

BRB No. 01-0895 BLA

RACHEL RANDOLPH)
(Survivor of WILLIAM G. RANDOLPH))
)
Claimant-Petitioner)
)
v.)
)
DRUMMOND COMPANY,)
INCORPORATED)
)
Employer-Respondent)
)
and)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)

DATE ISSUED:

DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James C. King (Franklin G. Williams), King, Harrison & Bryan, Jasper, Alabama, for claimant.

Carranza M. Pryor, Maynard, Cooper & Gale, P.C., Birmingham, Alabama, for employer.

Jennifer U. Toth (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (00-BLA-973) of

Administrative Law Judge Gerald M. Tierney with respect to a 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). The miner had thirty-eight years of coal mine employment before retiring in 1979. Director's Exhibit 3. He died on February 28, 1999, at age 83. The miner filed two lifetime claims for benefits (1983, 1993), which were denied. Director's Exhibits 29-46, 30-11. Claimant, the miner's surviving spouse, filed this survivor's claim with the Department of Labor in 1999, Director's Exhibit 1, which also was denied by the Office of Workers' Compensation Programs. Director's Exhibit 15. A hearing then was held before Administrative Law Judge Tierney.

Before the administrative law judge, claimant asserted that the evidence established that the miner's death was due to pneumoconiosis within the meaning of Section 718.205(c) because Dr. Datnow's autopsy report, sworn statement, and deposition demonstrated that pneumoconiosis was a substantially contributing cause of the miner's death. Claimant also asserted that the miner suffered from complicated pneumoconiosis, and therefore claimant was entitled to the irrebuttable presumption that death was due to pneumoconiosis pursuant to Section 718.304. 20 C.F.R. §§718.205(c), 718.304.¹ Employer submitted the reports of three physicians (two pathologists and one specialist in pulmonary medicine), who found that the miner died as a result of diffuse bronchopneumonia or aspiration pneumonia related to Alzheimer's disease. Director's Exhibits 13 (Perper); 26 (Fino); Employer's Exhibits 1, 2 (Caffrey).

The administrative law judge found claimant established the existence of pneumoconiosis caused by the miner's coal mine employment;² but failed to establish that

¹ The Department of Labor has amended the regulations implementing the Act. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² No party challenges the findings that claimant established the existence of pneumoconiosis, and that it was caused by the miner's coal mine employment; therefore they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the miner's death was due to pneumoconiosis within the meaning of 20 C.F.R. §718.205(c). Decision and Order at 3-6. Accordingly, he denied benefits.

On appeal claimant argues that the administrative law judge's reliance on the death certificate in finding that pneumoconiosis was not the cause of death is contrary to Eleventh Circuit precedent; and the administrative law judge erroneously favored the opinions of Drs. Caffrey, Fino, and Perper over those of autopsy prosector Datnow in finding that pneumoconiosis was not a substantially contributing cause or factor leading to the miner's death, did not hasten death, and death was not caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1), (c)(2), (c)(5). Claimant also contends that the administrative law judge erred in finding claimant not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Sections 718.205(c)(3) and 718.304.³ Employer argues in response that the factual findings regarding the cause of death are supported by substantial evidence, the administrative law judge's partial reliance on the miner's death certificate is not contrary to Eleventh Circuit precedent, and Dr. Datnow's opinion is not entitled to any deference because he demonstrated bias. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 establish that the miner suffered from pneumoconiosis, the pneumoconiosis arose out of coal mine employment, and 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 survivors' 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 mine'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 it. 20

³ Claimant also argues that she is entitled to the Section 718.303 rebuttable presumption of death due to pneumoconiosis. That presumption does not apply to claims such as this that were filed after 1982. *Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-19, n.3 (1989).

C.F.R. §718.205(c)(5) (2001); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001 (3d Cir. 1989).

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). An administrative law judge may give more weight to physicians' opinions that he finds are based on a more thorough review of the evidence of record and better reasoned. *See Hall v. Director, OWCP*, 8 BLR 1-193 (1985).

The administrative law judge's findings that claimant failed to establish death due to pneumoconiosis within the meaning of Sections 718.205(c)(1), (c)(2), and (c)(5), are rational and supported by substantial evidence. The administrative law judge found that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c)(1) because the miner's death certificate as well as hospital records listed respiratory acidosis due to aspiration pneumonia as the immediate cause of death; the autopsy report of Dr. Datnow identified bronchopneumonia as the immediate cause of death; and Drs. Perper, Caffrey and Fino -- who reviewed the autopsy report as well as the miner's medical records -- identified aspiration pneumonia or bronchopneumonia related to Alzheimer's disease as the primary cause of death. Decision and Order at 5.

Additionally, contrary to claimant's assertion, the administrative law judge's partial reliance upon the cause of death listed in the death certificate was reasonable and not contrary to *McClendon v. Drummond Coal Co.*, 861 F.2d 1512 (11th Cir. 1988). In that case, the court of appeals found a death certificate listing myocardial infarction as the cause of death did not rebut the Section 718.303 presumption that pneumoconiosis caused death where the autopsy physician reported findings of anthracosis, fibrosis, central lobular emphysema, and moderate hypertrophy of the pulmonary arteries; and the miner was treated for respiratory problems for several months before his death. In contrast to *McClendon*, in this case the death certificate was consistent with longstanding medical diagnoses, hospital records, and the opinions of Drs. Perper, Caffrey, and Fino. Claimant offers no other reason to reject the administrative law judge's finding with regard to Section 718.205(c)(1), and we find none. Therefore, the findings are supported by substantial evidence in the record and are affirmed. *O'Keefe, supra*.

Substantial evidence also supports the administrative law judge's finding that claimant did not prove that pneumoconiosis substantially contributed to or hastened death, or that death was due to complications of pneumoconiosis within the meaning of Section

718.205(c)(2) and (c)(5). 20 C.F.R. §718.205(c)(2), (c)(5). The administrative law judge found Dr. Datnow's opinion that pneumoconiosis was a substantially contributing cause of death, and that the miner's bronchopneumonia was a complication of his pneumoconiosis, outweighed by contrary evidence, including findings of Drs. Caffrey, Perper, and Fino that the miner's simple pneumoconiosis was mild and did not substantially contribute to the miner's death. The administrative law judge found it significant that, in addition to the autopsy report, Drs. Perper, Caffrey, and Fino reviewed the miner's extensive lifetime medical records, which Dr. Datnow did not. Decision and Order at 5-6.

Dr. Datnow diagnosed "advanced diffuse emphysema and anthracosis involving both right and left lungs," incidental right pleura mesothelioma, bilateral lower lobe bronchopneumonia, cor pulmonale secondary to the advanced emphysema, concentric left ventricular hypertrophy, atherosclerosis of the coronary arteries, a cardiac pacemaker in place, and Alzheimer's disease (clinical). Director's Exhibit 7. Dr. Datnow concluded that there "is advanced emphysema and anthracosis (black lung disease) with a complicating terminal broncho-pneumonia. . . . The heart exhibits the changes secondary to the emphysema and in addition there is enlargement of the left ventricle." *Id.* He later testified that the advanced emphysema and anthracosis were the cause of the miner's death. Director's Exhibit 24 at 8.

On the other hand, after reviewing the miner's extensive medical records as well as the autopsy report, Dr. Perper found evidence of simple coal workers' pneumoconiosis based upon the miner's employment history, x-rays read "by a number of radiologists as indicative of mild simple coal workers' pneumoconiosis. . . ," and the histological appearance of mild simple pneumoconiosis with associated centrilobular emphysema. Director's Exhibit 13. Dr. Perper noted that, although centrilobular emphysema has been causally associated with exposure to coal mine dust, the miner had two additional causes for his emphysema -- a history of heavy smoking and a history of bronchial asthma. Dr. Perper concluded that "[a]lthough the coal workers' pneumoconiosis and associated centrilobular emphysema might have been a contributory cause of death, there was no sufficient evidence to indicate that it was a *substantially contributory cause of death*. . . ." *Id.* (Emphasis in original). Dr. Perper based this opinion on the facts that the miner's "major and primarily operative cause of death was aspiration pneumonia, old and recent with the presence of multinucleated giant cells;" aspiration pneumonia is not a complication of coal workers' pneumoconiosis, and was most likely related to the miner's Alzheimer's disease; the contribution of coal worker's pneumoconiosis to the miner's emphysema was difficult to assess because of the confounding factors of heavy smoking history and bronchial asthma; there was a five year gap in the miner's medical records (from 1993-1998); and the abnormal pulmonary function and blood gas studies done in the last year of the miner's life could have been entirely related to the miner's recurrent episodes of aspiration pneumonia. *Id.*

Dr. Caffrey provided a report based upon his evaluation of the autopsy report and its supporting slides, as well as the miner's medical records. He found that the miner had a "very mild degree of simple coal workers' pneumoconiosis" that could not have caused his pulmonary disability. Employer's Exhibit 1. Because of the paucity of the lesions associated with simple coal workers' pneumoconiosis, Dr. Caffrey found that the miner's coal workers' pneumoconiosis could have been responsible for only a small fraction of his emphysema. He found death was due to diffuse bronchopneumonia associated with a history of aspiration pneumonia. *Id.* Dr. Caffrey concluded:

[T]he fact that Mr. Randolph was a coal worker, in my opinion, did not cause, contribute to, or hasten his death, nor did the fact that he had simple coal workers' pneumoconiosis cause him pulmonary disability when he was alive. The pulmonary disability which the patient had would have been due to his emphysema which was due to his years of smoking cigarettes. The degree of pulmonary disability which the patient had as noted by Dr. Jack Hasson when he examined the patient on 07-06-93, some fourteen years after he retired, was at most, mild, according to Dr. Hasson's report, and it must be noted that at that time the patient had organic brain syndrome and had previously had a pacemaker installed some seven years prior to that.

Employer's Exhibit 1.

Dr. Fino, who reviewed the autopsy report as well as the miner's medical records, found that simple coal workers' pneumoconiosis was present pathologically, but not clinically; there was no respiratory impairment arising out of the inhalation of coal mine dust; the miner was disabled due to his Alzheimer's disease and coal mine dust inhalation played no role in his overall disability; his death was due to Alzheimer's disease and pneumonia and not caused by, contributed to, or hastened by the inhalation of coal mine dust. Director's Exhibit 26.

Claimant argues that the administrative law judge erred in crediting the opinions of Drs. Perper, Caffrey, and Fino over those of prosecutor Datnow, asserting that Dr. Datnow's opinions "must" be given more weight. Claimant's Memorandum Brief at 5. It *may* be appropriate in a given case to give a prosecutor's opinion more weight than those of reviewing physicians, *Gruller v. Bethenergy*, 16 BLR 1-3 (1991). However, such an outcome is not required. *See Urgolites v. Bethenergy*, 17 BLR 1-20 (1992) (error to mechanistically give more weight to prosecutor's opinion). In light of the administrative law judge's carefully articulated rationale for finding the opinions of Drs. Perper, Caffrey, and Fino more credible

than that of Dr. Datnow's, the judge's determination is rational and supported by substantial evidence. Moreover, in light of the foregoing facts, the administrative law judge's decision to give more weight to the opinions of Drs. Perper, Caffrey, and Fino, while according less weight to Dr. Datnow's opinion is well within his wide discretion. *Mabe, supra; Sisak, supra*. Therefore, we affirm his finding that claimant failed to establish death due to pneumoconiosis within the meaning of Section 718.205(c)(2) and (c)(5).

Claimant's principal argument is that the administrative law judge's finding that claimant did not establish complicated pneumoconiosis and entitlement to the irrebuttable presumption of death due to pneumoconiosis under Section 718.304 is not supported by substantial evidence. We disagree. In determining not to give controlling weight to Dr. Datnow's diagnosis of complicated pneumoconiosis, the administrative law judge found that although Dr. Datnow used the term complicated pneumoconiosis to describe the miner's condition in his sworn statement and in a later deposition, Claimant's Exhibit 2, the doctor's findings did not meet the Section 718.304 criteria to establish the existence of complicated pneumoconiosis. In fact, the administrative law judge noted that in diagnosing complicated pneumoconiosis Dr. Datnow did not refer to or discuss any of the criteria set forth in the Section 718.304 regulation. Decision and Order at 4.

Rather, the administrative law judge credited the reports of Drs. Perper, Caffrey and Fino, none of whom concluded that the miner suffered from complicated pneumoconiosis. *Id.* The administrative law judge gave particular weight to Dr. Caffrey who disputed Dr. Datnow's findings. In reviewing the medical evidence of record, the administrative law judge found that Dr. Caffrey "explained why . . . neither the gross nor microscopic autopsy findings reported by Dr. Datnow nor Dr. Datnow's final diagnoses supported a diagnosis of complicated pneumoconiosis as set forth in the standards published in *The Archives of Pathology and Laboratory Medicine* in May 1979. . . . Dr. Caffrey was not convinced that Dr. Datnow was familiar with those standards." *Id.* The administrative law judge further found Dr. Caffrey's opinion to be more persuasive than Dr. Datnow's, and found that Drs. Perper and Fino supported Dr. Caffrey's opinion that the miner did not suffer from complicated pneumoconiosis. Thus, the administrative law judge concluded that the Section 718.304 presumption is not available to this case.

We find nothing in the administrative law judge's determination to accord more weight to the opinions of Drs. Perper, Caffrey, and Fino than to those of Dr. Datnow beyond the bounds of his discretion. *Mabe, supra; Sisak, supra*. Consequently, the administrative law judge's finding that claimant was not entitled to the irrebuttable presumption of complicated pneumoconiosis is rational and supported by substantial evidence. *O'Keefe, supra; see Lohr v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984); *Clites v. Jones & Laughlin Steel Corp.*, 2 BLR 1-1019 (1980); *Gaudio v. United States Steel Corp.*, 1 BLR

1-949 (1978)(in which Board has strictly construed requirements of Section 718.304).⁴

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

⁴ On appeal, claimant asserts that Dr. Datnow's diagnosis of "advanced emphysema and anthracosis (black lung disease) in both the right and left lungs" is synonymous with complicated pneumoconiosis. At one point in his decision, the administrative law judge states that Dr. Datnow in his autopsy report, did not identify the existence of complicated pneumoconiosis, *see* Decision and Order at 3, but then later recognizes that in his deposition subsequent to his autopsy report, Dr. Datnow indicates that although he did not use the term "complicated" in the autopsy report, the top five listed diagnoses in the autopsy report were indicative of complicated pneumoconiosis. *See* Decision and Order at 4. Ultimately, however, the administrative law judge concludes that Dr. Datnow's findings did not meet the Section 718.304 criteria for determining complicated pneumoconiosis and were outweighed by the other evidence of record. Moreover, we reject claimant's assertion that any diagnosis of complicated pneumoconiosis is sufficient to trigger entitlement to benefits. Rather, in order to invoke the presumption of Section 718.304, the fact finder must weigh the conflicting evidence. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge