

BRB No. 05-0101 BLA

CAROL A. CONTI )  
(Widow of LOUIS M. CONTI) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 READING ANTHRACITE COMPANY, )  
 INCORPORATED )  
 )  
 and )  
 )  
 LACKAWANNA CASUALTY COMPANY )  
 ) DATE ISSUED: 09/29/2005  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

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

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

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-5514) of  
Administrative Law Judge Robert D. Kaplan rendered on a survivor's claim<sup>1</sup> filed

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<sup>1</sup>By Decision and Order dated January 25, 1988, Administrative Law Judge Paul  
H. Teitler awarded benefits in the miner's claim, filed on April 6, 1984. Director's  
Exhibit 1. Subsequent to the miner's death on February 23, 2002, claimant filed the

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 noted the parties' stipulation to twenty-four years of coal mine employment, and indicated that employer does not contest that the miner had pneumoconiosis arising out of coal mine employment. Decision and Order at 2; *see* Hearing Transcript at 4, 18; *see also* Director's Exhibit 17. Considering the claim on its merits, the administrative law judge found that the evidence of record fails to meet claimant's burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied claimant's request for modification of the district director's prior denial of benefits, pursuant to 20 C.F.R. §725.310, and denied the claim. On appeal, claimant contends that the administrative law judge erred in finding that the miner's death certificate is entitled to no probative weight because the record contains no explanatory opinion by Dr. Wardeh, who completed the death certificate. Claimant also argues that the administrative law judge's finding that Dr. Hertz provided a more detailed opinion than did Dr. Prince, is unexplained and thus does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 30 U.S.C. §932(a). Claimant further argues that the administrative law judge provided no affirmable reason for "rejecting the opinion of Dr. Prince" that the miner's pneumoconiosis was a "major contributing factor to death." Claimant's Brief at 8; *see* Claimant's Exhibit 3. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief in the 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 rational, supported by substantial evidence, and in accordance with law, they are binding upon this Board and may not be disturbed. 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).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine

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instant claim for survivor's benefits on March 4, 2002. Director's Exhibits 2, 4. The district director denied benefits on June 27, 2002 because the evidence did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 12. On June 19, 2003, claimant filed a request for modification of the district director's denial of benefits. Director's Exhibit 13. On September 18, 2003, the district director denied claimant's request for modification at 20 C.F.R. §725.310 for failure to establish death due to pneumoconiosis. Director's Exhibit 19. Claimant subsequently requested a hearing, Director's Exhibit 20, which was held before the administrative law judge on June 22, 2004.

employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be 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 irrebuttable presumption set forth at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After consideration of the administrative law judge's Decision and Order, the issue on appeal and the evidence of record, we affirm the administrative law judge's denial of survivor's benefits based on his finding that the evidence of record does not meet claimant's burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). Substantial evidence supports the administrative law judge's finding that "[a]lthough the death certificate signed by Dr. Wardeh states that pneumoconiosis was the primary cause of death, the record contains no explanation of that opinion by the physician. (See n.5 above.)"<sup>2</sup> Decision and Order at 7 n.8. The administrative law judge thus found that the death certificate is entitled to no probative weight. *Id.* The record shows that the Discharge Summary from the miner's hospitalization that terminated in his demise, during which hospitalization Dr. Wardeh was the miner's attending physician, includes diagnoses of sepsis, end stage lung cancer, history of deep venous thrombosis, hypercalcemia, and cardiopulmonary arrest, but does not refer to pneumoconiosis. Director's Exhibit 6.

Further, the administrative law judge correctly noted that claimant's counsel withdrew, at the hearing, an August 1, 2003 narrative report by Dr. Wardeh. Hearing Transcript at 6, 7, 10; *see* Director's Exhibit 18. Claimant's counsel has set forth her strategy in deciding to withdraw Dr. Wardeh's report in order to submit Dr. Prince's consulting reports dated August 10, 2003 and May 24, 2004. Claimant's Brief at 5-6; *see* Claimant's Exhibits 1, 3. Specifically, claimant's counsel explained that Dr. Wardeh's medical report was "withdrawn so that the Claimant could submit a records review by a Pulmonologist equally qualified to that submitted by the Employer/Carrier [sic]." Claimant's Brief at 5. Claimant adds:

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<sup>2</sup>The miner's death certificate, completed by Dr. Wardeh, indicates that the miner died on February 23, 2002 due to anthracosilicosis/black lung, lung cancer, "CHF," and "CAD." Director's Exhibit 4.

The Claimant was essentially placed in a “Catch-22” position. If the report of the miner’s treating/attending physician remained in the record, then the Administrative Law Judge could rely on the “superior qualifications” of the Employer’s consultant to reject that doctor’s opinion. When the Claimant, within the constraints imposed, opted to provide a report from a qualified Pulmonologist, who reviewed the treating physician’s records, hospital records, and Death Certificate, the Administrative Law Judge then fell back on the fact that the treating physician’s report is not in the record. This is a grave disservice to the Claimant and to her right to have her claim fully and fairly reviewed in this matter.

*Id.* at 6.

Claimant’s contentions lack merit. As an initial matter, claimant’s counsel alone is responsible for her trial strategy and the decision to withdraw Dr. Wardeh’s report. Claimant makes the bald assertion that she was deprived of “her right to have her claim fully and fairly reviewed in this matter.” Claimant’s Brief at 6. Further, claimant’s suggestion that claimant’s counsel’s withdrawal of Dr. Wardeh’s report affected the administrative law judge’s weighing of the reports of Dr. Prince, the “[p]ulmonologist” to whom claimant refers, is refuted by the record.<sup>3</sup> The administrative law judge accorded

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<sup>3</sup>In his August 10, 2003 report, Dr. Prince opined:

The terminal cause of death was respiratory failure. Although there were a number of different contributing factors, the presence of disabling anthrosilicosis and chronic obstructive airways disease in part due to coal dust exposure is well-supported in the medical record. Anthrosilicosis was clearly a major contributing factor to [the miner’s] death secondary to respiratory failure and cardiac arrest.

Claimant’s Exhibit 1. In his May 24, 2004 report, Dr. Prince opined:

During the two years prior to death, there were at least several hospitalizations for respiratory insufficiency secondary to a combination of exacerbation of chronic obstructive pulmonary disease and worsening heart disease. Prior to death, Mr. Conti was diagnosed with metastatic carcinoma of the lung. Based on a mechanism of death of respiratory insufficiency, the conclusion was reached that anthracosilicosis was a major contributing factor to death.

Claimant’s 3. Dr. Prince concluded that “the presence of pre-existent disabling anthrosilicosis and chronic obstructive pulmonary disease in part due to coal dust

less weight to Dr. Prince's opinion, that the miner's pneumoconiosis was a "major contributing factor to death," Claimant's Exhibit 3, and accorded greater weight to Dr. Hertz's contrary report. Specifically, the administrative law judge found, within his discretion, that Dr. Prince did not adequately explain the basis for his opinion "in the face of only one diagnosis of pneumoconiosis in the miner's numerous diagnoses over the last year of his life, and this diagnosis of pneumoconiosis was far down on the list of diagnoses in that report (as Dr. Hertz pointed out)."<sup>4</sup> Decision and Order at 7; *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984); see Employer's Exhibit 6 (Dr. Hertz's June 15, 2004 report). The administrative law judge also properly determined that "although Dr. Prince stated that the basis for his opinion was the 'mechanism of death of respiratory insufficiency' [,] the physician failed to explain what that 'mechanism' was." Decision and Order at 7-8; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). The administrative law judge permissibly found that Dr. Hertz "provided a much more detailed review and analysis of the medical evidence than did Dr. Prince," and properly accorded Dr. Hertz' opinion greater weight on that basis. Decision and Order at 7; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

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exposure, was clearly a major contributing factor in Mr. Conti's death, secondary to respiratory failure and cardiac arrest." *Id.* These reports show that Dr. Prince used the terms "anthrosilicosis" and "anthracosilicosis" interchangeably.

<sup>4</sup>In his report dated June 15, 2004, Dr. Hertz stated:

As I noted in my initial report, Mr. Conti had 7 separate hospitalizations in the last 13 months of his life, with each hospitalization accompanied by a history and physical, and a discharge summary. In these multiple documents, with multiple problem lists, coal workers['] pneumoconiosis was listed only on one discharge summary in 3/01, as problem #10. It was not listed as a diagnosis on the other histories and physicals or discharge diagnoses from the multiple hospitalizations as noted. It is not even mentioned on the discharge summary at the time of the patient's death on 2/23/02, as a problem or issue during this hospitalization. Clearly, if coal workers['] pneumoconiosis was a significant factor in this patient's death or his downhill course over the 7 hospitalizations in the last 13 months of his life, it should have been mentioned consistently in these important medical documents.

Employer's Exhibit 6.

Based on the foregoing, we reject claimant's argument that the administrative law judge did not provide an affirmable rationale in support of his decision to accord less weight to the opinion of Dr. Prince. *Searls v. Southern Ohio Co.*, 11 BLR 1-161 (1988). Because it is supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding that the evidence of record does not meet claimant's burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). 20 C.F.R. §718.205(c); *Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-107-108. We, therefore, affirm the administrative law judge's denial of benefits in the instant survivor's claim.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

I concur.

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ROY P. SMITH  
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's determination to affirm the administrative law judge's decision denying benefits.

I feel constrained to write separately to point out that counsel's decision at trial to withdraw Dr. Wardeh's report and her argument on appeal that claimant has been deprived of "her right to have her claim fully and fairly reviewed," Claimant's Brief at 6, both reflect a fundamental misapprehension of the law. This is made plain in claimant's brief on appeal, wherein she states that "the parties were permitted to submit only one report in support of their respective positions." Claimant's Brief at 5. That statement is contrary to the regulations, *see* 20 C.F.R. §725.414(a)(2)(i), and is unsupported by the transcript of the hearing. Because it is counsel's misunderstanding of the law which

underlay her trial strategy and the appellate argument, she identifies no basis to overturn the administrative law judge's decision.

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REGINA C. McGRANERY  
Administrative Appeals Judge