA-0585) of Administrative Law Judge Ralph A. Romano 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).[2] In his original Decision and Order the administrative law judge found that claimant

---

22 (1989); *cf. Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

[2] Claimant filed a survivor's claim on February 6, 1997, Director's Exhibit 2, which was eventually denied by the district director, Director's Exhibit 11. On July 1, 1998, the administrative law judge, issued a Decision and Order Denying Benefits as claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 27. The administrative law judge subsequently denied claimant's Motion for Reconsideration by Order dated July 30, 1998. Director's Exhibit 28. Claimant, filed an appeal with the Board, but later requested that the Board dismiss the appeal, BRB No. 98-1623 BLA, and remand claimant's case to the district director for modification proceedings. Director's Exhibit 32. This request was granted by the Board by Order dated November 27, 1998. Subsequently, the district director referred the case to the Office of Administrative Law Judges, Director's Exhibit 37, and, on July 13, 1999, the administrative law judge issued a Decision and Order on Modification Denying Benefits. Claimant appeals that Decision and Order, BRB No. 99-1119 BLA, and requests that the Board reinstate her prior appeal, BRB No. 98-1623 BLA. By order dated August 10, 1998, the Board granted claimant's request, reinstated her original appeal, BRB No. 98-1623 BLA, and consolidated it with the present appeal, BRB No. 99-1119 BLA.

failed to establish death due to pneumoconiosis and denied benefits. On modification, the administrative law judge found that inasmuch as the instant case is a survivor's claim, the only basis for granting modification of the prior denial of benefits is a finding of a mistake in a determination of fact. Decision and Order on Modification at 2-3. On reviewing all of the evidence of record, including the newly submitted evidence, the administrative law judge concluded that such evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 3-4. The administrative law judge therefore found that claimant failed to establish a basis for modification, and, accordingly, denied benefits, again.

On appeal, claimant contends that the administrative law judge impermissibly admitted Dr. Spagnolo's medical opinion into the record without determining if good cause existed for the Director, Office of Workers' Compensation Programs (the Director), to proffer such evidence in violation of the "twenty-day rule." *See* 20 C.F.R. §725.456(b)(1).[3]

[3]Section 725.456(b) provides in pertinent part:

> (b)(1)Any...documentary material...which was not submitted to the [district director], may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim.
>
> (b)(2)Documentary evidence which is not exchanged in accordance with [the 20-day rule], may be admitted at the hearing with the written consent of the parties or upon a showing of good cause....If documentary evidence is not exchanged in accordance with [the 20-day rule] and the parties do not waive the 20-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the [district director] for consideration of such evidence.
>
> (b)(3)A medical report which is not made available to the parties in accordance with [the 20-day rule] shall not be admitted into evidence in any case unless the hearing record is kept open for at least 30 days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence. If, in the opinion of the administrative law judge, evidence is withheld from the parties for the purpose of

Claimant further contends that the administrative law judge impermissibly relied on the opinion of Dr. Spagnolo inasmuch as the physician only reviewed limited records and thus failed to provide a well-reasoned and well-documented opinion. Claimant further contends that the administrative law judge failed to address a medical opinion of Dr. Kraynak, dated July 14, 1998, which "cured the prior deficiencies in his [Dr. Kraynak's] prior reports." Claimant's Brief at 2. Finally, claimant contends that the administrative law judge erred in rejecting Dr. Weber's well-reasoned and well-documented opinion that the miner's death was due to pneumoconiosis, Claimant's Exhibit 1, and further erred in his finding regarding the length of the time Dr. Weber had treated the miner. The Director, in response, urges affirmance of the denial of benefits, arguing that by admitting Dr. Spagnolo's opinion into the record, the administrative law judge made an "implicit" finding of good cause pursuant to Section 725.456(b)(2), and that error, if any, was harmless since claimant was allowed to rebut Dr. Spagnolo's opinion. The Director further contends that any issue regarding the timely submission of Dr. Spagnolo's opinion is moot in light of claimant's request for modification.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, claimant contends that the administrative law judge erred in admitting into the record the medical opinion of Dr. Spagnolo, who concluded that pneumoconiosis played no role in the miner's death, Director's Exhibit 20, as it was submitted by the Director for the first time at the hearing on April 7, 1998. Claimant asserts that the instant case was forward for a hearing on June 17, 1997, and that the Director had "ample opportunity to develop any evidence," in this claim, but instead waited "until the hearing to present a report from a reviewing consultant, Dr. Spagnolo." Claimant's Brief at 5. Claimant contends that the administrative law judge erred in failing to determine specifically whether "good cause" existed to allow the report into the record and that the administrative law judge erred in "summarily" admitting the report into evidence and merely granting claimant an opportunity to respond to such evidence. In response to claimant's objection at the hearing, the Director informed the administrative law judge that based on Dr. Spagnolo's "backlog," he was

---

> delaying the adjudication of the claim, the administrative law judge may exclude such evidence from the hearing record and close the record at the conclusion of the hearing.

20 C.F.R. §725.456(b)(1)-(3).

unable to procure the physician's opinion until after the 20-day deadline passed. Hearing Transcript at 8-11.

This case was originally scheduled for hearing January 14, 1998, but was rescheduled to April 7, 1998 pursuant to claimant's request for a continuance. Claimant submitted an opinion from Dr. Kraynak on February 23, 1998, within the twenty-day rule. *See* 20 C.F.R. §725.456(b)(1). Employer sent claimant's file to Dr. Spagnolo for review March 6, 1998, and requested an enlargement of time to submit Dr. Spagnolo's opinion. At the hearing, employer stated that he was seeking to admit Dr. Spagnolo's opinion into the record at that time because he had not received Dr. Spagnolo's report until March 24, outside the twenty-day deadline. Hearing Transcript at 7-8. Claimant objected to the admission of Dr. Spagnolo's opinion. The administrative law judge, however, admitted Dr. Spagnolo's opinion, over claimant's objection, stating "I'm inclined to admit this document for the reason that because of the continuance in addition to the fact that it was mailed evidently March 6 with some hope it would be returned on time," Hearing Transcript at 11, and gave claimant forty-five days to submit rebuttal evidence. Hearing Transcript at 12.

Any evidence not submitted to the district director may be received in evidence subject to the objection of any party, if it is sent to all other parties at least twenty days before the hearing, *see* 20 C.F.R. §725.456(b)(1); *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). Pursuant to 20 C.F.R. §725.456(b)(2), the administrative law judge may admit, at his discretion, documentary evidence not submitted to the district director and not exchanged by the parties within twenty days before a hearing, if the parties waive the requirement or if a showing of good cause is made as to why such evidence was not exchanged, *see* 20 C.F.R. §725.456(b)(2); *Miller*, *supra*; *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). If the administrative law judge admits "late" evidence into the record, 20 C.F.R. §725.456(b)(3) requires that the record be left open for at least thirty days after the hearing to permit the parties the opportunity to respond to such evidence, *see* 20 C.F.R. §725.456(b)(3); *Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984); *but see Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991). In addition, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that, inasmuch as due process and the Administrative Procedure Act (APA), *see* 5 U.S.C. §556(d), as implemented by 20 C.F.R. §725.455(c), require an opportunity for rebuttal where it is necessary to the full presentation of a case, an opportunity to cross-examine or for rebuttal through other means must be provided when the administrative law judge relies heavily upon a medical report submitted with no opportunity for cross-examination when such cross-examination is necessary to the full presentation of the case, *see Miller*, *supra*; *see also* 20 C.F.R. §725.456(b)(3).

At the hearing of April 7, 1998, the administrative law judge admitted the "late" report

of Dr. Spagnolo into the record as the administrative law judge noted an earlier continuance in this case as well as finding that the report was "mailed evidently March 6 with some hope that it would be returned on time." Hearing Transcript at 11. We, thus, conclude that the administrative law judge has satisfied his obligation to make a good cause determination, *see Miller*, *supra*; *Newland*, *supra*; *cf. Buttermore v. Duquesene Light Co.*, 8 BLR 1-36 (1985)(Smith, J., dissenting), *modif'g* 7 BLR 1-604 (1984)(Ramsey, J., concurring and dissenting) and we further hold that the administrative law judge properly allowed claimant forty-five days to respond to the late submission of Dr. Spagnolo's medical opinion. *See* 20 C.F.R. §725.456(b)(3); *Baggett*, *supra*; *see also Miller*, *supra*. We recognize the broad discretion afforded an administrative law judge in dealing with procedural matters, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), and are unable to conclude that such discretion was abused in the instant case. Accordingly, we reject claimant's assertion that the administrative law judge failed to make a good cause determination, and we further conclude that the administrative law judge properly admitted Dr. Spagnolo's opinion into the record.

In order to establish entitlement to benefits on a survivor's claim pursuant to Section 718.205, a claimant must establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2). *See Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this claim arises, has held that a substantially contributing factor is any condition which hastens the miner's death. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *see also Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Claimant asserts that the administrative law judge erred in relying upon Dr. Spagnolo's opinion that pneumoconiosis played no role in the death of the miner. Director's Exhibit 20. Claimant asserts that Dr. Spagnolo, a non-examining physician, only reviewed limited records in this matter and had no chance to discuss the matter with the miner's widow. Claimant thus contends Dr. Spagnolo failed to provide a well-reasoned, well-documented medical opinion and that the administrative law judge thus erred in crediting the physician merely because of his superior credentials. Claimant further contends that the administrative law judge has erred in failing to address Dr. Kraynak's opinion dated July 14, 1998, concluding that pneumoconiosis hastened the miner's death. Claimant asserts that this most recent opinion of Dr. Kraynak "cured the prior deficiencies" in Dr. Kraynak's earlier reports, *see* Director's Exhibits 14, 24, as Dr. Kraynak this time addressed the miner's cardiac difficulties. Finally, claimant contends that the administrative law judge erred in rejecting the well-reasoned and detailed opinion of Dr. Weber, the miner's treating physician,

who concluded that the miner's anthracosilicosis was a significant contributing factor to the miner's death. Claimant's Exhibit 1. Claimant further contends that the administrative law judge erred in his determination as to the length of time the miner was treated by Dr. Weber.

In concluding that claimant failed to demonstrate that the miner's death was due to pneumoconiosis, the administrative law judge accorded greatest weight to the opinion of Dr. Spagnolo as it is the best reasoned and best supported of record. Decision and Order at 3. The administrative law judge further found that Dr. Spagnolo's opinion was entitled to greater weight based on the physician's superior qualifications. The administrative law judge found that Dr. Spagnolo fully addressed the miner's coronary history and reviewed the evidence of record. The admininstrative law judge also found that Dr. Kraynak's opinions of record contained unsupported conclusory statements and failed to address the miner's coronary difficulties. Finally, the administrative law judge found that Dr. Weber's medical opinion was similarly conclusory and the physician failed to refer to specific examinations upon which his conclusions were based.

Contrary to claimant's assertion, the administrative law judge, in a permissible exercise of his discretion, accorded greatest weight to the opinion of Dr. Spagnolo as he reviewed the miner's medical file and provided support for his conclusions. *See Clark*, *supra*; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Likewise, contrary to claimant's assertion, the administrative law judge properly accorded greatest weight to the opinion of Dr. Spagnolo based on his superior qualifications as the physician was board-certified in both internal medicine and pulmonary diseases. *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, an administrative law judge may accord less weight to the opinions which are not fully explained, *i.e.*, Dr. Kraynak's opinion. *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983).

Finally, contrary to claimant's assertion, the opinion of Dr. Kraynak, dated July 14, 1998, has not been made a part of the record. This opinion was submitted by claimant's counsel to the administrative law judge in conjunction with a Motion for Reconsideration, dated July 30, 1998. Accordingly, as the opinion was never admitted into the record it cannot be addressed by the administrative law judge on reconsideration, *see* 29 C.F.R. §18.54(c), or by the Board. The Board's review authority does not permit consideration of evidence not properly submitted into the record before the administrative law judge. *See Burks v. Hawley Coal Mining Corp.*, 2 BLR 1-323 (1979); *see also Sparkman v. Director, OWCP*, 2 BLR 1-488 (1979); *Ellison v. Director, OWCP*, 2 BLR 2-317 (1979). We, therefore, conclude that the administrative law judge properly found that claimant failed to establish that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.205(c)(1), (2); *Neeley*, *supra*;

Foreman, *supra*, and we affirm the administrative law judge's denial of modification and benefits. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge