

BRB No. 03-0819 BLA

ELIZABETH E. MILLER)
(Widow of WILLIAM J. MILLER))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 07/14/2004
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Daniel A. Miscavige, Hazleton, Pennsylvania, for claimant.

Barry H. Joyner (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2002-BLA-5369) of
Administrative Law Judge Janice K. Bullard 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

¹ Claimant, Elizabeth E. Miller, is the widow of the miner, William J. Miller. Mr.
Miller's first lifetime application for benefits, filed on August 23, 1973, was denied on
January 14, 1980. Director's Exhibit 1. The miner's second lifetime application for
benefits, filed on March 24, 1983, was approved on October 24, 1983. Director's Exhibit
2. Mr. Miller was receiving benefits at the time of his death on October 8, 2001.
Director's Exhibits 2, 4; Hearing Transcript at 10.

amended, 30 U.S.C. §901 *et seq.* (the Act).² Claimant's application for benefits filed on October 15, 2001 was denied by the district director and claimant requested a hearing.³ Director's Exhibits 12, 13. The administrative law judge accepted the concession of the Director, Office of Worker's Compensation Programs, (the Director) that the existence of pneumoconiosis arising out of coal mine employment was established. However, the administrative law judge found that claimant had not established that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.⁴

On appeal, claimant generally contends that the opinion of the miner's treating physician establishes that pneumoconiosis was a substantially contributing factor leading to the miner's death and the administrative law judge erred in denying benefits. The Director responds, urging affirmance of the administrative law judge's Decision and Order denying benefits.⁵

² 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ At the January 7, 2003 hearing, claimant's counsel requested the opportunity to submit a medical report from Dr. Dilliswar Sahoo, received by claimant's counsel on January 6, 2003, just one day prior to the hearing. Hearing Transcript at 4-5; *see* 20 C.F.R. §725.456(b)(1), (2). The Director, Office of Workers' Compensation Programs, (the Director) did not object to the late submission, but requested thirty days for the submission of rebuttal evidence, if necessary. Hearing Transcript at 5. The administrative law judge granted claimant's request, as well as the Director's request for a thirty day rebuttal period. No rebuttal evidence was ever submitted by the Director, however. Hearing Transcript at 5.

⁴ The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

⁵ The administrative law judge's findings that the record contains no evidence of large opacities or massive lesions, and that the irrebuttable presumption of totally disabling pneumoconiosis based on a showing of complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is inapplicable to this claim is affirmed as unchallenged on 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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated 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 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, 1-87-88 (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 or that death was caused by complications of pneumoconiosis. 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); *Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989). Failure to establish any one of these elements precludes entitlement. *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).

The record reflects that on October 7, 2001, the miner reported to the emergency room of St. Luke's Miners Memorial Hospital complaining of shortness of breath. He was evaluated and found to have an acute myocardial infarction and congestive heart failure and was admitted to the intensive care unit. Director's Exhibit 6. The miner did not respond favorably to treatment and on October 8, 2001, he died. Director's Exhibit 6. No autopsy was performed. Deputy Coroner Edward C. Smith completed the miner's death certificate and listed the immediate causes of death as "subendocardial Myocardial Infarction," due to "Renal Failure," due to "Respiratory Failure," due to Congestive Heart Failure." "Black Lung" was listed as a significant condition contributing to death but not resulting in the underlying cause of death. Director's Exhibit 4.

In addition to treatment records documenting the miner's hospital admission on January 15, March 26, June 25, July 5, and October 7, 2001, claimant submitted a letter from Dr. Todd R. Banning, D.O., who was the miner's treating physician. Director's

See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Exhibit 9.⁶ Dr. Banning stated that he would not address the miner's past medical history, but would focus instead on the sole issue of whether the miner's death was caused by or related to his pneumoconiosis. Director's Exhibit 9. Dr. Banning acknowledged that he was not present and did not treat the miner during his final hospitalization, but stated:

Of importance, however, is his admission on 10/8/01 to St. Luke's Miners Hospital in Coaldale, PA. In short, after reviewing his ECG (which is chronic Left bundle Branch Block) elevated Cardiac enzymes, and clinical course, I also doubt there is little argument that he suffered from an acute non-transmural Myocardial infarction. However, what is interesting to me, and begs attention, is that his X-ray failed to reveal any congestive findings, which may indicate left-sided heart failure, though he required, for acute Hypotension, fluid resuscitation and dopamine presser support. Without left-sided congestive findings on the X-ray and the lack of demonstrable significant Hypoxemia on Blood gas (as noted by examiner Michael Sherman) it is difficult to argue that his acute Myocardial Infarction was [sic] subsequent left sided heart failure was the only factor contributing to Mr. Miller's death.

While I did not immediately care for him, I strongly felt that his Cor Pulmonale secondary to his Coal Workers' Pneumoconiosis directly contributed to his demise by way of right-sided heart failure, with subsequent Hypotension and Shock. Clearly his underlying pulmonary disease with long-standing Cor Pulmonale secondary to such at the very least, expedited his demise.

In my medical opinion after reviewing the records his number one cause of death I would not argue should be acute non-transmural Myocardial Infarction, number two cause of death should read acute on-chronic right heart failure; secondary to Cor Pulmonale, number three Coal Workers' Pneumoconiosis, #4 acute on-chronic Renal failure."

Director's Exhibit 9.

Claimant also offered a letter from Dr. Dilliswar Sahoo, a physician whose qualifications are not in the record. Claimant's Exhibit 1. He noted that the miner

⁶ The administrative law judge noted that while Dr. Banning's curriculum vitae was not in the record, his letterhead indicates that his practice specializes in cardiology. Decision and Order at 8; Director's Exhibit 9.

had been under the care of his colleague, Dr. Banning, but that he himself had cared for the miner from October 7 to October 8, 2001, the date of the miner's demise, during Dr. Banning's absence. Claimant's Exhibit 1. Dr. Sahoo stated:

Mr. Miller had Acute MI, Subendocardial, Mr. Miller was known to [sic] have coal worker's pneumoconiosis. In my opinion, Mr. Miller's black lung disease (coal workers' pneumoconiosis) had significantly contributed to his death on 10/8/01.

Claimant's Exhibit 1.

The Director responded with a January 10, 2001 report from Dr. Michael S. Sherman, who is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibits 7, 8. Dr. Sherman reviewed the medical evidence of record and concluded that there was no evidence that the miner's death was caused by pneumoconiosis. He noted that records indicated that the miner's death was due to myocardial infarction, and that his history and presentation, and subsequent drop in blood pressure in association with his cardiogram changes was consistent with this diagnosis. Director's Exhibit 7. Dr. Sherman stated:

Mr. Miller had significant impairment from his pneumoconiosis with exacerbations of his COPD and was receiving oxygen therapy for his pneumoconiosis. The history given is consistent with an acute myocardial infarction and subsequent increasing shortness of breath due to cardiac failure. The PO₂ on admission was 77.5, suggesting that hypoxemia did not contribute to the etiology of the myocardial infarction. He was not described as having a COPD flare when he was admitted. I would therefore conclude that death was caused by Mr. Miller's underlying coronary artery disease, and that pneumoconiosis was not a substantially contributing cause or factor leading to his death, not [sic] was death caused by complications of pneumoconiosis. Pneumoconiosis does not appear to have hastened Mr. Miller's death as there is no evidence supplied to suggest that pneumoconiosis had any effect on Mr. Miller's cardiac disease.

Director's Exhibit 7.

After thoroughly discussing the medical reports in light of the physicians' qualifications and reasoning, Decision and Order at 6-8, the administrative law judge found that Dr. Sherman's opinion was more persuasive than the opinions of Drs. Banning and Sahoo. Decision and Order at 6-8. Consequently, the administrative law judge concluded that claimant had not met her burden of establishing that the miner's death was due to or hastened by pneumoconiosis.

Claimant asserts that the administrative law judge erred in not according the opinions of Dr. Banning, the miner's treating physician, controlling weight inasmuch as it met all the factors set forth at Section 718.104(d)(1)-(4). Claimant's Brief at 6-9. An administrative law judge may accord additional weight to a treating physician's opinion, but there is no *per se* rule that a treating physician's opinion must always be accorded the greatest weight. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002) *citing Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)(administrative law judge must consider quality of a physician's reasoning); *Lango*, 104 F.3d 577, 21 BLR 2-20 (administrative law judge may permissibly require treating physician to provide more than a conclusory statement). In assessing the medical reports, an administrative law judge is not bound to accept the opinion of any medical expert, but may weigh the medical evidence and draw his or her own inferences. *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

Here, the administrative law judge properly considered Dr. Banning's status as the miner's treating physician pursuant to the factors set forth at 20 C.F.R. §718.104(d), including the nature and duration of the patient doctor relationship, and the frequency and extent of treatment. Decision and Order at 7. The administrative law judge permissibly found, however, that although claimant testified that the miner had been treated by Dr. Banning since the 1970's,⁷ as Dr. Banning had not treated the miner during his final hospitalization and as his treatment records were not in the record, the evidence in the record did not fulfill the factors set forth in Section 718.104(d) which warrant the granting of controlling weight to the opinion of a treating physician.⁸ This was permissible. Decision and Order at 7; 20 C.F.R. §178.104(d); *see Lango*, 104 F.3d at 577, 21 BLR at 2-20-21. In addition, the administrative law judge permissibly accorded less weight to Dr. Banning's opinion as unreasoned because, in concluding that cor pulmonale secondary to coal worker's pneumoconiosis directly contributed to the miner's death, the physician did not address why previous flare-ups of the miner's breathing problems had been successfully treated during prior hospitalizations, yet similar treatment proved unsuccessful during the miner's final hospitalization. Decision and Order at 8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In addition, the administrative law judge permissibly found that Dr. Banning did not

⁷ Claimant testified that the miner began treatment with Dr. Richard Banning in the 1970's, and started treatment with his son and colleague, Dr. Todd Banning, approximately five years prior to the miner's death. Hearing Transcript at 10. Claimant further testified that the miner visited his physician approximately once a month, sometimes more. Hearing Transcript at 11.

⁸ As further noted by the administrative law judge, Dr. Banning did not discuss the miner's medical history in his March 13, 2002 report. Decision and Order at 5; Director's Exhibit 9.

sufficiently explain his conclusion that it was “significant” that the miner’s “X-ray failed to reveal any congestive findings, which might indicate left sided heart failure,” in light of the fact that an x-ray taken during the miner’s final hospitalization actually revealed “increasing opacification in the left base secondary to pneumonitis and/or effusion, fibrobullous emphysema.” Decision and Order at 8; Director’s Exhibit 5; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983).

Similarly, the administrative law judge permissibly declined to accord controlling weight to the opinion of Dr. Sahoo, who treated the miner during his final hospitalization, because Dr. Sahoo did not address the extent and duration of his treatment of the miner. Decision and Order at 7; 20 C.F.R. §718.104(d); *see Lango*, 104 F.3d at 577, 21 BLR at 2-20-21; *Berta*, 16 BLR at 1-70 (1992). In addition, the administrative law judge permissibly found Dr. Sahoo’s opinion to be of little probative value because it was conclusory, unexplained and unsupported by any medical documentation. Decision and Order at 7; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985).

Finally, the administrative law judge permissibly declined to credit the opinion of Edward C. Smith, the deputy coroner who signed the miner’s death certificate, because his qualifications were not contained in the record. Decision and Order at 6; *Lango*, 104 F.3d at 578; 21 BLR at 2-21; *see Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

In contrast, the administrative law judge properly credited the opinion of Dr. Sherman, that the miner’s death was not hastened by pneumoconiosis, as “the best reasoned and most consistent with the objective record” because the doctor fully explained how the medical evidence of the miner’s treatment during his final hospitalization supported the doctor’s opinion that the miner’s death was caused by his underlying coronary disease. Decision and Order at 7; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 n.4 (1993). In addition, the administrative law judge permissibly credited the opinion of Dr. Sherman based on his superior credentials, *i.e.*, he was a Board-certified pulmonologist while the credentials of Dr. Banning are not in the record. Decision and Order at 7; *Scott*, 14 BLR 1-37 (1990)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988).

Substantial evidence supports the administrative law judge’s determination that Dr. Sherman’s opinion was entitled to substantial weight because it was “the best reasoned and most consistent with the objective record,” whereas, by comparison, Drs. Banning and Sahoo did not sufficiently explain or document their opinions, despite their treatment of the miner. Decision and Order at 7-8; *see Trumbo*, 17 BLR at 1-87-88. Therefore, we reject claimant’s contention that the administrative law judge erred in finding that the opinion of Dr. Banning, the miner’s treating physician and the other

evidence of record did not establish that pneumoconiosis contributed to the miner's death.

We conclude that substantial evidence supports the administrative law judge's findings pursuant to Section 718.205(c). Because claimant did not establish that the miner's death was due to or hastened by pneumoconiosis pursuant to Section 718.205(c), *see Lango*, 104 F.3d at 576, 21 BLR at 2-18; *Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-108, an essential element of entitlement in a survivor's claim, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge