

BRB No. 02-0190 BLA

ROSEMARY SAMULEVICH)
(Widow of FRANK J. SAMULEVICH))

Claimant-Petitioner)

v.)

SILVERBROOK ANTHRACITE, INC.)

and)

CONSTITUTION STATE SERVICES)
COMPANY)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Ralph P. Carey, Scranton, Pennsylvania, for claimant.

Maureen Herron and A. Judd Woytek (Marshall, Dennehey, Warner, Coleman
& Goggin), Bethlehem, Pennsylvania, for employer.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals
Judges.

PER CURIAM:

Claimant,¹ the miner's widow, appeals the Decision and Order (2001-BLA-00397) 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 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge accepted employer's stipulation that the miner had eighteen and one-half years of coal mine employment and suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(c). The administrative law judge found, however, that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find that the evidence establishes death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated 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 the 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).

¹ Claimant is Rosemary Samulevich, the surviving spouse of the miner, Frank J. Samulevich, who died on March 8, 2000. Decision and Order at 3; Director's Exhibit 4. Claimant filed the instant survivor's claim on July 10, 2000. Decision and Order at 3; Director's Exhibit 1.

² The 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 codified at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

To establish entitlement to survivor's benefits, 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(a); *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). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). In the instant case, as it is undisputed that the miner had pneumoconiosis which arose out of his coal mine employment, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge weighed all of the relevant evidence of record and found that claimant had not sustained her burden of proving, by a preponderance of the evidence, that pneumoconiosis hastened, contributed to, or caused the miner's death. Claimant contends that the administrative law judge should have rejected the medical opinion of Dr. Hertz and credited the medical report authored by Dr. Katlic, as well as the death certificate signed by Dr. Wolanin. We disagree. Although the death certificate listed anthracosilicosis, lung carcinoma and right pleural effusion as the immediate causes of death, the administrative law judge permissibly accorded diminished weight to the miner's death certificate because it lacked any reasoning for the conclusion. *See Smith v. Camco Inc.*, 13 BLR 1-17 (1989); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 5; Director's Exhibit 4. Furthermore, Dr. Katlic, who performed an operation on claimant's lungs, never expressed an opinion regarding the cause of the miner's death. Decision and Order at 5, 7; Director's Exhibit 7.

In addition, the administrative law judge correctly found that as none of the other physicians attributed the miner's death to pneumoconiosis, claimant failed to establish entitlement to survivor's benefits.³ We, therefore, affirm the administrative law judge's

³ Dr. Sherman, Director's Exhibit 15, and Dr. Hertz, Director's Exhibit 24; Employer's Exhibit 1, concluded that the miner died of lung cancer and that pneumoconiosis played no role in his death.

finding that the medical evidence failed to establish that pneumoconiosis caused, contributed to, or hastened the miner's death. 20 C.F.R. §718.205(c); *see Lukosevicz, supra*.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Trent, supra; Perry, supra; Oggero, supra; White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge correctly concluded that the evidence does not establish that the miner's death was due to pneumoconiosis and because claimant has not met her burden of proof on one of the essential elements of entitlement in a survivor's claim, we must affirm the denial of benefits. *Lukosevicz, supra; Clark, supra; Trent, supra; Perry, supra; Trumbo, supra; Neeley, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge