

BRB No. 08-0176 BLA

Y.D.)	
(Widow of T.D.))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 11/26/2008
DIAMOND MAY COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2006-BLA-5624) of Administrative Law Judge Joseph E. Kane 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). Claimant is the widow of the miner, who died on February 20, 2005. Claimant filed her application for survivor’s benefits on June 7, 2005. Employer’s Exhibit 2. The administrative law judge determined that the evidence was sufficient to establish the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203. The administrative law judge further found that the miner’s death was hastened

by legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, asserting that the administrative law judge erred in weighing the conflicting medical opinion evidence as to the existence of legal pneumoconiosis at Section 718.202(a)(4). Specifically, employer contends that the administrative law judge improperly shifted the burden of proof to employer to disprove that coal dust exposure was a causative factor in the miner's chronic obstructive pulmonary disease (COPD) or emphysema. Employer maintains that the administrative law judge erred in discrediting Dr. Rosenberg's opinion as to the cause of the miner's emphysema, that he erred in finding Dr. Baker's opinion to be sufficient to establish that the miner suffered from legal pneumoconiosis, and that he erred in his consideration of Dr. Oesterling's opinion at Section 718.202(a)(4). Employer further contends that the administrative law judge erred in finding that the miner's death was hastened by legal pneumoconiosis at Section 718.205(c). Claimant's responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board. Employer has also filed a reply brief, reiterating its arguments that the administrative law judge erred in his consideration of the medical opinions.

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.¹ 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, 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. §§718.3, 718.202, 718.203, 718.205(a); *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 pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).²

Employer contends that the administrative law judge erred in finding that the miner's death was hastened by legal pneumoconiosis.³ A brief summary of the medical evidence is required. As noted by the administrative law judge, treatment records pertaining to the miner's final hospitalization indicate that the miner underwent coronary bypass surgery, after which he developed a severe respiratory infection and wound dehiscence that led to his death. The death certificate lists the immediate cause of the miner's death as respiratory failure, with ischemic heart disease listed as a significant condition contributing to death. Director's Exhibit 8. Dr. Ross performed the autopsy and diagnosed "chronic obstructive pulmonary disease (pulmonary emphysema and fibrosis, with diffuse anthracosis)." Director's Exhibit 10. Dr. Ross, however, did not offer an opinion as to the cause of the miner's death. *Id.*

Dr. Oesterling reviewed the miner's autopsy slides and opined that the miner died as a result of complications from heart disease and COPD in the form of severe panlobular emphysema due to smoking. Employer's Exhibit 4. Although Dr. Oesterling found pathological evidence of simple coal workers' pneumoconiosis, he stated that the pneumoconiosis was too mild to have caused or hastened the miner's death. *Id.*

Dr. Prater, the miner's treating physician, prepared a report in which he indicated that the miner had pneumoconiosis and COPD due to coal dust exposure. Director's Exhibit 22. Dr. Prater opined that the miner's death was hastened by pneumoconiosis, noting that "[p]neumoconiosis causes [a] restrictive lung defect placing more strain on the heart and impairs lung from cleaning bacteria, resulting in frequent infection (pneumonia), bronchospasm, [and] hypoxia, which can accelerate heart disease." *Id.*

² The administrative law judge determined that while the miner suffered from clinical pneumoconiosis, the evidence was insufficient to establish that it caused, contributed to, or hastened the miner's death. We affirm the administrative law judge's findings with regard to clinical pneumoconiosis as they are unchallenged by the parties in this appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). For the purposes of the regulation, a disease "arising out of coal mine employment" means a disease that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Dr. Baker prepared a report in which he opined that the miner's death was due to heart disease but was also complicated by COPD. Director's Exhibit 22. Dr. Baker indicated that, based on his physical examination of the miner on October 14, 2002, the miner suffered from simple coal workers' pneumoconiosis by x-ray and a moderately severe obstructive defect, as demonstrated by a reduction of the miner's FEV1 on pulmonary function testing to 42 percent of predicted. *Id.* Dr. Baker stated that: "at the time, I thought he had [c]oal [w]orkers [p]neumoconiosis, Category 1/0, and a moderately severe obstructive defect that was primarily due to his cigarette smoking history [of 45 years] but also, in part, due to his coal dust exposure [25 years] as well." *Id.* Dr. Baker reviewed the miner's medical records, including those covering his final hospitalization, and opined that "the miner's death was hastened by pneumoconiosis and his associated lung condition." *Id.* Dr. Baker opined that smoking was "probably the predominant cause of [the miner's] COPD" but that "his 22 years of coal dust exposure has likewise contributed to some extent . . . [t]his would be legal pneumoconiosis." Dr. Baker concluded that the miner died a pulmonary death, which hastened by coal dust exposure.⁴ *Id.*

Lastly, Dr. Rosenberg reviewed the miner's medical records and opined that the miner died as a result of complications related to his heart disease. Employer's Exhibit 1. Dr. Rosenberg concluded that the miner did not suffer from either clinical or legal pneumoconiosis. Dr. Rosenberg noted that, from a functional perspective, the miner had severe COPD characterized by a marked decrease in the FEV1 and FEV1/FVC values on pulmonary function testing. Employer's Exhibit 1. Dr. Rosenberg diagnosed COPD in the form of panlobular emphysema, as confirmed by the autopsy findings of Dr. Oesterling. Employer's Exhibit 2. In addressing the etiology of the miner's COPD/emphysema, Dr. Rosenberg cited to several medical articles and opined that the

⁴ In a supplemental questionnaire, Dr. Baker was asked, "If coal mining [and] some other factor have caused the chronic lung disease . . . how do you partition the effects of each? Dr. Baker responded:

It is difficult to partition the effects of cigarette smoking and coal dust and, in fact, they may be synergistic or additive in the formation of the chronic lung disease. He had approximately 45-pack years of smoking and 22 years of dust exposure. The predominate cause would be his cigarette smoking but there is yet a significant contribution from the coal dust exposure as well, and perhaps maybe 20 to 40 [percent] of his condition may have been due to coal dust exposure.

miner's reduced FEV1 was characteristic of smoking and not coal dust exposure.⁵ *Id.* Dr. Rosenberg opined that the miner died as a result of his coronary artery disease and wound dehiscence. *Id.* He further opined that the miner's death was neither caused nor hastened by coal dust exposure. *Id.*

Because the physicians were in agreement that the miner had COPD or emphysema, the administrative law judge first considered whether that respiratory condition was caused or aggravated by coal dust exposure pursuant to 20 C.F.R. 718.201 and whether claimant was able to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). The administrative law judge credited Dr. Baker's opinion, that the miner's COPD was due in part to coal dust exposure, over the contrary opinions of Drs. Oesterling and Rosenberg, that the miner's COPD/emphysema was caused solely by smoking.⁶

Employer challenges the administrative law judge's findings pursuant to Section 718.202(a)(4), asserting that the administrative law judge erred in rejecting Dr. Rosenberg's opinion as to the etiology of the miner's emphysema. Although Dr. Rosenberg opined that the miner's emphysema was unrelated to coal dust exposure, the administrative law judge concluded that the rationale underlying Dr. Rosenberg's causation finding was flawed and that his opinion was entitled to little weight. The administrative law judge explained:

In relying on Claimant's decreased FEV₁/FVC, Dr. Rosenberg cited an article for the proposition that "generally the FEV₁% does not fall to any clinically significant extent" as a result of coal mine dust exposure, and then argued that the miner's decreased FEV₁% "represents the pattern of obstruction generally seen with cigarette smoking, and not coal mine dust

⁵ Dr. Rosenberg noted that chronic obstructive pulmonary disease (COPD) "is defined functionally as a decrease in FEV1/FVC or FEV1%." Employer's Exhibit 1. Dr. Rosenberg further noted that "[w]hen the relationship of this respiratory parameter to coal mine dust exposure has been investigated . . . it has been determined that generally the FEV1% does not fall to any clinically significant extent[.]" while "with smoking-related COPD, this parameter is characteristically reduced." *Id.*

⁶ The administrative law judge found Dr. Prater's diagnosis of COPD due to coal dust exposure to be insufficiently reasoned because Dr. Prater did not explain the basis for his opinion. Decision and Order at 20. We affirm, as unchallenged, the administrative law judge's finding with respect to Dr. Prater's opinion at 20 C.F.R. §718.202(a)(4). *Skrack*, 6 BLR at 1-711.

exposure.” . . . Dr. Rosenberg’s reasoning is inconsistent with the Act, which allows a claimant to establish disability solely on the basis of a qualifying FEV₁ accompanied by an FEV₁/FVC value equal to or less than 55%. 20 C.F.R. § 718.204(b)(2)(i)(C).

Decision and Order at 17; Employer’s Exhibit 1.

Employer maintains that the administrative law judge “confuses a finding of disability with disability causation” and that the administrative law judge erred by failing to address the entirety of Dr. Rosenberg’s opinion, that the miner had a “classic pattern” of cigarette-induced obstruction that consists of a markedly decreased FEV₁/FVC ratio, combined with a markedly reduced diffusing capacity and air trapping. Employer’s Brief in Support of Petition for Review at 15-16; Employer’s Exhibit 3. These arguments are without merit.

Contrary to employer’s contention, the administrative law judge rationally concluded that “while pulmonary function study results do not establish the existence of legal pneumoconiosis, it would not have made sense for the Department to permit miners to use a decreased FEV₁/FVC to establish total disability if, as Dr. Rosenberg believes, pneumoconiosis does not cause a decreased FEV₁/FVC.” Decision and Order at 17. Furthermore, as noted by the administrative law judge, “in comments to [20 C.F.R.]§718.201, the Department cites with approval studies that report that coal dust exposure does result in decreased FEV₁/FVC values.” Decision and Order at 17; see 65 Fed. Reg. 79940, 79943 (Dec. 20, 2000). Because the administrative law judge found that Dr. Rosenberg relied on a faulty premise that “contradicts legislative fact,” we affirm the administrative law judge’s decision to assign Dr. Rosenberg’s opinion less weight. Decision and Order at 17; see *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001) (It is proper to discount a doctor’s opinion based on medical science which the Department of Labor has determined not to be “in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.” 65 Fed Reg. 79,920, 79,939 (Dec. 20, 2000).

Furthermore, contrary to employer’s contention, the administrative law judge did not ignore the other reasons cited by Dr. Rosenberg for why he opined that the miner’s respiratory disease was unrelated to coal dust exposure. Rather, the administrative law judge specifically found Dr. Rosenberg’s opinion to be less credible as Dr. Rosenberg did “not explain why ‘increased air trappings’ establish that the miner’s [respiratory] condition was not aggravated by coal dust exposure.” Decision and Order at 18. Because the administrative law judge has discretion to render credibility determinations based on his evaluation of the reasoning underlying a physician’s opinion, we affirm the administrative law judge’s decision to accord less weight to Dr. Rosenberg’s opinion

pursuant to Section 718.202(a)(4). See *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Employer further asserts that the administrative law judge erred in finding that the miner suffered from legal pneumoconiosis because he “overlook[ed] Dr. Oesterling’s explanation of the forms of emphysema and his opinion that the miner’s emphysema was in no way related to his coal mine employment.” Employer’s Brief in Support of Petition for Review at 23. We disagree. Dr. Oesterling opined that the miner’s emphysema was not caused, contributed to, or aggravated by coal dust exposure because the autopsy showed panlobular emphysema, a type of emphysema that Dr. Oesterling stated was generally associated with smoking, but not centrilobular emphysema, the type of emphysema that he believed to be associated with coal dust exposure. Dr. Oesterling testified that centrilobular and panlobular emphysema may co-exist in the lung, but he stated that, “typically, by the time we get to panlobular [emphysema], most of the centrilobular [emphysema] has been destroyed.” Employer’s Exhibit 6 at 37. On cross examination, Dr. Oesterling agreed that it was possible, in this case, that the miner had centrilobular emphysema due to coal dust exposure early in his life, which was now masked, or had been destroyed, by the presence of panlobular emphysema due to smoking. *Id.* at 38.

In weighing Dr. Oesterling’s opinion at Section 718.202(a)(4), the administrative judge reasonably questioned, based on Dr. Oesterling’s testimony, whether “any emphysema that may have been caused by coal dust exposure would have been later overshadowed by the form of emphysema identified by Dr. Oesterling.” Decision and Order at 21. In light of Dr. Oesterling’s concession that the miner may have suffered from both centrilobular and panlobular emphysema, and to the extent that the administrative law judge was not persuaded that Dr. Oesterling had fully explained the basis for his conclusion that coal dust exposure was not a contributing or aggravating factor in the development of the miner’s emphysema, we affirm the administrative law judge’s decision to accord Dr. Oesterling’s opinion “slightly less weight” at Section 718.202(a)(4). *Stephens*, 298 F.3d at 522; 22 BLR at 512; *Rowe*, 710 F.2d at 255, 5 BLR at 1-103; *Clark*, 12 BLR at 1-151.

Lastly, we reject employer’s contention that Dr. Baker’s opinion is legally insufficient to support claimant’s burden of proof at Section 718.202(a)(4) and that the administrative law judge erred in relying on Dr. Baker’s opinion to find that the miner’s COPD was due, in part, to coal dust exposure. Employer’s Brief in Support of Petition for Review at 19. As noted by the administrative law judge, Dr. Baker opined that the primary cause of the miner’s COPD was his 40 to 50 pack-year smoking history, but he also opined that the miner’s 22 years of coal dust exposure “was probably contributory as

well.” Director’s Exhibit 22. Dr. Baker estimated that “20% to 40% of his condition may have been due to coal dust exposure.” *Id.* According to employer, because the administrative law judge acknowledged that Dr. Baker’s opinion was “somewhat equivocal” as to the extent to which coal dust exposure contributed to the miner’s COPD, the administrative law judge was required to find Dr. Baker’s opinion to be unreasoned. Employer’s Brief at 19, quoting Decision and Order at 19. We disagree.

Employer’s argument that Dr. Baker’s opinion is neither reasoned nor documented goes to the authority of the administrative law judge to render credibility determinations. We rely on the Sixth Circuit’s statement in *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002) which applies with equal force to the case at bar:

[E]mployer’s central argument, when stripped to its essentials, appears to be a quarrel with the [administrative law judge’s] credibility determinations. But this court is required to defer to the [administrative law judge’s] assessment of the physicians’ credibility. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002)(“Lacking the authority to make credibility determinations, we will defer to the [administrative law judge’s findings]”).

Id. Because the Sixth Circuit is clear that it is for the administrative law judge as factfinder to render credibility determinations and decide whether a doctor’s opinion is sufficiently reasoned, we defer to the administrative law judge’s credibility findings as they pertain to Dr. Baker. *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002).

The administrative law judge properly took into account the qualified statements by Dr. Baker as to what portion of the miner’s respiratory condition was due to coal dust exposure, and acted within his discretion in finding Dr. Baker’s overall opinion to be reasoned as it was based on “a physical examination (including pulmonary function testing) and an accurate record of the miner’s smoking and employment history.”⁷

⁷ The administrative law judge determined that “on balance, Dr. Baker’s opinion on legal pneumoconiosis is entitled to greater weight based on his superior credentials in diagnosing pulmonary disease.” Decision and Order at 20. In this regard, the administrative law judge noted that Dr. Baker is Board-certified in pulmonary medicine while Dr. Oesterling is Board-certified in pathology. Decision and Order at 20-21. The administrative law judge permissibly concluded that Dr. Baker is “more qualified [than Dr. Oesterling] to assess the extent to which dust exposure contributed to the miner’s emphysema.” Decision and Order at 21; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Decision and Order at 19. The administrative law judge had discretion to assess the persuasiveness of Dr. Baker's opinion as a whole, and conclude that it was legally sufficient to establish that the miner's COPD was due, at least in part, to coal dust exposure. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483-484 (6th Cir. 2007); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000). Although we recognize that the evidence of record may permit an alternative conclusion, we defer to the administrative law judge's authority to render findings of fact. *Stephens*, 298 F.3d at 522; 22 BLR at 2-513. Thus, we affirm the administrative law judge's finding that Dr. Baker's opinion is sufficiently reasoned and documented to satisfy claimant's burden of proving the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). See 20 C.F.R. §718.201(a)(2); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19 (2003).

Employer's final argument is that the administrative law judge erred in finding the opinions of Drs. Oesterling and Baker to be sufficient to establish that legal pneumoconiosis hastened the miner's death. We disagree. Both Drs. Baker and Oesterling opined that COPD, in the form of emphysema, was a significant contributing factor in the miner's death. Director's Exhibit 22; Employer's Exhibits 4, 5. The administrative law judge correctly noted that Dr. Oesterling "explained in detail how the miner's emphysema caused lung problems which interacted in a 'cyclical' manner with the miner's failing heart, ultimately leading to his death." Decision and Order at 22; Employer's Exhibit 4. Because the administrative law judge permissibly found Dr. Oesterling's opinion, as to the cause of the miner's death to be reasoned and documented, and in light of the administrative law judge's finding that the miner's emphysema was due, in part, to coal dust exposure, we affirm the administrative law judge's finding that the miner's death was hastened by legal pneumoconiosis pursuant to Section 718.205(c).⁸ See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Thus, we affirm the administrative law judge's award of survivor's benefits.

⁸ The administrative law judge properly noted that Dr. Rosenberg did not address the issue of whether emphysema played any role in the miner's death. Decision and Order at 22.

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge