



BRB No. 21-0268 BLA

MARY LOU SMITHBOWER)
(Widow of CLAIR SMITHBOWER))

Claimant-Petitioner)

v.)

TANOMA MINING COMPANY,)
INCORPORATED)

and)

STATE WORKERS' INSURANCE FUND)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 3/15/2022

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Natalie A. Appetta,
Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long),
Ebensburg, Pennsylvania, for Claimant.

Donna M. Hojo Lowman (Rulis & Bochicchio, LLC), Pittsburgh,
Pennsylvania, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES,
Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits (2020-BLA-05058) rendered on a survivor's claim filed on July 25, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with 26.87 years of underground coal mine employment. She found the evidence insufficient to establish the Miner had complicated pneumoconiosis; thus, Claimant could not invoke the irrebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. The ALJ also found the evidence insufficient to establish the Miner was totally disabled at the time of his death; thus, Claimant could not invoke the Section 411(c)(4) presumption.² 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established clinical pneumoconiosis arising out of coal mine employment and legal pneumoconiosis.³ 20 C.F.R. §§718.202(a), 718.203. However, she further found Claimant failed to establish the Miner's death was due to pneumoconiosis and denied benefits. 20 C.F.R. §718.205.

¹ Claimant is the widow of the Miner, who died on April 14, 2018. Director's Exhibits 2, 17. The Miner filed only one claim, which he withdrew. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. Therefore, Section 422(l) of the Act, 30 U.S.C. §932(l) (2018), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, is not applicable in this case.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

³ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

On appeal, Claimant argues the ALJ erred in finding the medical opinion evidence does not establish pneumoconiosis caused the Miner's death.⁴ Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

In a survivor's claim where no statutory presumptions are invoked, a claimant must establish by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements precludes an award of benefits. *Trumbo*, 17 BLR at 1-87-88.

A miner's death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of the miner's death or if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006 (3d Cir. 1989).

The ALJ considered the Miner's death certificate, the autopsy reports of Drs. Goldblatt and Swedarsky, and Dr. Fino's medical opinion.⁶ Decision and Order at 18-20; Director's Exhibits 17-20, Claimant's Exhibits 1, 2; Employer's Exhibits 1, 3-7.

⁴ We affirm, as unchallenged on appeal, the ALJ's findings that the Miner had 26.87 years of underground coal mine employment and that Claimant did not establish complicated pneumoconiosis or total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.202(a), 718.204(b)(2), 718.394; Decision and Order at 5, 7, 10, 18-19.

⁵ The Board will apply the law of the United States Court of Appeals for the Third Circuit because the Miner performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

⁶ The ALJ found the Miner's treatment records do not address death causation or treatment for a chronic respiratory or pulmonary disease. Decision and Order at 20.

The Miner's death certificate listed amyotrophic lateral sclerosis (ALS) as the immediate cause of his death. Director's Exhibit 17. It did not list any underlying disease processes or contributing causes of his death. *Id.* Dr. Goldblatt performed a limited autopsy of the Miner's lungs and heart and opined his death was due to hypertensive cardiovascular disease. He indicated the Miner's clinical pneumoconiosis and coal mine dust-related emphysema significantly contributed to his death.⁷ Director's Exhibit 18; Claimant's Exhibits 1, 2 at 17-18, 34-35. Upon reviewing Dr. Goldblatt's autopsy report and slides, Dr. Swedarsky opined the autopsy did not establish an immediate cause of the Miner's death as the procedure was limited to an examination of his heart and lungs which revealed "no evidence of aspiration, no evidence of acute pneumonia, no evidence of pulmonary emboli, [and] no evidence of acute myocardial infarct." Employer's Exhibit 6 at 21. Based on the Miner's medical records, Dr. Swedarsky opined his death was "most likely" due to complications arising from ALS. *Id.* at 32; Employer's Exhibit 7 at 59. Dr. Swedarsky further opined the "very mild simple coal workers' pneumoconiosis" and "mild to moderate emphysema" he observed on the Miner's autopsy slides did not hasten or contribute to the Miner's death because he had no history of respiratory impairment. Employer's Exhibits 6 at 30, 32, 7 at 60-61.

Dr. Fino reviewed the Miner's medical records and Dr. Goldblatt's autopsy report. Employer's Exhibit 1. He opined the Miner did not have clinical or legal pneumoconiosis. However, assuming the Miner did have one or both forms of the disease, Dr. Fino stated there is no evidence that either played any role in his death as there was no objective evidence of a respiratory impairment. *Id.* at 5-6, Employer's Exhibit 5 at 41-43.

The ALJ found all the physicians well-credentialed. Decision and Order at 16. She initially discounted Dr. Fino's opinion because he did not diagnose pneumoconiosis, contrary to her finding that the Miner had the disease. *Id.* at 19. She found the autopsy opinions of Drs. Goldblatt and Swedarsky well-reasoned, documented, and similarly persuasive. *Id.* at 20. She thus concluded the medical opinions are in equipoise and that Claimant failed to establish the Miner's death was due to pneumoconiosis. *Id.* at 20.

Claimant contends the ALJ erred in finding the autopsy evidence in equipoise. Claimant's Brief at 6. Claimant first asserts Dr. Fino's opinion tips the balance because he diagnosed legal pneumoconiosis, contrary to the ALJ's finding. She further argues Dr. Fino's opinion is sufficient to establish the Miner's death was due to pneumoconiosis since he stated that "someone with diseased lungs and ALS would have a shorter survival time

⁷ Dr. Goldblatt also stated "ALS could have contributed to [the Miner's] death by interfering with normal motor function and respiration." Claimant's Exhibit 2 at 21.

than a person with ALS and without diseased lungs.” *Id.* (quoting Decision and Order at 20). We reject Claimant’s assertion as she has mischaracterized Dr. Fino’s opinion.

Contrary to Claimant’s contention, Dr. Fino specifically stated the Miner did not have clinical or legal pneumoconiosis. Employer’s Exhibit 1 at 5. During his deposition, when Claimant’s counsel asked Dr. Fino whether a person with healthy lungs and ALS would survive longer than a person with lung disease and ALS, Dr. Fino responded: “that would be pure speculation. I mean, common sense would say, yeah, maybe they would, but I can’t prove that. . . . there’s just no way that with reasonable certainty, an answer can be given to that question.” Employer’s Exhibit 5 at 40-41. The ALJ permissibly found Dr. Fino was not diagnosing legal pneumoconiosis, explaining: “I find this statement to be probative because it acknowledges that while it makes sense that someone with diseased lungs and ALS would have a shorter survival time than a person with ALS and without diseased lungs, *there is no evidence in the record that supports that conclusion.*” Decision and Order at 19-20 (emphasis added); Employer’s Exhibits 1 at 6; 5 at 41. Because we see no error in the ALJ’s conclusion that Dr. Fino did not diagnose clinical or legal pneumoconiosis, we affirm her permissible credibility determination. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 237 (3d Cir. 1979).

Claimant also asserts the ALJ erred in finding Dr. Swedarsky’s opinion well-reasoned and documented; she contends Dr. Swedarsky’s opinion is “internally inconsistent” and cannot credibly weigh against Dr. Goldblatt’s opinion. Claimant’s Brief at 6-7. Claimant argues because “Dr. Swedarsky admits that the *record* is insufficient to determine death causation, his later conclusion that [the Miner’s death] was not due to pneumoconiosis must be discredited.” *Id.* at 7 (emphasis added). We disagree as Claimant mischaracterizes Dr. Swedarsky’s opinion.

Contrary to Claimant’s allegation, Dr. Swedarsky did not “admit[] that the record is insufficient to determine death causation.” Claimant’s Brief at 7. Rather, upon noting “the postmortem was restricted to the heart and lungs and did not include an examination of the central nervous system, he opined “the [*autopsy*] *procedure* did not establish an *immediate* cause of death.” Employer’s Exhibit 6 at 21 (emphasis added); *see also* Employer’s Exhibit 7 at 58. We see no inconsistency between this statement and Dr. Swedarsky’s opinion that the pneumoconiosis and emphysema seen on the Miner’s autopsy did not hasten or contribute to his death. Employer’s Exhibits 6 at 30, 32; 7 at 60-61. As Claimant raises no other challenge to the ALJ’s finding that Dr. Swedarsky “adequately explained” how his pathology findings and the Miner’s treatment records support his opinion, we affirm the ALJ’s conclusion that Dr. Swedarsky’s opinion is well documented, reasoned, and entitled to probative weight. Decision and Order at 20; *see Soubik*, 366 F.3d at 234;

Consolidation Coal Co. v. Kramer, 305 F.3d 203, 211 (3d Cir. 2002); *McCabe*, 593 F.2d at 237.

Claimant's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Having rejected Claimant's assertions of error, we affirm the ALJ's finding that the medical opinions are in equipoise and that Claimant, therefore, did not establish the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.205; see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281 (1994); Decision and Order at 20. Because Claimant did not establish that the Miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the ALJ's denial of benefits. See 20 C.F.R. §718.205; *Trumbo*, 17 BLR at 1-87-88.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge