

BRB No. 02-0369 BLA

BETTY WENTZ)	
(Widow of JOSEPH WENTZ))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WEST PAVING 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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant

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

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (01-BLA-0798) of Administrative Law Judge Paul H. Teitler 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 instant case involves a survivor's claim³ filed on July 26, 2000.

¹Claimant is the surviving spouse of the deceased miner who died on September 26, 1998. Director's Exhibit 8.

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

⁴ After accepting the parties' stipulation that the miner worked for eighteen and one-half years in coal mine employment, the administrative law judge found that the evidence was sufficient to establish that the miner suffered from pneumoconiosis at the time of his death. The administrative law judge, however, found that the evidence was insufficient to 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 administrative law judge erred in finding the evidence insufficient to establish that the miner's death was 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 filed a response brief.

The Board must affirm the findings 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The miner filed a claim on February 9, 1977. Director's Exhibit 26. The district director denied the claim on April 17, 1981. *Id.* There is no indication that the miner took any further action in regard to his 1977 claim.

⁴The administrative law judge found that claimant's survivor's claim was filed on August 2, 2000. Decision and Order at 2. Although claimant's application for survivor's benefits is stamped as having been received on August 2, 2000, an earlier stamp on the application indicates that the claim was filed on July 26, 2000. *See* Director's Exhibit 1.

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁵ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A

⁵Section 718.205(c) provides that:

- (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 of 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).

miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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)(5); see *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant contends that in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge erred in crediting the opinions of Drs. Hertz, Sherman and Dittman that the miner's death was not due to pneumoconiosis,⁶ Director's Exhibits 15, 27; Employer's Exhibits 1, 2, over Dr. Tavarria's contrary opinion. Director's Exhibit 8; Claimant's Exhibit 5.

⁶In a report dated July 11, 1999, Dr. Hertz opined that "metastatic lung carcinoma was the most significant cause of [the miner's] deterioration and eventual death." Director's Exhibit 27. Dr. Hertz opined that the miner's coal workers' pneumoconiosis was not a significant factor in contributing to, or hastening, his death. *Id.* During a September 9, 1999 deposition, Dr. Hertz reiterated that the miner's coal workers' pneumoconiosis was not a significant contributing factor to his death. Director's Exhibit 27 at 12. Dr. Hertz explained that:

[The miner] presented in September 1998 with a terminal, widespread, end-stage, metastatic cancer. He would have died quickly from widespread, terminal cancer regardless of his other medical conditions. Survival would have been extremely limited with or without these other medical conditions including the coal workers pneumoconiosis, and he would have died regardless of those other disease processes quickly.

Director's Exhibit 27 at 18-19.

In a report dated December 23, 2000, Dr. Sherman opined that because the miner's lung cancer was not detected earlier, "it does not appear that the presence of pneumoconiosis could have hastened [the miner's] death." Director's Exhibit 15.

In a report dated August 3, 2001, Dr. Dittman opined that the miner's coal workers' pneumoconiosis did not cause, contribute, or hasten his death. Employer's Exhibit 1. During an October 5, 2001 deposition, Dr. Dittman opined that the miner's death was due to widespread and extensive cancer of the lung. Employer's Exhibit 2 at 19. Dr. Dittman further opined that the miner's coal workers' pneumoconiosis did not cause, contribute to, or hasten, even briefly, the miner's death. *Id.*

Claimant contends that the administrative law judge erred in not according greater weight to Dr. Tavaría's opinion based upon his status as the miner's treating physician. While an administrative law judge may accord more weight to the opinion of a treating physician, he is not required to do so. See *Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). An administrative law judge may permissibly require a treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to a miner's death. See *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Dr. Tavaría completed the miner's death certificate. Dr. Tavaría listed the miner's immediate cause of death as respiratory failure. Director's Exhibit 8. Dr. Tavaría listed "cancer of the lung" and coal workers' pneumoconiosis as underlying causes of the miner's death. *Id.* The administrative law judge found "no support in the record for Dr. Tavaría's inclusion of pneumoconiosis on the death certificate as a cause of the [miner's] fatal lung cancer." Decision and Order at 10. The mere fact that a death certificate refers to pneumoconiosis cannot be viewed as a reasoned medical finding, particularly if no autopsy has been performed. See *Lango, supra*. Inasmuch as claimant does not challenge the administrative law judge's basis for discrediting the miner's death certificate, we affirm the administrative law judge's finding that the miner's death certificate is insufficient to support a finding that the miner's death was due to pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983)

Claimant also contends that Dr. Tavaría's deposition testimony supports a finding of death due to pneumoconiosis because Dr. Tavaría opined that the "miner was not able to be treated for his diagnosed lung cancer due to the fact that he suffered from advanced lung disease caused by coal workers' pneumoconiosis." Claimant's Brief at 3. There is no evidence in the record to support Dr. Tavaría's assertion that the miner's pneumoconiosis prevented the miner from receiving effective treatment for his lung cancer. Therefore, this aspect of Dr. Tavaría's opinion is insufficient to support a finding of death due to pneumoconiosis.

Claimant also contends that the administrative law judge erred in not according less weight to the opinions of Drs. Hertz, Sherman and Dittman because they did not examine the miner. The Board has held that an administrative law judge cannot reject the report of a physician solely because the physician did not examine the miner. See *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). In determining the weight to be accorded a physician's opinion, an administrative law judge may properly take into consideration the fact that the physician had not personally examined the miner. See *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*); *Wilson v. United States Steel Corp.*, 6

BLR 1-1055 (1984). In the instant case, the administrative law judge acted within his discretion in relying upon the opinions of the non-examining physicians of record. The administrative law judge specifically noted that Drs. Hertz, Sherman and Dittman based their opinions upon a review of the medical evidence of record. Decision and Order at 5-6.

Claimant's remaining statements regarding the opinions of Drs. Hertz, Sherman and Dittman amount to no more than a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁷

⁷Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that claimant is precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3); Decision and Order at 10.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge