

BRB No. 07-0353 BLA

N. Z.)	
(Widow of B. Z.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BARNES & TUCKER COMPANY)	DATE ISSUED: 01/31/2008
)	
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 Daniel L. Leland, 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, LLC), Johnston, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2005-BLA-6146) of Administrative Law Judge Daniel L. Leland on a survivor's claim filed on July 16, 2004, 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 found that the parties stipulated to eight years of coal mine employment and determined that the miner had pneumoconiosis arising out of his coal mine employment, as conceded by

employer.¹ The administrative law judge further found, however, that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial 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. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this 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'Keefe v. Smith, Hinchman and 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 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), (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, 1006, 13 BLR 2-100, 2-107-8 (3d Cir. 1989). Failure to establish any one of these elements precludes entitlement to benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

¹ Claimant is the widow of the miner who died on October 3, 2003. Director's Exhibit 10.

² The administrative law judge's decision to credit the miner with eight years of coal mine employment, and his finding that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b) are not challenged on appeal and are, therefore, affirmed. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

The evidence relevant to the cause of the miner's death consists of the death certificate and reports from eight physicians. On the death certificate, Dr. Massoud identified the cause of the miner's demise as acute myeloid leukemia. Director's Exhibit 10. Drs. Schaaf, Begley and Castle, Board-certified pulmonologists, and Dr. Pietragallo, a Board-certified hematologist, offered opinions on the contribution that pneumoconiosis may have made to the miner's death. Dr. Schaaf and Dr. Begley stated that because the miner's coal workers' pneumoconiosis weakened his lungs and made him susceptible to bronchopneumonia, coal workers' pneumoconiosis was a significant contributing factor to the miner's death. Claimant's Exhibit's 1, 2, 5, at 14. Dr. Castle and Dr. Pietragallo determined that the miner's compromised immune system led to the development of severe bronchopneumonia, but attributed this to the miner's acute myelogenous leukemia and stated it was unrelated to the miner's coal workers' pneumoconiosis. Director's Exhibit 14. Dr. Pietragallo specifically concluded that the miner's lung disease had no impact on the prognosis of the miner's leukemia, and that his immune system was impaired due to leukemia and chemotherapy. Employer's Exhibit 1.

The administrative law judge also considered the opinions of four Board-certified pathologists: Drs. Rizkalla, Perper, Bush and Tomashefski. In his autopsy report, Dr. Rizkalla stated the miner had simple micronodular coal workers' pneumoconiosis and that the miner died due to acute bronchopneumonia. Director's Exhibit 11. In a subsequent report and in his deposition testimony, Dr. Rizkalla stated that the miner's pneumoconiosis played a role in his death by causing his fatal bronchopneumonia. Claimant's Exhibits 3, 4 at 17-18. Dr. Perper determined in his report that the miner's pneumoconiosis and associated centrilobular emphysema contributed to the development of his bronchopneumonia, while Dr. Bush stated that the miner's leukemia caused his bronchopneumonia and that coal workers' pneumoconiosis had no effect on his death. Director's Exhibit 12. Dr. Tomashefski opined that the miner's coal workers' pneumoconiosis played no role in the clinical course of his leukemia or bronchopneumonia, and that the leukemia impaired his ability to fight infection and led to the development of terminal bronchopneumonia. Employer's Exhibit 3.

The administrative law judge found that the opinions of Drs. Schaaf and Begley were not well reasoned because they did not fully explain how the miner's pneumoconiosis predisposed him to infections such as bronchopneumonia. Decision and Order at 6. In contrast, the administrative law judge accorded greater weight to the opinion of Dr. Pietragallo, that pneumoconiosis played no role in the miner's death, than to the opinions of the pulmonologists, based on Dr. Pietragallo's experience as a hematologist who has treated patients with blood disorders, such as leukemia, for many years. *Id.* The administrative law judge discredited Dr. Rizkalla's opinion on the ground that he did not explain how the additional medical data that he reviewed supported a conclusion that was absent from his autopsy, *i.e.*, that pneumoconiosis hastened the

miner's death. *Id.* The administrative law judge noted the conflicting opinions of Drs. Perper and Bush and then stated that:

I give the most weight to the opinion of Dr. Tomashefski. Dr. Tomashefski is a pulmonary pathologist who teaches pulmonary pathology in medical school and has published widely on that subject. He clearly has more expertise on the issues in this case than the other pathologists none of whom are experts on pulmonary pathology. Dr. Tomashefski concluded that the miner's coal workers pneumoconiosis played no role in the clinical course of his leukemia or bronchopneumonia, and that the leukemia impaired his ability to fight infection and led to the development of terminal bronchopneumonia. Based on his superior expertise, I credit the opinion of Dr. Tomashefski.

Id. The administrative law judge concluded, therefore, that the medical opinions of record were insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death. *Id.*

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death at Section 718.205(c), because his findings are in conflict with the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Claimant specifically argues that the administrative law judge erred in finding that Drs. Schaaf and Begley did not sufficiently explain their opinions, in determining that Dr. Rizkalla's opinion was poorly reasoned and inconsistent with his autopsy report, and in according greater weight to the opinion of Dr. Tomashefski based on his credentials.

We reject claimant's arguments. The APA requires that an administrative law judge independently evaluate the evidence and set forth the rationale underlying his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge acted within his discretion in considering the credentials of the physicians and relying upon the opinions of the physicians that he found had more experience or superior qualifications. Decision and Order at 5-6; *see Director, v. Mangifest*, 826 F.2d 1318, 1326, 10 BLR 2-220, 2-238 (3d Cir. 1987); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18, 1-22 (1994); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). Because all of the physicians acknowledged that the miner was suffering from acute leukemia at the time of his death, the administrative law judge reasonably relied upon the opinion of Dr. Pietragallo, who is a specialist in hematology and oncology. *Id.* at 5. In addition, the administrative law judge acted within his discretion in giving "most weight" to Dr. Tomashefski's opinion based upon

his superior expertise, because he found that none of the other pathologists was an expert in *pulmonary* pathology. *Id.* at 3, 5, 6. In his deposition, Dr. Tomashefski stated that he is Board-certified in Anatomical and Clinical Pathology. Employer's Exhibit 7 at 9. Dr. Tomashefski further indicated that he was a Research Fellow in Pulmonary Pathology and is now a full professor at Case Western Reserve University and teaches pulmonary pathology. *Id.* at 10-12. Dr. Tomashefski also stated that he has taught this subject at the national level as part of the American College of Radiology's B reader course on the pathology of pneumoconiosis. *Id.* Consequently, even if the administrative law judge had found that the opinions of Drs. Schaff, Begley, and Rizkalla were well reasoned and well documented, this would not alter the administrative law judge's permissible determination that the opinions of Drs. Pietragallo and Tomashefski were entitled to greater weight based upon their superior expertise and experience.

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-128-9(1987). As the administrative law judge's findings are supported by substantial evidence, we affirm the administrative law judge's weighing of the medical opinions, and his finding that the miner's death was not caused, contributed to, or hastened by coal workers' pneumoconiosis pursuant to Section 718.205(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge