

BRB No. 02-0125 BLA

ALICE M. HAWKINS (Widow of)	
THORUS W. HAWKINS))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
J.O. LIVELY CONSTRUCTION)	
)	
Employer-Respondent)	
)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, the miner's widow,¹ appeals the Decision and Order (2001-BLA-8) of Administrative Law Judge Gerald M. Tierney denying benefits on a survivor's claim pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹Claimant is Alice M. Hawkins, the surviving spouse of the deceased miner, Thorus W. Hawkins, who died on October 5, 1999. Decision and Order at 2; Director's Exhibit 13.

amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge credited the miner with seventeen years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, survivor's benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in finding that the medical opinion and autopsy evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(4). Employer responds, urging affirmance of the denial of benefits.³ The Director, Office of Workers' Compensation Programs, has not participated 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 the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to

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 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, are to the amended regulations.

³Claimant acknowledges that she could not establish the existence of pneumoconiosis by x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) or by biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). *See* Decision and Order at 2.

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)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevich 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 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 are no reversible errors contained therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Pursuant to Section 718.202(a)(2), the administrative law judge considered whether the autopsy evidence established the existence of pneumoconiosis. In doing so, the administrative law judge reviewed the opinions of Dr. Ona-Sarino, the autopsy prosector, and Drs. Tomashefski, Wecht and Naeye, the reviewing pathologists. Dr. Ona-Sarino's final anatomical diagnosis included anthracosis. Decision and Order at 4; Director's Exhibit 14. Dr. Wecht diagnosed anthracosilicosis, while Drs. Tomashefski and Naeye identified black pigment, but stated that there were no findings of coal workers' pneumoconiosis. Director's Exhibit 16; Claimant's Exhibit 1; Employer's Exhibits 5-6, 9.

The administrative law judge thoroughly reviewed the autopsy evidence and found that it failed to establish that the miner suffered from pneumoconiosis. Specifically, the administrative law judge, within a rational exercise of his discretion, relied on Dr. Naeye's opinion over the contrary opinions of Drs. Ona-Sarino and Wecht, based on several factors. The administrative law judge discussed Dr. Naeye's explanation of the need to show evidence of tissue damage associated with the anthracotic pigment in order to make a diagnosis of coal workers' pneumoconiosis. Decision and Order at 5; Employer's Exhibit 5-6, 9. The administrative law judge noted that while Dr. Naeye listed two types of tissue damage, fibrosis and emphysema, he indicated that the fibrosis was not associated with black pigment and, therefore, did not result in a diagnosis of coal workers' pneumoconiosis. *Id.* Instead, Dr. Naeye associated the fibrosis with the miner's radiation treatment for cancer and the centrilobular emphysema with the miners' smoking history. Decision and Order at 6; Employer's Exhibit 5-6, 9. The administrative law judge acknowledged Dr. Naeye's extensive experience and expertise and concluded that Dr. Naeye's explanation seemed to be supported by the evidence, while Dr. Wecht's opinion was not as persuasive. *Id.* Thus, the administrative law judge rationally found that the existence of pneumoconiosis was not

established as the mere presence of black pigment was insufficient, by itself, to establish the presence of pneumoconiosis. 20 C.F.R. §718.202(a)(2); *see Hapney v. Peabody Coal Co.*, 22 BLR 1-106 (2001)(*en banc*)(Smith and Dolder, JJ., dissenting in part and concurring in part); *Dagnan v. Blue Diamond Coal Mining Co.*, 994 F.2d 1536, 1541, 18 BLR 2-203, 2-209 (11th Cir. 1993); *see also Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); Decision and Order at 4-6.

The administrative law judge also properly determined that Dr. Tomashefski's opinion, that the miner's lungs contained black pigment, but that there were no findings to support a diagnosis of pneumoconiosis and there was no relationship between the fibrosis and emphysema and coal mine employment, supported Dr. Naeye's opinion. Decision and Order at 5; Director's Exhibit 16. Moreover, the administrative law judge rationally found that the opinions of Drs. Naeye and Fino were persuasive regarding the existence of pneumoconiosis inasmuch as their attribution of the miner's emphysema and resulting chronic obstructive pulmonary disease to the miner's heavy cigarette smoking history is supported by the record. *See* 20 C.F.R. §718.201; *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 661 (4th Cir. 1999); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Consequently, the administrative law judge reasonably accorded determinative weight to the opinion of Dr. Naeye as Dr. Naeye is well qualified and provided a detailed discussion supporting his opinion, that the miner did not suffer from coal workers' pneumoconiosis prior to his death, that was based on his review of the autopsy protocol, tissue slides and additional medical records. *See Trumbo, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 4-6. Therefore, the administrative law judge properly credited the opinion of Dr. Naeye, as supported by the opinion of Dr. Tomashefski, on the ground that both physicians possess pathological expertise. The administrative law judge also acted within his discretion in crediting the opinion of Dr. Fino, who possesses pulmonary expertise, and in finding that the weight of these physicians' opinions, all of whom agreed that the autopsy evidence was negative for pneumoconiosis, established that the miner was not suffering from pneumoconiosis pursuant to Section 718.202(a)(2). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Decision and Order at 4-6. The revised regulations explicitly provide that "[a] finding in an autopsy or biopsy of anthracotic pigmentation...shall not be sufficient, by itself, to establish the existence of pneumoconiosis," and, therefore, the administrative law judge permissibly found that there is no autopsy evidence of pneumoconiosis. 20 C.F.R. §718.202(a)(2). Accordingly, we affirm the administrative law judge's Section 718.202(a)(2) finding. *See* 20 C.F.R. §718.202(a)(2); *Hapney, supra*.

In weighing the medical opinions on the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), the administrative law judge concluded that this

evidence, which consisted of the opinions of Drs. Wecht, Jackson, Gaziano, Fino and Weiss, failed to establish the existence of pneumoconiosis. Decision and Order at 12-14, 17-18; Director's Exhibits 12, 42, 69; Employer's Exhibits 2-4, 7. The administrative law judge noted that the evidence indicated that the miner suffered from chronic obstructive pulmonary disease, fibrosis, emphysema and lung cancer. The administrative law judge evaluated the medical opinions to determine whether there were any reasoned and documented opinions causally linking the miner's lung diseases to coal dust exposure in coal mine employment, thereby establishing the existence of legal pneumoconiosis. In finding that claimant failed to establish, by a preponderance of the evidence, that there was a causal nexus between the miner's chronic lung diseases and his coal dust exposure, the administrative law judge credited the opinions of Drs. Fino and Weiss over the contrary opinion of Dr. Wecht.⁴ Decision and Order at 7-8. The administrative law judge determined that the reasoning of Drs. Fino and Weiss on this issue was more complete and that these physicians not only disagreed with the position espoused by Drs. Wecht, they provided a thorough explanation for their position. *Id.* The administrative law judge noted that while Dr. Wecht opined that the miner's chronic obstructive pulmonary disease, emphysema and fibrosis were due to coal dust exposure, Drs. Fino and Weiss provided detailed explanations of the various types of emphysema and described what factors indicated that cigarette smoking, and not coal mine dust exposure, caused the miner's emphysema and associated chronic obstructive pulmonary disease. *Id.*

Accordingly, the administrative law judge reasonably accorded the opinions of Drs. Fino and Weiss dispositive weight because these physicians fully discussed their conclusions that the miner's anthracotic pigmentation did not manifest to a finding of pneumoconiosis and that the miner's death was the result of the deteriorating complications of his chronic lung diseases unrelated to coal dust exposure in coal mine employment. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We, therefore, affirm the administrative law judge's Section 718.202(a)(4) determination as this finding is rational and supported by substantial evidence. As the administrative law judge rationally found that claimant failed to affirmatively establish the existence of pneumoconiosis by a

⁴The administrative law judge noted that neither Dr. Jackson nor Dr. Gaziano was asked to determine the existence of pneumoconiosis as both were informed that the existence of the disease was accepted by the district director. Decision and Order at 7; Director's Exhibits 15, 17.

preponderance of the evidence, we also affirm the administrative law judge's finding pursuant to Section 718.202(a). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Although claimant alleges error with respect to the weight the administrative law judge accorded to the medical opinions, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement in a survivor's claim, we also affirm his denial of survivor's benefits under 20 C.F.R. Part 718. *See Trent, supra; Perry, supra; see also Trumbo, supra.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge