

BRB Nos. 97-1785 BLA  
and 97-1785 BLA-A

ELIZABETH A. PENLAND	)	
(Widow of ALFRED PENLAND)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL	)	DATE ISSUED:
COMPANY	)	
	)	
Employer/Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and the Amended Decision and Order of Edith Barnett, Administrative Law Judge, United States Department of Labor.

G. Todd Houck, Mullens, West Virginia, for claimant.

Lawrence C. Renbaum (Arter & Hadden, LLP), Washington, D.C., for employer.

Gary K. Stearman (Marvin Krislov, Deputy Solicitor for National Operations; 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, the United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals, the Decision and Order and the Amended Decision and Order (97-BLA-0112) of Administrative Law Judge Edith Barnett awarding benefits on a claim filed by the miner's survivor 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 credited the miner with sixteen and one-half years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish that pneumoconiosis was a substantially contributing cause of, or served to hasten, the miner's death pursuant to 20 C.F.R. §718.205(c)(2) in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).<sup>1</sup> Accordingly, benefits were awarded as of May 1, 1996. In her Amended Decision and Order issued September 26, 1997, the administrative law judge ordered that benefits be awarded commencing May 1, 1986, not May 1, 1996, as the miner died on May 11, 1986. On appeal, employer challenges the administrative law judge's weighing of the evidence. Claimant responds, urging affirmance of the award of benefits. The Director filed a cross-appeal in this case, but subsequently filed a motion to dismiss his cross-appeal.<sup>2</sup> Employer also filed a reply brief.<sup>3</sup>

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in West Virginia. Director's Exhibit 2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>2</sup> By letter dated February 17, 1998, the Director requested that his cross-appeal filed in BRB No. 97-1785 BLA-A be dismissed. We hereby grant the Director's request to dismiss his appeal therein.

<sup>3</sup> We affirm the findings of the administrative law judge on the length of coal mine

The Board's scope of review is defined by statute. We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis under any of the methods available at 20 C.F.R. §718.202(a)(1)-(4) before establishing death due to pneumoconiosis at 20 C.F.R. §718.205(c). *Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Furthermore, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, has held that in order for a survivor to demonstrate that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to 20 C.F.R. §718.205(c), the survivor may demonstrate that the miner's death was hastened to any degree by the presence of his pneumoconiosis. *See Shuff, supra*.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal 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. In considering the evidence of record pursuant to Section 718.205(c)(2), the administrative law judge listed all of the relevant medical evidence, including the death certificate, autopsy report, and medical opinions. Decision and Order at 2-5. In determining whether claimant established death due to pneumoconiosis pursuant to Section 718.205(c)(2), the administrative law judge credited the opinion of Dr. Rasmussen, which was supported by the opinions of Drs. Ahmed, Dy, Pecoraro and Ranavaya, who opined that the miner's pneumoconiosis contributed to his death, over the contrary opinions of Drs. Kleinerman and Banks. Decision and Order at 6. The administrative law judge initially found that Dr. Kleinerman's opinion, that pneumoconiosis did not contribute to the miner's death, was not well-reasoned or

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employment, the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203 and his onset determination as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

well-documented because the physician contradicted the report of the autopsy prosector, Dr. Rasheed, who found that the miner's pneumoconiosis was associated with his interstitial fibrosis. Decision and Order at 6-7; Director's Exhibits 9-10; Claimant's Exhibit 1. The administrative law judge therefore accorded little weight to the opinion of Dr. Kleinerman as well as Dr. Banks, who the administrative law judge found was influenced by Dr. Kleinerman's opinion. Decision and Order at 7; Director's Exhibit 10.

Initially, employer argues that the administrative law judge overstepped her role by substituting her opinion for that of Dr. Kleinerman. We disagree. The administrative law judge did not independently interpret the medical evidence, she only weighed the evidence, see *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984), and permissibly found that Dr. Kleinerman's opinion, as well as Dr. Banks' opinion, was incorrect on the extent of pneumoconiosis demonstrated in the slides, in light of the Dr. Rasheed's contrary findings as he was the autopsy prosector and thus had the best opportunity to evaluate the miner's condition. Decision and Order at 7; *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985). The administrative law judge has broad discretion in weighing and assessing the evidence of record in determining whether a party has met its burden of proof and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law judge's determination that the preponderance of the medical opinion evidence of record was sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c)(2), as it is supported by substantial evidence. See *Shuff, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Accordingly, the Decision and Order and the Amended Decision and Order of the administrative law judge awarding benefits in this survivor's claim are affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge