

BRB No. 02-0598 BLA

MADELINE M. YASEK)
(Widow of JOHN FRANCIS YASEK))
)
Claimant-Petitioner)
)
v.)
)
BETHENERGY MINES, INC.)
)
Employer-Respondent)
)
)
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Madeline M. Yasek, Ellsworth, Pennsylvania, *pro se*.

Carl J. Smith, Jr. (Richman & Smith), Washington, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, the miner's widow and without the assistance of counsel, appeals the Decision and Order (2001-BLA-899) of Administrative Law Judge Daniel L. Leland 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).¹ The

¹Claimant is Madeline M. Yasek, the miner's widow. The miner, John Francis Yasek, filed a claim for benefits on April 30, 1980, which was finally denied on September 21, 1993. Director's Exhibit 25. The miner died on October 13, 1998, and claimant filed her survivor's

administrative law judge found, and the parties stipulated to, forty-one and one-half years of coal mine employment. Decision and Order at 2; Hearing Transcript at 5. The parties further did not contest that employer is the proper responsible operator or that the miner was suffering from pneumoconiosis arising out of the miner's coal mine employment. Director's Exhibit 26; Hearing Transcript at 5. Considering entitlement in this survivor's claim pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the only issue to be resolved was whether the miner's death was due to pneumoconiosis.²

Decision and Order at 2. The administrative law judge, after noting the proper standard and reviewing all of the relevant evidence of record, concluded that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 5. The administrative law judge further determined that the evidence of record was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 6. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to find that the miner's death was due to pneumoconiosis. Employer responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial 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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

claim, the subject of the instant appeal, on July 12, 2000. Director's Exhibits 1, 6, 7.

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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *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). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).³

³This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

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 is no reversible error contained therein. The administrative law judge properly considered the entirety of the medical opinion evidence of record and rationally found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The relevant evidence of record concerning the cause of death consists of five medical opinions and the death certificate.⁴ Dr. Cohen, who performed the autopsy, diagnosed chronic obstructive pulmonary disease and anthrasicosis of the lungs but stated that the probable cause of death was cardiac hypertrophy, coronary artery atherosclerosis and bilateral hydrothorax. Director's Exhibit 8. Dr. Naeye, who is a Board-certified pathologist, examined the evidence of record and opined that the miner had severe simple coal workers' pneumoconiosis which did not cause any disability or hasten his death. The physician concluded that the miner's death was due to sudden cardiac arrhythmia arising from chronic heart failure and that malignant melanoma and substantial brain damage also contributed to his death. Director's Exhibit 20. Dr. Green, who is a Board-certified pathologist, reviewed the evidence of record and opined that the miner had severe simple coal workers' pneumoconiosis and that there were confluent nodules measuring 1.7 centimeters in section 5 and 1.2 centimeters in section 7. Dr. Green further concluded that the miner died from cardiopulmonary disease secondary to cardiac amyloidosis, in combination with pneumoconiosis, which played a major contributing role in his death by placing an additional burden on the heart due to constriction of the small vessels in the lung and by adversely affecting oxygenation of the heart muscle through limitation of gas transfer. Claimant's Exhibits 1, 2. Dr. Gosai, the miner's treating physician, stated in a letter that based on his records as well as the records, sent to him, the miner had substantial pneumoconiosis which was a substantial contributing factor in his death. Director's Exhibit 11. Dr. Laman, who is a Board-certified pulmonologist, reviewed the evidence of record and concluded that, although there was evidence of pneumoconiosis present, it did not play a role in the miner's death. The physician opined that the miner died due to cardiac arrest as a result of his longstanding cardiac disease. Employer's Exhibits 1, 3. The death certificate listed the cause of death as congestive heart failure, cardiorespiratory arrest, atrial fibrillation and malignant melanoma. Director's Exhibit 7.

The administrative law judge determined that Dr. Gosai, the miner's treating physician, did not possess any special qualifications and further gave no rationale for his opinion that pneumoconiosis was a substantial contributing factor in the miner's death and therefore rationally discounted his opinion. *See Lafferty v. Cannelton Industries, Inc.*, 12

⁴The administrative law judge also properly noted that the record contains the treatment summaries from Mercy Hospital. Decision and Order at 2-3; Director's Exhibits 9, 10.

BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); Director's Exhibit 11; Decision and Order at 5. Although an administrative law judge may accord determinative weight to an opinion because it is offered by a treating physician, he is not required to do so as the weight that is to be given to the treating physician must also be based on the credibility of the physician's opinion in light of the reasoning and documentation contained therein. *See Mancina v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994).

In addressing the opinion of Dr. Green, that the miner's pneumoconiosis played a major contributing role in his death, the administrative law judge, in a proper exercise of his discretion, fully considered this opinion and rationally concluded that it was outweighed by the preponderance of the contrary evidence of record. *See Clark, supra; Dillon, supra*; Decision and Order at 5; Director's Exhibits 7, 8, 20; Employer's Exhibits 1, 2; Claimant's Exhibit 1. The administrative law judge, after noting that this is the only remaining opinion supportive of claimant's burden, rationally accorded less weight to the opinion of Dr. Green as the physician's conclusions are inconsistent with the evidence of record and based upon speculation that is not supported by the objective studies of record.⁵ *See Lafferty, supra*;

⁵ Dr. Green concluded:

The pneumoconiosis (which includes simple coal worker's pneumoconiosis, early PMF and emphysema) was, in my opinion, a major contributing factor to his death. Mr. Yasek had a weakened heart from his cardiac amyloidosis. The lung disease would cause an extra mechanical burden on the heart due to

Clark, supra; Dillon, supra; Perry, supra; Lucostic, supra; Hutchens, supra; Kuchwara, supra; Decision and Order at 5; Director's Exhibits 7, 8, 20; Employer's Exhibits 1, 2; Claimant's Exhibit 1. We affirm, therefore, the administrative law judge's finding that the preponderance of the evidence does not establish that pneumoconiosis caused, contributed to, or hastened the miner's death as it is supported by substantial evidence and is in accordance with law. See Lukosevich, supra; Perry, supra; Kuchwara, supra.

constriction of the small vessels in the lung secondary to the emphysema and the pneumoconiosis, and would also adversely influence the oxygenation of the heart muscle by limiting gas transfer. Although the pulmonary function tests were normal, these primarily measured lung mechanics and there were no gas transfer studies, particularly under conditions of stress. In my view, tests of this nature done in his later years would have revealed a functional abnormality. I base this opinion on the severity of his disease at autopsy. (Emphasis added).

With respect to 20 C.F.R. §718.304, the administrative law judge properly considered all of the relevant evidence of record and permissibly concluded that it was insufficient to establish the existence of complicated pneumoconiosis. The administrative law judge noted the conflicting opinions of Drs. Naeye and Green with respect to the existence of complicated pneumoconiosis as well as the x-ray and CT scan evidence of record. Decision and Order at 6; Director's Exhibits 20, 25; Employer's Exhibits 3-5; Claimant's Exhibits 1, 2. The administrative law judge found that this evidence was insufficient to establish that the miner suffered from complicated pneumoconiosis. Decision and Order at 6. Substantial evidence supports this conclusion. There is no x-ray evidence of record indicating an opacity greater than one centimeter in diameter and the CT scan did not show large opacities. Director's Exhibit 25; Employer's Exhibits 3, 5. Further, Dr. Green's statement that there were "confluent nodules measuring 1.7 centimeters in section 5 and 1.2 centimeters in section 7" and the physician's opinion that the miner had "severe" pneumoconiosis, without equating these findings with the size of x-ray opacities, are insufficient to trigger the presumption.⁶ Pursuant to 20 C.F.R. §718.304(a); Claimant's Exhibit 1. *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984); *see also Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR 2- (4th Cir. 1999); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999). Additionally, no physician characterized the autopsy as revealing "massive lesions" and there is no other evidence of complicated pneumoconiosis in the record. *See* 20 C.F.R. §718.304(b), (c); Director's Exhibits 7, 8, 11, 20, 25; Employer's Exhibits 1, 3-5; Claimant's Exhibits 1, 2. Thus, we affirm the administrative law judge's finding that the medical evidence is insufficient to establish entitlement to the presumption at Section 718.304 as it is supported by substantial evidence. *See Smith v. Island Creek Coal Co.*, 7 BLR 1-734 (1985); *Lohr, supra*.

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 Trumbo, supra; Haduck, supra; Boyd, supra; Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found the evidence indicating that the miner's death was due to pneumoconiosis was outweighed by the contrary evidence of record, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo, supra; Haduck, supra; Boyd, 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 (1989), 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). Furthermore, since the determination of whether the miner's death is due to

⁶Dr. Green specifically acknowledged that these nodules would not be seen on x-ray. Claimant's Exhibit 2.

pneumoconiosis is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's findings and therefore could not satisfy claimant's burden of proof on this issue. *See* 20 C.F.R. §718.205; *Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Anderson, supra*; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985). Consequently, we affirm the administrative law judge's findings that the evidence of record is insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 or that the miner's death was due to pneumoconiosis pursuant to Section 718.205 as they are supported by substantial evidence and are in accordance with law. *See Lukosevicz, supra*; *Neeley, supra*; *Trumbo, supra*.

Because claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Lukosevicz, supra*; *Trumbo, supra*; *Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Accordingly, the administrative law judge's Decision and Order denying benefits in this survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge