

BRB No. 01-0303 BLA

MARY F. URBAN)
(Widow of RICHARD F. URBAN))
)
 Claimant-Petitioner)

v.)

DATE ISSUED:

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

DECISION and ORDER

Appeal of the Decision and Order Upon Remand of Ralph A. Romano,
Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Upon Remand (98-BLA-0595) of Administrative Law Judge Ralph A. Romano 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 In a previous Decision and Order, dated February 3, 1999,

¹Claimant is the deceased spouse of the miner, who died on June 1, 1997. Director's Exhibit 4.

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 on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be 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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal

the administrative law judge considered the instant survivor's claim,³ which was filed on August 19, 1997, pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). After crediting the miner with twelve years of coal mine employment, the administrative law judge determined that the miner suffered from pneumoconiosis arising out of coal mine employment based upon the concession of the Director, Office of Workers' Compensation

before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

³The miner filed a living miner's claim on February 9, 1996. Director's Exhibit 21. The miner's claim was initially denied by the district director, and a hearing was held before Administrative Law Judge Paul H. Teitler on May 8, 1997. *Id.* At the hearing, the Director, Office of Workers' Compensation Programs, moved for Judge Teitler to remand the case to the district director for the payment of benefits in the miner's claim. *Id.* In an Order of Remand dated June 5, 1997, Judge Teitler remanded the claim for the district director to enter an award of benefits. *Id.*

Programs (the Director). The administrative law judge further found the evidence of record insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000), however. Consequently, the administrative law judge denied benefits. Claimant appealed, and the Director filed a Motion to Remand, requesting that the Board remand this case for Dr. Simelaro to be deposed and for the administrative law judge to reconsider his decision in light of Dr. Simelaro's testimony. The Board vacated the administrative law judge's finding that the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c)(2) (2000), and remanded the case for the parties to depose Dr. Simelaro. *Urban v. Director, OWCP*, BRB No. 99-0512 BLA (Feb. 3, 2000)(unpublished).

In an Order dated May 4, 2000, the administrative law judge stated: "The Benefits Review Board has remanded this matter for the taking of further evidence. The record was returned on April 20, 2000. The record shall remain open indefinitely for submission of additional evidence by either party to this matter." May 4, 2000 Order at 1. Claimant thereafter on two occasions corresponded with the administrative law judge, in letters dated May 15, 2000 and June 21, 2000, asserting that the Board had only remanded the case for the taking of Dr. Simelaro's deposition and that it was inappropriate for the administrative law judge to allow the record to remain open for the submission of any additional evidence. Under cover letter dated July 6, 2000, claimant submitted Dr. Simelaro's deposition testimony, along with a Motion to Close the Record without the admission of any additional evidence. Simultaneously, by letter dated July 6, 2000, before the administrative law judge replied to claimant's letters, the Director objected to claimant's requests that the administrative law judge reconsider his May 4, 2000 Order, and the Director submitted a report from Dr. Spagnolo as rebuttal evidence. In a succinct Order dated August 31, 2000, the administrative law judge closed the record and instructed the parties to file briefs within thirty days. In his Decision and Order Upon Remand, the administrative law judge rejected Dr. Simelaro's opinion that the miner's death was hastened by pneumoconiosis, and credited the contrary opinion of Dr. Spagnolo in finding the evidence insufficient to establish death due to pneumoconiosis under Section 718.205(c) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in admitting into the record on remand Dr. Spagnolo's report as rebuttal to Dr. Simelaro's deposition, and asserts that, if the Board disagrees, she should have been afforded the opportunity to submit rebuttal evidence to Dr. Spagnolo's report. Claimant further contends that the administrative law judge improperly weighed the conflicting reports under Section 718.205(c)(2) (2000). The Director has not filed a brief in response to claimant's appeal.

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’Keeffe 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.⁴ *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor’s claim, a claimant must establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner’s pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203; *Boyd, supra*.

⁴Section 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).

The United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, has held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) (2000) in a case in which the disease actually hastens his death. *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989); *see also* 20 C.F.R. §718.205(c)(2), (c)(5).

On appeal, claimant initially argues that the administrative law judge's admission of Dr. Spagnolo's report into the record on remand went beyond the scope of the Board's remand order. Claimant asserts that the Board clearly remanded the case for the sole purpose that Dr. Simelaro's deposition be taken. Claimant further contends that the administrative law judge violated her rights in failing to respond to her requests to reconsider the Order allowing the submission of evidence other than Dr. Simelaro's deposition, as well as her motion to close the record upon receipt of the deposition.

Claimant's contentions lack merit. The administrative law judge has broad discretion in procedural matters. 20 C.F.R. §725.455. In the instant case, the administrative law judge did not abuse that discretion. In remanding the case for the deposition of Dr. Simelaro, the Board did not address whether or not the administrative law judge could leave the record open for rebuttal evidence. Thus, contrary to claimant's contention, the administrative law judge did not exceed the scope of the Board's remand instructions in admitting the report submitted by the Director, *i.e.*, Dr. Spagnolo's report. In addition, as the Director stated in his letter to the administrative law judge upon submitting Dr. Spagnolo's July 16, 2000 report as rebuttal to Dr. Simelaro's deposition, Dr. Simelaro reviewed medical evidence which had previously not been exchanged with the Director in formulating his opinion. That evidence, which was produced at the deposition, consisted of two pulmonary function studies and a medical report dated April 4, 1997 from Dr. Venditto. *See* Simelaro Deposition. It was thus reasonable for the administrative law judge to allow the Director to submit Dr. Spagnolo's report in rebuttal to Dr. Simelaro's deposition. Furthermore, the administrative law judge neither abused his discretion in waiting to close the record on remand until the Director responded to his May 4, 2000 Order, nor in precluding claimant's submission of additional rebuttal evidence. *See discussion, supra*.

In challenging the administrative law judge's finding that the weight of the evidence was insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2) (2000), claimant first contends that the administrative law judge erred in discounting, as unreasoned and undocumented, the death certificate, which indicates that pneumoconiosis was a significant condition leading to the miner's death. Director's Exhibit 4. Claimant contends that Dr. Guttman, who signed the death certificate, was an attending physician during the miner's hospitalizations, and therefore, the death certificate was clearly documented and reasoned. Claimant's contention lacks merit. As the administrative law judge correctly stated in his initial Decision and

Order, the record does not contain any report from Dr. Guttman addressing the cause of the miner's death, except the death certificate, which the administrative law judge properly found did not provide any reasoning or documentation supporting its conclusion that pneumoconiosis was a significant condition leading to the miner's death. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); 1999 Decision and Order at 6; Director's Exhibit 4.

Claimant also argues that the administrative law judge mischaracterized the record when summarizing, in his initial Decision and Order, the medical records submitted with the earlier miner's claim, and thus remand is necessary. Specifically, noting that much of the evidence in the miner's claim was developed within 4 months of the miner's June 1, 1997 death, claimant contends that the administrative law judge mischaracterized the record in stating that the majority of the evidence submitted in connection with the miner's claim was developed well before the miner's death. 1999 Decision and Order at 3-4. Claimant's contention is without merit. It is undisputed in the instant case that the miner suffered from pneumoconiosis, and the evidence in the miner's claim to which claimant refers does not address the dispositive issue in this case, *i.e.*, whether the miner's death was hastened by the disease.

Claimant next contends that the administrative law judge erred in discounting Dr. Simelaro's opinion under Section 718.205(c)(2) (2000). Dr. Simelaro examined the miner on February 20, 1997, and reviewed the medical reports of record. Director's Exhibit 6; Simelaro Deposition Tr. at 7-14. Dr. Simelaro opined that the primary cause of the miner's death was bladder cancer, but that coal workers' pneumoconiosis played a significant role in shortening the miner's life. Director's Exhibit 6; Simelaro Deposition Tr. at 14-15. Dr. Simelaro stated that the miner's bladder cancer metastasized into the miner's lung, a lung which was already irritated by pneumoconiosis. Simelaro Deposition Tr. at 24-27. Dr. Simelaro indicated that pneumoconiosis can cause secretions in a person's lung, and that cancer in a lung can increase the secretions, ultimately causing asphyxiation. *Id.* Stating that the miner's already present pneumoconiosis "added insult to injury," when combined with the cancer in his lung, Dr. Simelaro indicated that the secretions in the end "probably killed [the miner]" by asphyxiation. *Id.* at 27.

Claimant argues that the administrative law judge mischaracterized Dr. Simelaro's opinion and erred in rejecting it without any explanation in violation 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). This contention lacks merit. Contrary to claimant's contention, the administrative law judge fully explained his reasons for discounting Dr. Simelaro's opinion, and we hold that he properly discounted the opinion as conclusory. *See Clark, supra; Tackett, supra;* Decision and Order Upon Remand at 3-6; Director's Exhibit 6; Simelaro Deposition. The administrative law judge reasonably

construed Dr. Simelaro's deposition testimony, that cancer in the lung and pneumoconiosis can combine to cause secretions leading to asphyxiation and death, as general testimony. The administrative law judge properly found that the doctor failed to adequately explain how this happened in the miner's case in light of the fact that the hospital records at the time of the miner's death did not mention that there were secretions in the miner's lungs, or that the miner asphyxiated. *See Clark, supra; Tackett, supra*; Decision and Order at 3-4; Director's Exhibit 15. In addition, the administrative law judge properly discounted Dr. Simelaro's opinion as inadequately explained in light of the doctor's inconsistent statements with respect to the course of the miner's cancer. *See Clark, supra; Tackett, supra*; Decision and Order at 4. Dr. Simelaro testified that the bladder cancer must have metastasized to the miner's lungs in 1996. Simelaro Deposition Tr. at 57. At another point in the deposition, however, Dr. Simelaro stated that he had not found the presence of cancer in the miner's lungs in his February 1997 examination of the miner.⁵ *Id.* at 58. We affirm, therefore, the administrative law judge's findings with respect to Dr. Simelaro's opinion.⁶

⁵Dr. Simelaro stated that he certainly would have been able to detect cancer on the miner's x-ray at that time, but that the x-ray did not show cancer. Simelaro Deposition Tr. at 58.

⁶We reject claimant's contentions that Dr. Simelaro's opinion should have been credited because Dr. Simelaro was an examining physician, and that the administrative law judge erred in discounting Dr. Simelaro's opinion on the additional basis that the doctor relied upon a different work history (twenty-two years) than the history of twelve years of coal mine employment credited by the administrative law judge. As the administrative law judge noted, he was not required to credit an examining physician's opinion which is flawed. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Moreover, an administrative law judge may give less weight to a doctor's opinion which is based on an inaccurate length of coal mine employment history. *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Claimant further argues that the administrative law judge erred in failing to credit Dr. Kraynak's opinion as reasoned and documented, and in failing to reject Dr. Spagnolo's opinion as unreasoned and undocumented. We disagree. Claimant's contention amounts to a request to reweigh the evidence. Incorporating his finding from his initial Decision and Order, the administrative law judge properly discounted Dr. Kraynak's opinion on the ground that the doctor failed to adequately explain his conclusions.⁷ *See Clark, supra; Tackett, supra*; 1999 Decision and Order at 6; Claimant's Exhibit 2. Moreover, the administrative law judge properly relied upon Dr. Spagnolo's opinion, finding it to be well-reasoned and documented. Dr. Spagnolo, who reviewed the entire record, opined that the miner's death, at age 71, was unrelated to and not substantially hastened, even briefly, by coal workers' pneumoconiosis, nor was coal workers' pneumoconiosis a contributing factor in death. Director's Exhibits 24, 25. Dr. Kraynak stated that the obvious cause of death was metastatic bladder cancer, and that such a widespread tumor ultimately led to the miner's general deterioration, intractable pain, urinary obstruction and death. Director's Exhibit 25. The administrative law judge found Dr. Spagnolo's opinion well reasoned and documented because Dr. Spagnolo indicated that the miner's lungs were regularly found to be clear, and explained that Dr. Simelaro's theory that abnormal lung sounds were present just prior to the miner's death should be disregarded because shallow breathing and chest congestion are commonly seen in terminal patients with metastatic cancer. *See Clark, supra; Tackett, supra*; Decision and Order Upon Remand at 6; Director's Exhibit 25. The administrative law judge also properly determined that Dr. Spagnolo's opinion was well reasoned and documented because Dr. Spagnolo explained that the pulmonary function tests in 1997, which Dr. Simelaro relied upon in formulating his opinion, could be disregarded because at the time of testing, the miner's cancer had spread to his lungs, and he was not capable of performing the tests in a reliable and reproducible manner. *Id.* We, therefore, affirm the administrative law judge's finding that the evidence was insufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c)(2) (2000). *See* 20 C.F.R. §718.205(c)(2), (c)(5); *Lukosevicz, supra*.

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

⁷Dr. Kraynak reviewed medical records in this case. Claimant's Exhibit 6. Dr. Kraynak opined that the miner's bladder cancer obviously was a very severe and substantial contributing factor in his death. *Id.* Dr. Kraynak further opined that the miner "would have been in a much better position to fight off this disease entity if it was [sic] not for his coal workers' pneumoconiosis." *Id.* Dr. Kraynak concluded that the miner "would have been able to breathe better, oxygenate his blood to a better degree, and would have survived longer." *Id.*

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge