

BRB No. 05-0498 BLA

ANNA BAXTER	)	
(Widow of ROBERT BAXTER)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 02/28/2006
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
PEABODY INVESTMENTS	)	
INCORPORATED	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Greenville, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-0029) of Administrative Law Judge Daniel J. Roketenetz awarding 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). The administrative law judge accepted the

parties' stipulations that the miner had eighteen years of coal mine employment,<sup>1</sup> that employer was the responsible operator, and that the miner suffered from pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §718.202(a); 718.203(b). Considering entitlement in this survivor's claim<sup>2</sup> pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 5-11. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the existence of legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) arising out of coal mine employment was established based upon employer's stipulation that the miner had pneumoconiosis. Employer argues that the administrative law judge therefore failed to consider all relevant evidence as to the etiology of the miner's COPD, and provided invalid reasons for discounting employer's experts' opinions that the miner's death was unrelated to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer has filed a reply brief reiterating its contentions. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not file a substantive response in this appeal.<sup>3</sup>

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 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).

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<sup>1</sup> The record indicates that the miner's last coal mine employment occurred in Kentucky. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>2</sup> Claimant is Anna Baxter, the miner's widow. The miner, Robert Baxter, filed a claim for benefits on November 9, 1993, which was awarded on December 4, 1997 based on a finding that the miner proved that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. The miner died on November 27, 2001 and claimant filed her survivor's claim on January 14, 2002. Director's Exhibits 3, 11. The district director awarded survivor's benefits and employer requested a hearing. Director's Exhibits 25, 26.

<sup>3</sup> The administrative law judge's length of coal mine employment and responsible operator determinations are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 (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), (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); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Initially, we reject employer's contention that in considering the medical opinion evidence, the administrative law judge did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).<sup>4</sup> Contrary to employer's contention, the administrative law judge fully discussed the relevant evidence and adequately explained the reasons for his findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 5-11.

Pursuant to Section 718.202(a), employer contends that the administrative law judge erred in finding that the existence of both clinical and legal pneumoconiosis were established based on employer's stipulation that the miner had pneumoconiosis arising out of coal mine employment. Employer argues that it stipulated to the existence of clinical pneumoconiosis but not legal pneumoconiosis, and asserts that the administrative law judge mischaracterized employer's stipulation.<sup>5</sup> We disagree.

The record supports the administrative law judge's interpretation of employer's stipulation. At the hearing, employer's counsel informed the administrative law judge that "[B]ased upon the evidence of this claimant and in the previous claim filed by Mr. Baxter . . . I will withdraw contest[at]ion of Issue No. 5, involving Mr. Baxter having

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<sup>4</sup> The Administrative Procedure Act requires that all decisions include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

<sup>5</sup> The regulations specify that "'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses," while "'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequela arising out of coal mine employment." 20 C.F.R. §718.201(a)(1),(2).

contracted pneumoconiosis.” Hearing Tr. at 9. Employer’s counsel also stipulated that the miner’s pneumoconiosis arose out of coal mine employment. *Id.* The “evidence of this claimant,” to which employer’s counsel referred when making the stipulation, consisted of medical opinions from Drs. Baker and Hardison diagnosing the miner with both clinical pneumoconiosis and COPD due to both smoking and coal dust exposure.<sup>6</sup> Director’s Exhibit 14; Claimant’s Exhibit 1. In “the previous claim filed by Mr. Baxter,” also referenced by employer’s counsel as a basis for the stipulation, the miner established both the existence of clinical and legal pneumoconiosis based on the medical opinion evidence under Section 718.202(a)(4). Director’s Exhibit 1. Thus, the administrative law judge accurately characterized employer’s stipulation as including legal pneumoconiosis. These facts distinguish this case from *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999), cited by employer, where the Fourth Circuit court held that the employer stipulated to clinical pneumoconiosis only, because that was the only type of pneumoconiosis diagnosed in the record. That is not the situation here.

Therefore, the administrative law judge did not err in finding that the existence of legal pneumoconiosis was established based on employer’s stipulation. *See Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996). Stipulations of fact that are freely and fairly entered into are binding. *Fairway Constr. Co. v. Allstate Modernization, Inc.*, 495 F.2d 1077, 1079 (6th Cir. 1974); *Nippes v. Florence Mining Co.*, 12 BLR 1-108, 1-109 (1985). Consequently, we affirm the administrative law judge’s finding that the existence of both clinical and legal pneumoconiosis were established pursuant to Section 718.202(a). Decision and Order at 2 n.3, 11.

Pursuant to Section 718.205(c), the administrative law judge found that Dr. Baker’s opinion, that the miner died due to his COPD which resulted from both cigarette smoking and coal dust exposure, was entitled to the greatest weight. Decision and Order at 8, 11; Claimant’s Exhibit 1. The administrative law judge further found that the opinion of Dr. Hardison, that the miner’s death was due to pneumoconiosis, and the contrary opinions of Drs. Fino and Branscomb, were entitled to less probative weight on the cause of the miner’s death. Decision and Order at 8-11; Director’s Exhibits 11, 14; Employer’s Exhibits 1-3.

The administrative law judge acted within his discretion in according little weight to Dr. Fino’s opinion that the miner’s death was related solely to his smoking history, because he found that it was not supported by adequate data or sound analysis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Decision and Order at 8-9; Employer’s Exhibit 2. Contrary to employer’s assertion, the administrative

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<sup>6</sup> No autopsy evidence was submitted.

law judge did not discount Dr. Fino's opinion merely because Dr. Fino failed to note the title of or attach a citation to a 1994 medical research article by Dr. Leigh concerning coal dust exposure and emphysema. Rather, the administrative law judge accorded little weight to Dr. Fino's opinion because Dr. Fino failed to specifically discuss how the miner's test results in this case, "were supportive or unsupportive of Dr. Leigh's findings." Decision and Order at 9; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

The administrative law judge rationally accorded little weight to the opinion of Dr. Branscomb because he did not believe that the miner had either clinical or legal pneumoconiosis. Decision and Order at 10-11; Employer's Exhibit 3. Contrary to employer's contention, an administrative law judge may accord less weight to an opinion regarding the cause of death which is based on a faulty underlying premise that the miner did not have pneumoconiosis. *See Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *see also Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004)(Roth, J., dissenting); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

The administrative law judge permissibly found that Dr. Baker's opinion that the cause of the miner's death was obstructive airways disease due in part to coal dust exposure was well-reasoned and documented. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 8-11; Claimant's Exhibit 1. Employer's argument that Dr. Baker's opinion was not well-reasoned or documented essentially asks us to evaluate the credibility of Dr. Baker's opinion, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore reject employer's allegation of error and affirm the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge