

BRB No. 00-0632 BLA

PATTY S. CARTER )  
(Widow of BILLY R. CARTER) )  
 )  
                    Claimant-Petitioner ) )  
 )  
                    v. )  
 )  
CONSOLIDATION / ITMANN COAL )  
COMPANY )  
 )  
                    Employer-Respondent ) ) DATE ISSUED:  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
                    Party-in-Interest ) ) DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor

Before: HALL, Chief Administrative Appeals Judge, McATEER, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge..

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (99-BLA-1014) of Administrative Law Judge Fletcher E. Campbell, Jr., 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).<sup>2</sup> The administrative law judge credited the miner with two

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<sup>1</sup>Claimant is Patty S. Carter, the surviving spouse of the miner, Billy R. Carter, who died on February 17, 1998. Director's Exhibit 12. The miner filed his initial claim for benefits on May 21, 1984, which was denied by the district director on October 19, 1984, due to the miner's failure to establish any element necessary for entitlement. Director's Exhibit 23. On April 17, 1997, the miner filed a second application for benefits which was denied by the district director on August 28, 1997, because although the miner established the presence of pneumoconiosis, he was unable to establish that his pneumoconiosis arose out of his coal mine employment, or a material change in condition. Director's Exhibit 24. Claimant filed an application for survivor's benefits on February 2, 1999, which is the only claim at issue herein. Director's Exhibit 1.

<sup>2</sup>The 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). For the convenience of the parties, all citations to the

years and eight months of coal mine employment and found that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203 (2000). However, the administrative law judge denied benefits finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2000).

In the instant appeal, claimant challenges the administrative law judge's weighing of the evidence at Section 718.205(c) (2000). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in the merits of this appeal.

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regulations herein refer to the amended regulations, as the disposition of this case is not affected by the regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which only employer and the Director have responded.<sup>3</sup> Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.<sup>4</sup> Therefore, the Board will proceed to adjudicate the merits of 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

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<sup>3</sup>Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

<sup>4</sup>In a brief dated March 19, 2001, employer asserted that the regulations at issue in the lawsuit "could" affect the outcome of this case. Employer's Brief at 4, 10. Employer contends that the provisions contained at 20 C.F.R. §§718.201(c), 718.204(a), may affect the disposition of this case, but has not specifically indicated how the application of the new regulations to the facts of the case herein could affect the outcome of the instant appeal. In a brief dated March 1, 2001, the Director asserted that the regulations at issue in the lawsuit do not affect the outcome of the present case.

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 into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor’s benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, that the miner’s death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304 (2000); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4<sup>th</sup> Cir. 1992) *cert. denied*, 113 S.Ct. 969 (1993);<sup>5</sup> *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). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner’s death establishes that pneumoconiosis was a substantially contributing cause of the

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<sup>5</sup>The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as the miner’s coal mine employment occurred in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 2.

miner's death pursuant to Section 718.205(c) (2000). *See Shuff, supra.*

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Claimant argues that the administrative law judge erred in his consideration of the evidence relevant to the cause of the miner's death by failing to credit the opinion of Dr. Green who stated that the miner's death was due to interstitial fibrosis and silicosis arising out of his coal dust exposure, with ischemic heart disease as a contributing factor, and by crediting the opinion of Dr. Bush who diagnosed minimal silicosis which did not contribute to the miner's death which he concluded was due to idiopathic pulmonary fibrosis.<sup>6</sup> Claimant's Exhibit 1; Employer's Exhibits 4, 13. We find no merit in claimant's contention. The Decision and Order indicates that the administrative law judge considered the relevant medical opinions of Drs. Naeye, Hansbarger, Caffrey, and Imbing, and rationally accorded little weight to these opinions as none of these physicians affirmatively diagnosed the presence of silicosis which was contrary to the administrative law judge's finding that the miner suffered from this disease, and undermined their opinions that the miner's death was unrelated to his coal dust exposure. Decision and Order at 9; Employer's Exhibits 1,3, 4, 9,

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<sup>6</sup>We affirm the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§ 718.201, 718.202, 718.203 (2000), as unchallenged on appeal.

10, 12; Director's Exhibit 13; *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4<sup>th</sup> Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4<sup>th</sup> Cir. 1994).<sup>7</sup> The administrative also rationally determined that the contradictory opinions of Dr. Green and Dr. Bush, were both reasoned medical reports, and that since these physicians also had similar qualifications as they are both board-certified pathologists, they were in equipoise.<sup>8</sup> Decision and Order at 8-9; Claimant's Exhibit 1; Employer's Exhibits 4, 6, 8, 11, 13-15; *Trumbo, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, the administrative law judge rationally found that claimant had failed to satisfy her affirmative burden of proof to establish that the miner's death was caused or hastened by coal workers' pneumoconiosis.<sup>9</sup> See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich*

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<sup>7</sup>We note that the administrative law judge did not discuss the findings of Dr. Tamayo, who signed the miner's death certificate. Director's Exhibit 12. However, since this physician attributed the miner's death solely to heart disease, this omission is harmless as it supports the administrative law judge's finding on this issue. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

<sup>8</sup>The administrative law judge also rationally accorded little weight to the opinions of Drs. Morgan, Castle and Zaldivar, since these physicians reviewed the miner's medical records, but did not review the autopsy slides, and diagnosed only minimal pneumoconiosis as an incidental finding which did not contribute to the miner's death, and contradicted the administrative law judge's finding that claimant established the existence of pneumoconiosis. Decision and Order at 6, 8-9; Employer's Exhibits 6, 8, 11, 14, 15.

<sup>9</sup>We also note that the Decision and Order does not reflect consideration of Dr. Ranavaya's opinion that pneumoconiosis contributed to the miner's death pursuant to Section 718.205(c) (2000). Director's Exhibit 14. However, we will not address this issue as it was not raised by claimant on appeal. See *White v. Douglas Van Dyke Coal Co.*, 6 BLR 1-905 (1984).

*Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-61 (4<sup>th</sup> Cir. 1992); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4<sup>th</sup> Cir. 1999); *Trumbo, supra*.

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 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Inasmuch as we find the administrative law judge's determination is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000), and the denial of survivor's benefits. *Shuff, supra; Trumbo, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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J. DAVITT McATEER  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge