

BRB No. 04-0345 BLA

CONSTANCE ISABEL GARRETT)	
(Widow of VERNON MAURICE)	
GARRETT))	
)	
Claimant-Respondent)	
)	
v.)	
)	
BETHENERGY MINES, INCORPORATED)	DATE ISSUED: 01/27/2005
)	
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 Awarding Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Andrew C. Onwudinjo (Krasno, Krasno & Onwudinjo), Pottsville, Pennsylvania, for claimant.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-00043 and 03-BLA-05134) of Administrative Law Judge Janice K. Bullard on a miner's claim and 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). Initially,

the administrative law judge noted that employer conceded that claimant¹ has established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total respiratory disability pursuant to 20 C.F.R. §718.204(b), Hearing Transcript at 5. Decision and Order at 3. The administrative law judge credited the miner with fourteen years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 10. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence of record was sufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 12. Additionally, the administrative law judge found that the miner's pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). *Id.* at 14. Accordingly, benefits were awarded on the miner's claim, commencing July 2000 and benefits were awarded on the survivor's claim, commencing April 2001. *Id.*

On appeal, employer contends that the administrative law judge erred in finding that the miner's disability was due to pneumoconiosis pursuant to Section 718.204(c) and in finding that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c). Employer's Brief at 4-6. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.²

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With regard to the miner's claim, employer asserts that the administrative law judge erred in crediting the opinions of Drs. Hertz and Sherman over the opinion of Dr. Dittman. Employer's Brief at 4-5. In addressing the cause of the miner's disability, the administrative law judge noted that the United States Court of Appeals for the Third

¹Claimant is Constance Isabel Garrett, the widow of Vernon Maurice Garrett, the miner, who died on April 3, 2001. Director's Exhibit 36. The miner filed his claim for benefits on July 5, 2000. Director's Exhibit 1. Claimant filed her claim for benefits on April 16, 2001. Director's Exhibit 40.

²We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the date from which benefits commence in the miner's and survivor's claims. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Circuit, within whose jurisdiction this case arises, held in *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), that in order to establish total respiratory disability due to pneumoconiosis, a claimant must prove that “pneumoconiosis is a substantial contributor” to the miner’s disability. Decision and Order at 10. Additionally, the administrative law judge cited 20 C.F.R. §718.204(c)(1)(i), (ii), which states that:

Pneumoconiosis is a “substantially contributing cause” of the miner’s disability if it:

- (i) Has a material adverse effect on the miner’s respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii), Decision and Order at 10. Pursuant to Section 718.204(c), the administrative law judge considered the opinions of Dr. Corazza, Dr. Mariglio, who is the miner’s treating physician, as well as Dr. Hertz, Dr. Sherman, and Dr. Dittman.³ Decision and Order at 10. The administrative law judge accorded less weight to Dr. Corazza’s opinion because she found it “to be equivocal on the issue of causation” and “not well-reasoned.” *Id.* at 10-11. Moreover, the administrative law judge considered Dr. Mariglio’s status as the miner’s treating physician, but chose to accord this physician’s report less weight because “his opinion on the issue of the cause of [the miner’s] disability is not conclusive.”⁴ *Id.* at 11. Relying on the opinions of Dr.

³The relevant medical evidence regarding the cause of the miner’s impairment is as follows. Dr. Hertz found that coal workers' pneumoconiosis was a very significant factor in causing the miner’s disability. Claimant's Exhibit 4 at 25. Dr. Sherman opined that the cause of the miner’s severe pulmonary impairment was “multifactorial,” that “it [was] not possible to ascertain how much of [the miner’s] impairment from COPD was due to coal workers' pneumoconiosis vs. his cigarette smoking,” and “that the effects of coal dust inhalation and cigarette smoking are additive.” Director's Exhibit 58. Dr. Dittman found no disability due to the miner’s coal workers' pneumoconiosis. Employer's Exhibit 3 at 25. Dr. Mariglio stated that the miner had acute chronic respiratory failure probably secondary to a combination of COPD related to tobacco abuse and interstitial lung disease related to occupational exposures. Director's Exhibit 46. Dr. Corazza found that pulmonary disease and hypertension are the major factors in the miner’s disability. Director's Exhibit 6.

⁴Employer states that it “agrees with” the administrative law judge’s decision to accord less weight to the opinions of Drs. Corazza and Mariglio. Employer's Brief at 5 n.1.

Hertz, who examined the miner and reviewed his medical records, and Dr. Sherman, who reviewed the miner's medical records, the administrative law judge found that claimant established that the miner's total disability was caused by his pneumoconiosis. *Id.* at 11-12. The administrative law judge noted that Dr. Hertz is Board-certified in internal medicine and pulmonary disease, and found the opinions of Drs. Hertz and Sherman to be "well-reasoned and well-documented."⁵ *Id.* Conversely, the administrative law judge accorded less weight to Dr. Dittman's opinion because she found it was not well-reasoned and well-documented. *Id.* at 12.

In finding Dr. Hertz's opinion to be "well-reasoned and well-documented," the administrative law judge noted that this physician "examined the Miner only two weeks before his death." *Id.* at 11. The administrative law judge further stated that:

Dr. Hertz explained that the Miner worked for eight years in a coal mine with a tracheostomy. He added that the foam patch the Miner wore over the stoma would quickly become covered with black coal dust. He reasonably and persuasively concluded that a tracheostomy patient would have a much higher deposition of dust and ambient particles into the lungs because he did not have his nose, sinuses, and throat to screen out and trap particles.

Id. The administrative law judge stated that "Dr. Hertz also based his opinion on chest x-rays, the very low oxygen level that he believed was inconsistent with pure emphysema, and an elevated blood count." *Id.* Additionally, the administrative law judge found that "Dr. Hertz's conclusions were not persuasively contradicted by any opposing medical opinion." *Id.*

Regarding Dr. Sherman's report, the administrative law judge found that this physician "reasonably concluded the Miner had CWP but said that it was not possible to determine how much of the impairment from COPD was due to CWP versus cigarette smoking." *Id.* at 12. The administrative law judge found that Dr. Sherman's opinion was "not speculative." *Id.* In doing so, the administrative law judge cited to the Board's

⁵The record reflects that Dr. Hertz is Board-certified in internal medicine, pulmonary disease and critical care medicine and that Dr. Dittman is Board-certified in internal medicine. Claimant's Exhibit 4 at 4, 6; Employer's Exhibit 3 at 7. Dr. Sherman's credentials are not in the record. However, the administrative law judge noted that "Dr. Sherman is listed in the American Medical Association's list of Board Certified Physicians as holding that certification." Decision and Order at 12 n.2.

decision in *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003), in which the Board concluded that a physician “was not required to ‘specify relative contributions of coal dust exposure and cigarette smoking to establish that [the miner’s] total disability is due to pneumoconiosis.’” *Id.* The administrative law judge concluded that Dr. Sherman’s opinion is credible, persuasive, and supported by the record. *Id.*

In according less weight to Dr. Dittman’s opinion, the administrative law judge found this physician’s opinion to be “not well-reasoned and well-documented.” *Id.* In doing so, the administrative law judge stated that Dr. Dittman opined that the miner was totally disabled from COPD due to smoking and congestive heart failure. However, the administrative law judge noted that “it is clear from the medical records that the Miner did not have any documented cardiac problems.” *Id.* The administrative law judge referred to the opinion of the miner’s cardiologist, Dr. Gulotta, who stated in January 2001 that there does not appear to be a cardiac basis for the miner’s dyspnea, and the administrative law judge noted that an echocardiogram performed on May 2, 2000 was unremarkable, Director's Exhibit 46. Decision and Order at 12. Moreover, the administrative law judge “discount[ed] Dr. Dittman’s opinion because he placed great emphasis on the onset of the miner’s symptoms eleven (11) years after he left coal mine employment without describing all the implications and effects of the Miner’s eight (8) years working in a coal mine with a tracheostomy.” *Id.* The administrative law judge found that the “equivocacy” of Dr. Dittman’s statement, that it would be highly unlikely to develop symptoms from coal workers' pneumoconiosis eleven years after stopping employment, “diminishes the probative value of [his] opinion” because Dr. Dittman does “not rule out the possibility.” *Id.*

Employer contends that the administrative law judge erred in weighing the opinions of Drs. Hertz, Sherman, and Dittman. Employer's Brief at 4-5. Specifically, employer asserts that the administrative law judge erred in crediting the opinions of Drs. Hertz and Sherman “based upon what appears to be nothing but their credentials.” *Id.* at 4. Employer also asserts that Dr. Hertz could not have formed a credible opinion because he examined the miner one time, two weeks before his death, when the miner’s condition had deteriorated. *Id.* Additionally, employer asserts that the administrative law judge should not have credited Dr. Sherman’s opinion because this physician did not examine the miner and because he “could not determine the apportionment of [the miner’s] pulmonary impairment between his cigarette-smoking-related COPD and his CWP.” *Id.* at 4-5.

We reject employer’s assertions. Regarding Dr. Hertz’s report, while a physician who examines a miner during a period of acute respiratory distress may not get an accurate picture of his average physical condition, there is no evidence in the record to support employer’s assertion that when Dr. Hertz examined the miner his condition had deteriorated. *See Jeffries v. Director, OWCP*, 6 BLR 1-1013 (1984)(Board rejected the Director’s argument that a blood gas study taken during claimant’s hospitalization for a

heart attack is unreliable because the Director produced no evidence to substantiate his assertion). To the contrary, Dr. Hertz testified that when he examined the miner on March 22, 2001 “[t]here was no indication at that point that [the miner] was about to die.” Claimant’s Exhibit 4 at 39. Therefore, the administrative law judge reasonably relied on Dr. Hertz’s opinion pursuant to Section 718.204(c). See *Jeffries*, 6 BLR at 1-1014; see also *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Additionally, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Sherman, a non-examining physician, over that of Dr. Dittman, an examining physician, because she found Dr. Sherman’s opinion to be better reasoned and documented. See *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); see also *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000). Further, in crediting Dr. Sherman’s opinion, the administrative law judge considered that this physician could not “specify relative contributions of coal dust exposure and cigarette smoking to establish that [the miner’s] total disability is due to pneumoconiosis.” Decision and Order at 12. However, the administrative law judge properly determined that because Dr. Sherman found that pneumoconiosis was one of two causes of claimant’s respiratory impairment, his opinion was sufficient to establish that pneumoconiosis was a “substantially contributing cause” of the miner’s total disability pursuant to Section 718.204(c)(1). *Gross*, 23 BLR at 1-18-19.

Finally, contrary to employer’s assertion, because the administrative law judge properly found the opinions of Drs. Hertz and Sherman to be better reasoned and documented than the opinion of Dr. Dittman, she did not rely solely on the former physicians’ qualifications. See *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). Because an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met her burden of proof, see *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, see *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws her own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge’s finding that claimant established that the miner’s disability was due to pneumoconiosis pursuant to Section 718.204(c). See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff’g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d

730, 17 BLR 2-64 (3d Cir. 1993); *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47.

With regard to the survivor's claim, employer challenges the administrative law judge's determination to credit the opinions of Drs. Hertz and Sherman and to discredit the opinion of Dr. Dittman pursuant to Section 718.205(c). Employer's Brief at 5-6. To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (c)(4). 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)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Drs. Hertz and Sherman stated that pneumoconiosis substantially contributed to the miner's death, whereas Dr. Dittman opined that pneumoconiosis did not contribute to the miner's death.⁶ Claimant's Exhibit 2; Director's Exhibit 58; Employer's Exhibit 3 at 31-32. Pursuant to Section 718.205(c), the administrative law judge found Dr. Hertz's opinion to be well-reasoned and well-documented. Decision and Order at 13-14. The administrative law judge stated that Dr. Hertz based his finding regarding the cause of the miner's death on chest x-rays, chronically elevated blood counts, high hemoglobin, and an oxygen level "low enough to provoke other organ problems such as stroke or heart attack." *Id.* The administrative law judge additionally noted that Dr. Hertz "observed that the Miner's death was not clinically consistent with an individual who died as the result of emphysema" because "patients with emphysema do not typically require 14 liters of oxygen therapy." *Id.* at 14. Accordingly, the administrative law judge found Dr. Hertz's "explanation to be both credible and persuasive, and entitled to more weight." *Id.*

⁶The death certificate lists the immediate causes of death as chronic obstructive pulmonary disease and anthrasilicosis, with hypertension listed under "Other Significant Conditions." Director's Exhibit 36. The administrative law judge assigned "little weight" to the death certificate. Decision and Order at 13. Neither claimant nor employer challenges the administrative law judge's determination to accord little weight to the death certificate. No autopsy was performed.

The administrative law judge found Dr. Sherman's report to be "well-reasoned and . . . consistent with the evidence of record." *Id.* In doing so, the administrative law judge stated that Dr. Sherman "noted the Miner's shortness of breath, oxygen requirement, and severe dyspnea on exertion" and "found that a primary cardiac cause of death was unlikely as there was no history of coronary artery disease." *Id.* Accordingly, the administrative law judge found that Dr. Sherman "reasonably concluded that the most likely cause of death was an acute cardiac arrhythmia precipitated by hypoxemia from the Miner's pulmonary disease, which was caused, at least in part, by pneumoconiosis." *Id.*

The administrative law judge accorded less weight to Dr. Dittman's opinion because this physician "stated that CWP did not contribute to the Miner's death because it was unusual for individuals with CWP to deteriorate so quickly," but "did not rule out the possibility that CWP could cause the same effect."⁷ *Id.* The administrative law judge added that Dr. Dittman "did not discuss the possible health ramifications of a Miner working in a coal mine for eight years with a tracheostomy." *Id.*

Employer asserts that because Dr. Hertz's examination of the miner took place shortly before he died, this physician could not have gained enough knowledge about the miner's condition to render a "credible or well-reasoned" opinion. Employer's Brief at 6. However, in addition to examining the miner in March of 2001, Dr. Hertz also reviewed the miner's medical records in preparation for his deposition. Therefore, Dr. Hertz, who examined the miner and reviewed his medical records, had as much information on the miner as Dr. Dittman, who also examined the miner and reviewed his medical records. Accordingly, we reject employer's contentions and hold that the administrative law judge properly weighed the medical opinion evidence pursuant to Section 718.205(c). *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *see Anderson*, 12 BLR at 1-113; *Worley*, 12 BLR at 1-23. Therefore, we affirm the administrative law judge's finding that claimant established that pneumoconiosis substantially contributed to the miner's death. 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order Awarding benefits on the miner's and survivor's claims is affirmed.

⁷As previously discussed at Section 718.204(c), the administrative law judge did not err, pursuant to Section 718.205(c), in according greater weight to the opinion of Dr. Sherman, a non-examining physician, over that of Dr. Dittman, an examining physician. *See King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge