

BRB No. 04-0151 BLA

SHIRLEY KINNEY)	
(Widow of PATRICK KINNEY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
INLAND STEEL COMPANY)	DATE ISSUED: 09/10/2004
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (00-BLA-0124) of Administrative Law Judge Richard A. Morgan on a claim for survivor's benefits 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).¹ Claimant, widow of

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

the deceased miner, filed her claim on May 20, 1999. This case is before the Board for the third time.² Most recently, the majority of the Board granted, in part, in *Kinney v. Inland Steel Co.*, BRB No. 01-0593 BLA (April 30, 2003)(*en banc*)(unpub.), employer's motion for reconsideration of the Board's Decision and Order in *Kinney v. Inland Steel Co.*, BRB No. 01-0593 BLA (May 9, 2002)(unpub.)(Gabauer, J., dissenting), and remanded the case.³ The majority of the Board found merit in employer's argument that the administrative law judge did not adequately explain his weighing of the medical opinion evidence at 20 C.F.R. §718.205(c) and erroneously relied upon his own assessment of the significance of the fact that the miner's medical records do not document a respiratory or pulmonary impairment. *Kinney*, slip op. at 2. The majority indicated that the administrative law judge on remand, in accordance with 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 U.S.C. §932(a), must set forth the rationale underlying his determination that Dr. Yerger's opinion was entitled to additional weight because he had "previous experience with [the miner] while living," *see* Administrative Law Judge's March 23, 2001 Decision and Order at 11, and explain, in

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

² Claimant filed her claim for benefits on May 20, 1999. Director's Exhibit 1. The district director made an initial finding on October 1, 1999 that claimant was entitled to benefits. Director's Exhibit 24. Employer contested the district director's finding and requested a hearing. Director's Exhibit 25. Subsequent to a hearing, Administrative Law Judge Richard A. Morgan awarded benefits by Decision and Order dated March 23, 2001. Employer appealed to the Board. The majority of the panel, in *Kinney v. Inland Steel Co.*, BRB No. 01-0593 BLA (May 9, 2002)(unpub.)(Gabauer, J., dissenting), affirmed the administrative law judge's award of benefits on May 10, 2002. Employer then filed a Motion for Reconsideration, and, on April 30, 2003, the Board issued its Decision and Order in *Kinney v. Inland Steel Co.*, BRB No. 01-0593 BLA (April 30, 2003)(*en banc*)(unpub.), remanding the case for further consideration at 20 C.F.R. §718.205(c).

³ In *Kinney v. Inland Steel Co.*, BRB No. 01-0593 BLA (May 9, 2002)(unpub.)(Gabauer, J., dissenting), the majority of the panel affirmed the administrative law judge's award of survivor's benefits. Specifically, the majority affirmed the administrative law judge's finding that Dr. Yerger's opinion, that pneumoconiosis was a contributing cause of the miner's death, was sufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.205(c). The dissenting panel member would have vacated the award of benefits and remanded the case to the administrative law judge with instructions to provide a more thorough explanation of the rationale underlying his weighing of the medical opinions of record.

further detail, his finding that Drs. Mendelow, Cagle, Bush, Naeye, Kane, and Griffin based their conclusions upon “conjecture” and “a statistical probability,” *id. Kinney*, slip op. at 3. The majority of the Board further held, however, that there was no merit in employer’s contention that the administrative law judge did not apply the proper standard in assessing whether claimant established that pneumoconiosis was a contributing cause of the miner’s death at 20 C.F.R. §718.205(c). The majority indicated that the administrative law judge determined appropriately that the requirements of 20 C.F.R. §718.205(c) are satisfied if claimant proves that pneumoconiosis hastened the miner’s death. The dissenting panel members would have affirmed the administrative law judge’s award of survivor’s benefits under 20 C.F.R. §718.205(c) as the administrative law judge fully explained his reasons for according greater weight to the opinion of Dr. Yerger and for according less weight to the opinions of Drs. Mendelow, Cagle, Bush, Naeye and Griffin, and because the administrative law judge did not substitute his opinion for that of the medical experts.

On remand, the administrative law judge found that the medical opinion evidence of record was sufficient to establish that the miner’s pneumoconiosis was a substantially contributing cause of his death pursuant to Section 718.205(c). Specifically, the administrative law judge accorded greater weight to Dr. Yerger’s opinion as he found it to be reasoned and documented, and because Dr. Yerger was the autopsy prosector and had first-hand knowledge of the miner’s medical history. Dr. Yerger opined that the cause of death was metastatic synovial sarcoma to the lung and that coal workers’ pneumoconiosis was a “contributing and intervening” cause of death. Claimant’s Exhibit 1 at 10, 21. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical opinions and urges the Board to reverse the administrative law judge’s award of survivor’s benefits. Claimant responds, urging affirmance of the decision below. The Director, Office of Workers’ Compensation Programs, has filed a letter indicating that he will not file a brief in this 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 supported by substantial evidence, are rational, and are consistent with applicable 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’Keeffe 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 employment, and that the miner’s death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *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 presumption, relating to complicated pneumoconiosis, set forth at Section 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); *see Lukosevic v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989).

Employer contends that Dr. Yerger's opinion is inadequate as a matter of law and should not be credited, arguing that "all we have from Dr. Yerger is that pneumoconiosis in some way hastened death to some extent." Employer's Brief at 6. Employer's contention lacks merit. Dr. Yerger found that the miner would have lived longer if he had not had pneumoconiosis and explained that the miner's lung impairment was due to coal workers' pneumoconiosis, sarcoma and anemia, which combined to produce breathlessness that induced the cardiac event leading to his death. Claimant's Exhibit 1. Thus, contrary to employer's contention, Dr. Yerger fully addressed the issue of death due to pneumoconiosis and his opinion is legally sufficient to carry claimant's burden at Section 718.205(c). Further, the record thus supports the administrative law judge's specific finding that "Dr. Yerger considered the effect of the miner's lung capacity on his last hours of life." Decision and Order on Remand at 5.

The administrative law judge properly found that Dr. Yerger's opinion was entitled to greatest weight as it was well-reasoned, documented, and as Dr. Yerger not only had first hand knowledge of the miner's medical history,⁴ but as the autopsy prosector, *see* Director's Exhibit 14, Dr. Yerger was in the best position to determine whether pneumoconiosis contributed to the miner's death. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *United States v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982). Thus, we affirm the administrative law judge's crediting of the opinion of Dr. Yerger.

Employer contends that the administrative law judge on remand again erred by discrediting the opinions of Drs. Mendelow, Cagle, Bush, Naeye, Kane and Griffin, finding that pneumoconiosis did not contribute to the miner's death, *see* Director's Exhibits 23, 27; Employer's Exhibits 1-7, on the basis of the administrative law judge's own assessment that the medical records did not document treatment for any respiratory or pulmonary impairment.

⁴ Dr. Yerger testified that he diagnosed "the original sarcoma in [the miner's] foot." Claimant's Exhibit 1 at 5.

Given the record in the instant case and the administrative law judge's findings, we hold that substantial evidence supports the administrative law judge's decision to accord determinative weight to the opinion of Dr. Yerger, that the miner's coal workers' pneumoconiosis hastened death, Claimant's Exhibit 1, over the contrary opinions of record. Specifically, the administrative law judge found:

As a rationale for his conclusion that if the miner had not had pneumoconiosis, he would have lived longer, Dr. Yerger explained that the miner's lung impairment from sarcoma, coal [workers'] pneumoconiosis and anemia combined to produce breathlessness which induced a cardiac event leading to his death. (CX 1 at 12). Thus, in addition to performing the autopsy and being familiar with the miner's medical history, Dr. Yerger considered the effect of the miner's lung capacity on the last hours of life.

Decision and Order on Remand at 5. Conversely, the administrative law judge found that Drs. Bush, Naeye, Mendelow, Griffin, Kane and Cagle did not account for the miner's declining lung condition immediately prior to death and "evaluated [the miner] based on an average miner with the same degree of pneumoconiosis, as opposed to considering the complete factual situation at hand." Decision and Order on Remand at 7.⁵ The administrative law judge's reliance on the opinion of Dr. Yerger at 20 C.F.R. §718.205(c) was rational. *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Campbell v. North American Coal Corp.*, 6 BLR 1-244 (1983). Accordingly, we do not further address employer's arguments that the administrative law judge substituted his opinion for that of the medical experts as any error in this regard would be harmless. *Larioni*, 6 BLR at 1-1276.

Based on the foregoing, we affirm the administrative law judge's finding that claimant met her burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). We, therefore, affirm the administrative law judge's award of survivor's benefits in the instant case.

⁵ Dr. Naeye reported that it would not be possible to determine whether or not cor pulmonale was present because the miner's heart was only slightly enlarged, *see* Director's Exhibit 27, but he later testified in his deposition that "there is clear and definitive evidence that chronic cor pulmonale was absent." Employer's Exhibit 7. The administrative law judge properly accorded Dr. Naeye's opinion less weight due to this conflict in the evidence and the confusion it created when Dr. Naeye attempted to explain the contradictions in his opinion. *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984); Decision and Order on Remand at 6.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge