

BRB No. 03-0273 BLA

CATHERINE HARTZ	)	
(Widow of HARRY J. HARTZ)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
09/09/2004	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

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

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Request for Modification (02-BLA-0179) of Administrative Law Judge Robert D. Kaplan

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<sup>1</sup>Claimant is the surviving spouse of the miner, who died on January 26, 1997. The miner's death certificate lists the causes of death as an acute

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).<sup>2</sup> Claimant filed a survivor's claim on February 6, 1997. In a Decision and Order dated July 1, 1998, Administrative Law Judge Ralph A. Romano found that the parties stipulated that the miner worked for ten years in coal mine employment, and that he suffered from pneumoconiosis arising out of coal mine employment. Judge Romano further found, however, that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Consequently, he denied benefits. Judge Romano subsequently denied claimant's request for reconsideration by Order dated July 30, 1998. Director's Exhibit 28. Claimant filed an appeal with the Board, but in a motion dated November 5, 1998, counsel for claimant requested that the Board dismiss the appeal and remand the case to the district director for modification proceedings. The Board granted claimant's motion in an Order dated November 27, 1998, remanding the case to the district director for modification proceedings pursuant to 20 C.F.R. §725.310 (2000). *Hartz v. Director, OWCP*, BRB No. 98-1623 BLA (Nov. 27, 1998)(unpublished Order).

The district director informed claimant that because no new evidence was submitted, the claim was being referred to the Office of Administrative Law Judges. While the claim was before Judge Romano, claimant submitted a medical report from Dr. Weber. In a Decision and Order dated July 13, 1999, Judge Romano considered this newly submitted evidence, and found it insufficient to establish death due to pneumoconiosis under Section 718.205(c)(1)-(3) (2000). Judge Romano further found all of the evidence of record insufficient to establish death due to pneumoconiosis under Section 718.205(c)(1)-(3) (2000). Judge Romano thus found that claimant failed to establish a mistake in a determination

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myocardial infarction and coronary artery disease, with anthracosilicosis listed as an "other significant condition." Director's Exhibit 2. The miner had filed a miner's claim on May 18, 1983. Director's Exhibit 14. On September 22, 1983, the district director awarded benefits on this claim. Claimant is not eligible for derivative survivor's benefits based on the filing date of the miner's claim. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf.*, *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86-87 (1988).

<sup>2</sup>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 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.

of fact under Section 725.310 (2000). Accordingly, Judge Romano denied benefits. Claimant appealed.<sup>3</sup> The Board rejected claimant's contention that Judge Romano erred in admitting into the record a medical opinion from Dr. Spagnolo, dated March 19, 1998, 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). *Hartz v. Director, OWCP*, BRB Nos. 98-1623 BLA and 99-1119 BLA (Sept. 21, 2001)(unpublished). The Board affirmed Judge Romano's reliance upon Dr. Spagnolo's opinion, that pneumoconiosis played no role in the miner's death, and thus affirmed Judge Romano's finding that the evidence was insufficient to establish death due to pneumoconiosis under Section 718.205(c)(1)-(3) (2000). *Id.* The Board affirmed Judge Romano's finding that claimant failed to establish modification under Section 725.310 (2000). *Id.*

Claimant filed another request for modification. The case was referred to Administrative Law Judge Robert D. Kaplan (the administrative law judge), who held a hearing on June 26, 2002. At the hearing, the administrative law judge admitted the deposition testimony of Dr. Kraynak, submitted by claimant, Claimant's Exhibit 1, and allowed the Director thirty days to submit a rebuttal report from Dr. Spagnolo. 2002 Hearing Tr. at 7-8. The Director timely submitted the report from Dr. Spagnolo, dated July 14, 2002. Director's Exhibit 61. Claimant filed a motion to strike the rebuttal report. In an Order Denying Motion to Strike Rebuttal, dated August 20, 2002, the administrative law judge rejected claimant's contention that Dr. Spagnolo's report exceeded the scope of rebuttal, and denied claimant's request to file surrebuttal evidence. In a Decision and Order dated December 5, 2002, the administrative law judge found the evidence of record insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(1)-(5). Accordingly, the administrative law judge denied modification. On appeal, claimant contends that the administrative law judge erred in admitting into the record Dr. Spagnolo's supplemental medical opinion, dated July 14, 2002. Claimant further challenges the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c)(2), (c)(5). The Director responds, urging affirmance of the administrative law judge's decision denying benefits.<sup>4</sup>

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<sup>3</sup>Claimant also requested that the Board reinstate her appeal in *Hartz v. Director, OWCP*, BRB No. 98-1623 BLA. By Order dated August 10, 1999, the Board granted claimant's motion, consolidating claimant's prior appeal with her appeal in *Hartz v. Director, OWCP*, BRB No. 99-1119 BLA.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

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. *See* 20 C.F.R. §§718.1, 718.205(c); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (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.
- ...
- (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).

On appeal, claimant first argues that the administrative law judge erred by considering Dr. Spagnolo's supplemental, July 14, 2002, report because he did not determine, pursuant to 20 C.F.R. §725.456(b)(1), whether good cause existed for the Director's post-hearing submission of the report. This contention lacks merit. We agree with the Director that the administrative law judge implicitly determined that there was good cause for allowing the Director's submission of rebuttal

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<sup>4</sup>We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence of record is insufficient to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c)(1), (c)(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4-5.

evidence in response to Dr. Kraynak's deposition testimony. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); 2002 Hearing Tr. at 7-8; August 20, 2002 Order Denying Motion to Strike Rebuttal at 1. Claimant submitted Dr. Kraynak's May 24, 2002 deposition by letter dated May 29, 2002, approximately one week prior to the expiration of the twenty day period prior to the June 26, 2002, hearing. See 2002 Hearing Tr. at 6. At the hearing, the administrative law judge properly found that, under these circumstances, the Director was entitled to submit Dr. Spagnolo's report to rebut this evidence.<sup>5</sup> *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd en banc*, 9 BLR 1-236 (1987). The administrative law judge is afforded broad discretion in dealing with procedural matters. *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Because the administrative law judge restricted Dr. Spagnolo's report to responding to Dr. Kraynak's deposition testimony, and correctly found that Dr. Spagnolo's report complied with the restriction,<sup>6</sup> the administrative law judge properly denied claimant's post-hearing motion to strike Dr. Spagnolo's report or, in the alternative, to submit surrebuttal evidence. *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Laughlin v. Director, OWCP*, 1 BLR 1-488 (1978); Order Denying Motion to Strike Rebuttal at 1. We hold that claimant has failed to show any abuse of discretion. *Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568 (1984). Accordingly, we reject claimant's contention that

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<sup>5</sup>In *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd en banc*, 9 BLR 1-236 (1987), the Board held that an employer was not afforded due process at the hearing where the administrative law judge refused to allow employer an opportunity to respond to a medical report which claimant submitted just prior to the deadline imposed by the twenty day rule for submitting documentary evidence.

<sup>6</sup>Claimant specifically contends that Dr. Spagnolo's report exceeded the scope of rebuttal because Dr. Spagnolo reviewed Dr. Weber's opinion rather than confining his report to a review of Dr. Kraynak's deposition. This contention lacks merit. In his Order Denying Motion to Strike Rebuttal, dated August 20, 2002, the administrative law judge found that Dr. Spagnolo's report did not exceed the scope of rebuttal permitted at the hearing because Dr. Spagnolo specifically addressed Dr. Kraynak's deposition testimony, and provided reasoning and grounds for disagreeing with that testimony. The administrative law judge's finding is rational and supported by substantial evidence. Dr. Kraynak testified in his deposition that he based his opinion, in part, on Dr. Weber's diagnosis of cor pulmonale. Claimant's Exhibit 1 at 7-8. Thus Dr. Spagnolo's reference to, and disagreement with, Dr. Weber's diagnosis of cor pulmonale was directly relevant to rebutting Dr. Kraynak's opinion. Director's Exhibit 61.

the administrative law judge improperly admitted Dr. Spagnolo's July 14, 2002 report into the record.

Claimant next contends that the administrative law judge improperly credited Dr. Spagnolo's opinion, that pneumoconiosis played no role in the miner's death, over the contrary opinions of Drs. Kraynak and Weber, who found that the miner's death was hastened by pneumoconiosis. Specifically, claimant first contends that the administrative law judge mischaracterized the opinions of Drs. Spagnolo and Kraynak by stating that both physicians acknowledged that an acute myocardial infarction was the immediate cause of the miner's death. Claimant's contention is misplaced. The administrative law judge did not make the statement claimant contends he made. Rather, the administrative law judge correctly noted that *Dr. Spagnolo* stated, in his July 14, 2002 report, that the records he and Dr. Kraynak reviewed indicated that "an acute myocardial infarction was the immediate cause of [the miner's] death." Decision and Order at 6; Director's Exhibit 61 at 1.

Claimant next contends that the administrative law judge improperly credited Dr. Spagnolo's reasons for disagreeing with the opinions of Drs. Kraynak and Weber, mischaracterizing the opinions of Drs. Kraynak and Weber in the process. This contention lacks merit. The administrative law judge properly credited Dr. Spagnolo's opinion as well-reasoned because:

Dr. Spagnolo explained that, contrary to Dr. Kraynak, he did not 'believe that the medical records..., show any objective evidence of right heart failure, [i.e.,] cor pulmonale, from a chronic lung condition.'

Decision and Order at 6; Director's Exhibit 61. Claimant argues that Dr. Kraynak did not base his opinion on a rationale that the miner suffered from cor pulmonale or right heart failure. Contrary to claimant's contention, however, Dr. Kraynak testified that he relied upon Dr. Weber's opinion that the medical records revealed evidence of right heart failure. Claimant's Exhibit 1 at 7-8.

The administrative law judge further properly credited Dr. Spagnolo's opinion that Dr. Weber contradicted himself in his May 18, 1999 report. Decision and Order at 6-7; Director's Exhibits 46, 61. Contrary to claimant's contention that Dr. Spagnolo mischaracterized Dr. Weber's report, Dr. Spagnolo correctly indicated that Dr. Weber stated that the miner "had no cardiac complaints prior to his death." Director's Exhibit 46. Dr. Spagnolo explained that this statement was inconsistent with Dr. Weber's opinion that the miner had cor pulmonale because, in a patient with no cardiac complaints, a diagnosis of cor pulmonale cannot be made. Director's Exhibit 61.

Claimant next argues that Dr. Spagnolo “essentially spent his time trying to challenge the validity of the reports of Drs. Kraynak and Weber, which is violative of the Third Circuit’s holding in [*Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997)].” Claimant’s Brief at 13. As the Director contends, the holding of the court in *Mancia* does not preclude an administrative law judge from relying upon a consulting physician’s critique of an examining physician’s opinion. Director’s Brief at 12. The court, in fact, mandates that an administrative law judge should reject, as insufficiently reasoned, any medical opinion that reaches a conclusion contrary to objective evidence without explanation. *Mancia*, 130 F.3d 579, 588, 21 BLR 2-217. In this case, the administrative law judge properly discounted, as unexplained, the conclusory statements of Drs. Kraynak and Weber, indicating that pneumoconiosis was a significant contributing factor in the miner’s death. The administrative law judge thus properly discounted Dr. Weber’s opinion, notwithstanding that Dr. Weber was a treating physician. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Contrary to claimant’s contentions, the administrative law judge properly credited Dr. Spagnolo’s opinion as well-reasoned and supported by objective evidence indicating that the miner’s blood oxygenation was entirely normal. Decision and Order at 6-7; Director’s Exhibit 61; *Clark*, 12 BLR at 1-155; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*).

In addition, the administrative law judge properly accorded greater weight to Dr. Spagnolo’s opinion, based upon the relative qualifications of the physicians. Specifically, the administrative law judge properly found that Dr. Spagnolo, as a physician who is Board-certified in internal medicine and pulmonary diseases, possesses qualifications superior to those of Dr. Kraynak, who is Board-eligible in family medicine, Claimant’s Exhibit 1, and Dr. Weber, who is Board-eligible in internal medicine, Director’s Exhibit 46. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 7. We affirm, therefore, the administrative law judge’s finding that the evidence of record is insufficient to establish death due to pneumoconiosis under Section 718.205(c)(2), (c)(5). Consequently, we affirm the administrative law judge’s finding that claimant failed to establish death due to pneumoconiosis under Section 718.205(c) and, thus, modification pursuant to Section 725.310 (2000).

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge