BRB No. 98-1652 BLA

SUSAN L. BONACCI (Widow of DOMINIC BONACCI)	)	
Claimant-Respondent	)	
v.	)	
PRICE RIVER COAL COMPANY	)	DATE ISSUED:
and	)	
AEP SERVICE CORPORATION	)	
Employer/Carrier-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Suzanne Marelius (Littlefield & Peterson), Salt Lake City, Utah, for claimant.

William J. Evans (Parsons, Behle & Latimer), Salt Lake City, Utah, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits (92-BLA-1178) of Administrative Law Judge Samuel J. Smith 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). This case is before the Board for the second time. In the initial Decision and Order, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited the miner with sixteen years of qualifying coal

mine employment. Next, the administrative law judge found that claimant[1] established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) and that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits. Consequently, employer appealed the award.

The Board affirmed only the administrative law judge's application of the "hastening death" standard inasmuch as, subsequent to the administrative law judge's decision, the United States Court of Appeals for the Tenth Circuit adopted this standard in *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996). The Board vacated the administrative law judge's findings on the merits with respect to 20 C.F.R. §§718.202(a)(2), (a)(4), 718.203(b), and 718.205(c)(2) inasmuch as these findings were erroneous and not supported by substantial evidence. Accordingly, the case was remanded to the administrative law judge for further consideration. *Bonacci v. Price River Coal Co.*, BRB No. 95-1484 BLA (Jun. 26, 1997) (unpub.).

On remand, the administrative law judge found that claimant established pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(2), (a)(4), and 718.203(b) and that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erroneously found that claimant established the existence of pneumoconiosis under Sections 718.202(a)(2) and (a)(4) and that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant has not filed a brief responding to employer's arguments. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter

[1] Claimant, Susan L. Bonacci, is the widow of Dominic Bonacci, the miner, who died on July 13, 1991. Director's Exhibit 9. Claimant filed her application for benefits on November 4, 1991. Director's Exhibit 1. The miner never filed an application for benefits.

indicating that he will not participate in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits on a survivor's claim filed on or after January 1, 1982, a claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 718.205(a). Death will be considered due to pneumoconiosis if the evidence establishes 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. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Pickup, supra.*

In challenging the administrative law judge's Decision and Order, employer raises a plethora of arguments in its voluminous brief. We choose not to restate each and every argument *seriatim,* however, we have considered all of employer's arguments challenging the administrative law judge's analysis of the relevant evidence pursuant to Sections 718.202(a)(2), (a)(4), and 718.205(c)(2). Based on the discussion *infra*, we hold that the administrative law judge's Decision and Order on Remand is rational, in accordance with law, and supported by substantial evidence.

With respect to Section 718.202(a)(2), employer argues that the administrative law judge mechanically accorded greater weight to the opinion of Dr. Critchfield because he was the autopsy prosector and that his opinion is significantly outweighed by those of Drs. Naeye

[2] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(1), (a)(3), 718.203(b), and 718.205(c)(1) as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 6 n.2, 10.

and Flinner. We disagree. Although the administrative law judge found Dr. Critchfield's opinion entitled to substantial weight based on his status as the autopsy prosector, the administrative law judge did not rely on this factor as the sole reason for crediting Dr. Critchfield's opinion. Within a proper exercise of his discretion, the administrative law judge found Dr. Critchfield's opinion, that the autopsy demonstrated simple coal workers' pneumoconiosis, more persuasive because Dr. Critchfield applied the correct definition of pneumoconiosis, testified at his deposition about the published standards he relied upon, and stated that when performing the autopsy he viewed characteristic lesions of coal workers' pneumoconiosis. *See Pickup*, 100 F.3d at 874, 20 BLR at 2-341; *Peabody Coal Co. v. Shonk*, 906 F.2d 264, 269 (7th Cir. 1990); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992); Decision and Order on Remand at 17-21; Director's Exhibit 10; Employer's Exhibit 8. Furthermore, the administrative law judge properly exercised his discretion in finding Dr. Critchfield's pneumoconiosis diagnosis consistent with the opinions of Drs. Hill and Etzel, the miner's treating physicians. *See Pickup*, 100 F.3d at 876, 20 BLR at 2-344; Decision and Order on Remand at 21. Inasmuch as the administrative law judge rationally analyzed and weighed Dr. Critchfield's opinion together with the reviewing pathologists' contrary opinions and provided an adequate rationale for his conclusion that the opinions of Drs. Naeye and Flinner were entitled to less weight, we reject employer's arguments. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Employer avers that the administrative law judge erroneously rejected Dr. Naeye's autopsy opinion that the miner did not have coal workers' pneumoconiosis. Employer's argument lacks merit. The administrative law judge permissibly determined that Dr. Naeye had a predisposition to attribute the miner's emphysema to cigarette smoking because his opinion that the miner's emphysema did not arise out of coal mine employment was based on general medical studies indicating that coal mine employment does not cause emphysema.[3] Furthermore, the administrative law judge rationally found Dr. Naeye's opinion entitled to less weight because Dr. Naeye believed that simple pneumoconiosis does not progress in miners after cessation in coal mine employment. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Orange v. Island Creek Coal Co.*, 786

[3] In a report dated January 10, 1993, Dr. Naeye opined that coal workers' pneumoconiosis is absent and stated, "The centrilobular emphysema that is present cannot be attributed to occupational exposure to coal or to coal mine dust because the ALFORD scientists have shown that US coal miners, including those with simple coal workers' pneumoconiosis, have no more pulmonary emphysema than non-miners (Morgan et al, THORAX 26:585, 1971, Arch Envir Health 28:182, Am Rev Resp Dis 115:890)." Employer's Exhibit 1.

F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Consolidation Coal Co. v. Chubb*, 741 F.2d 968 (7th Cir. 1984). In addition, the administrative law judge found Dr. Naeye's testimony during his deposition, that Dr. Critchfield was unfamiliar with the published standards and criteria for diagnosing the existence of pneumoconiosis, directly refuted by Dr. Critchfield's testimony regarding his familiarity with and reliance upon pathological publications and standards. Decision and Order on Remand at 21; Employer's Exhibits 7, 8. Inasmuch as it is the role of the administrative law judge, as trier-of-fact, to determine both the credibility of the evidence and the inferences to be drawn from it and such determinations must be upheld unless they are unreasonable or unsupported by the record, we reject employer's arguments. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).

Employer additionally asserts that the administrative law judge erroneously discounted Dr. Flinner's autopsy review, which revealed no evidence of coal workers' pneumoconiosis. Contrary to employer's contentions, the administrative law judge properly found Dr. Flinner's autopsy opinion worthy of little weight because Dr. Flinner failed to consider that a diagnosis of emphysema may constitute the presence of legal pneumoconiosis, *see McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988); the doctor rendered an equivocal opinion, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987), and he failed to provide the definition of pneumoconiosis upon which he relied when rendering his opinion, *see Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Barber v. U.S. Steel Mining Co., Inc.*,43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); Decision and Order on Remand at 20-21; Employer's Exhibit 3. Inasmuch as the administrative law judge's determination that the autopsy evidence established the existence of pneumoconiosis is rational and supported by substantial evidence, we affirm the administrative law judge's Section 718.202(a)(2) determination.

With regard to Section 718.202(a)(4), employer argues that the administrative law judge improperly found Dr. Etzel's opinion sufficient to establish the existence of pneumoconiosis because Dr. Etzel had not diagnosed pneumoconiosis during his prior treatment of the miner, failed to state upon what objective evidence he relied, and offered no reason for his diagnosis. We disagree. Contrary to employer's contentions, the administrative law judge reasonably found that Dr. Etzel conducted multiple physical examinations of the miner and relied upon symptomotology, a history of chronic obstructive pulmonary disease, blood gas studies, and pulmonary function studies, therefore, the physician rendered a sufficiently documented opinion. *See Adamson v. Director, OWCP*, 7 BLR 1-229 (1984); *Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); Decision and Order on Remand at 34; Director's Exhibit 13. The administrative law judge properly credited Dr. Etzel's diagnoses of coal workers' pneumoconiosis, end-stage chronic obstructive pulmonary disease, and cor pulmonale based on his treating physician status, *see*

Frey v. Brown, 816 F.2d 508 (10th Cir. 1987); *Broadbent v. Harris*, 698 F.2d 407, 412 (10th Cir. 1983), his numerous physical examinations of the miner, and his familiarity with the miner's long history of chronic obstructive pulmonary disease, symptomotology, and smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Decision and Order on Remand at 34. We, therefore, affirm the administrative law judge's crediting of Dr. Etzel's opinion.

Employer contends further that the administrative law judge impermissibly found Dr. Hill's opinion corroborative of Dr. Etzel's because, in employer's opinion, Dr. Hill merely adopted Dr. Etzel's pneumoconiosis diagnosis without making an independent conclusion. Similarly, employer contends that the administrative law judge failed to discount Dr. Hill's equivocal opinion during the miner's lifetime about the presence of pneumoconiosis compared to his unequivocal opinion after the miner's death that pneumoconiosis was present.[4] Employer's arguments are without merit. The administrative law judge permissibly found Dr. Etzel's opinion corroborated by that of Dr. Hill, a treating physician, who had diagnosed the miner on several occasions with chronic obstructive pulmonary disease and cor pulmonale. We affirm the administrative law judge's finding that Dr. Hill's opinion was entitled to substantial weight on the bases that Dr. Hill conducted physical examinations of the miner, had a more complete picture of the miner's health during his lifetime, *see Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); *Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716, 1-719 (1984), and demonstrated pulmonary expertise because he is Board-certified in internal and pulmonary medicine, *Worley v. Burns Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984); Decision and Order on Remand at 36-37; Director's Exhibit 18; Employer's Exhibit 9.[5]

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[4] During his deposition on April 14, 1993, Dr. Hill acknowledged that even though he did not diagnose the existence of pneumoconiosis during his treatment of the miner from April to June 1991, "the assumption was that [the miner] had some degree of coal workers' pneumoconiosis, based on his clinical history, history of exposures, and from Dr. Etzel's diagnosis." Employer's Exhibit at 7. The physician also explained that he diagnosed "probable" black lung in his June 1991 report because he "had not personally performed an x-ray or pulmonary function study that was compatible with that" because his care of the miner centered around the placement of a catheter for oxygen purposes. Employer's Exhibit at 10.

[5] In addition, employer argues that neither Dr. Etzel nor Hill rendered an opinion relating the miner's chronic obstructive pulmonary disease to coal mine employment. Although employer is correct that neither physician rendered an opinion relating the miner's chronic obstructive pulmonary disease to coal mine employment, both physicians unequivocally diagnosed the presence of coal workers' pneumoconiosis. *See* 20 C.F.R. §§718.201,

718.202(a)(4). In his April 3, 1991 report, Dr. Etzel's hospital report listed coal workers' pneumoconiosis as a discharge diagnosis. Director's Exhibit 13. On March 5, 1992, Dr. Hill opined that the miner's lung disease consisted of a combination of coal workers' pneumoconiosis and chronic obstructive lung disease. Director's Exhibits 19, 21.

Employer similarly argues that the administrative law judge erroneously rejected Dr. Renzetti's opinion that the miner did not have pneumoconiosis but had severe chronic obstructive pulmonary disease due to long and heavy cigarette smoking history because Dr. Renzetti believes that symptoms of simple pneumoconiosis do not progress absent further exposure to coal dust and because there is no legal precedent holding that legal pneumoconiosis, unlike clinical pneumoconiosis, progresses after cessation of coal mine employment. We reject employer's argument. *See Mullins, supra.* It has consistently been held that pneumoconiosis is a legal term defined by the Act, therefore, "the legal definition of 'pneumoconiosis' is incorporated into every instance the word is used in the statute and regulations," *Barber*, 43 F.3d at 901, 19 BLR at 2-66 [emphasis in original]; *Chastain v. Freeman United Coal Mining Co.*, 919 F.2d 485, 488 (7th Cir. 1990), notwithstanding physicians' usage of pneumoconiosis as a *medical* term that comprises merely a small subset of the afflictions compensable under the Act.

We, likewise, reject employer's challenges to the administrative law judge's discrediting of the opinions of Drs. Naeye and Flinner at Section 718.202(a)(4) inasmuch as the administrative law judge properly referred to his rejection of these physicians' opinions regarding the existence of pneumoconiosis in his analysis of the medical opinion evidence under Section 718.202(a)(2). *See Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order on Remand at 31. Similarly, employer's contention that the administrative law judge improperly relied on the physicians who mentioned the presence of cor pulmonale and irrationally discredited those who did not lacks merit inasmuch as cor pulmonale is a recognized sequela of pneumoconiosis and thus, may be indicative of the existence of pneumoconiosis. *Christian v. Monsanto Corp.*, 12 BLR 1-56, 1-58 (1988); *Bonacci, slip op.* at 4 n.3. Hence, we affirm the administrative law judge's determination that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Relevant to Section 718.205(c)(2), employer avers that the administrative law judge erroneously found that pneumoconiosis hastened the miner's death based on the opinions of Drs. Etzel and Hill because neither physician opined that pneumoconiosis contributed to the miner's death. We disagree. The administrative law judge, within a proper exercise of his discretion, accorded determinative weight to Dr. Hill's testimony during a deposition on April 14, 1993, that coal workers' pneumoconiosis was not, in and of itself, the cause of death or a significant respiratory disability during the miner's life, but that the miner's advanced chronic obstructive pulmonary disease, in the form of emphysema and simple pneumoconiosis contributed to the miner's death. *See Pickup, supra*; *see also Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 816, 17 BLR 2-135, 2-140 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); Decision and Order on Remand at 41; Employer's Exhibit 9 at 16-17. Similarly, the administrative law judge permissibly relied upon Dr. Hill's listing of chronic obstructive pulmonary disease on the death certificate as a significant

condition in the miner's demise; he found the opinions of Drs. Naeye and Renzetti that chronic obstructive pulmonary disease was a contributing cause of the miner's death supportive of Dr. Hill's opinion, and credited Dr. Hill's opinion that coal workers' pneumoconiosis was a component of the miner's chronic obstructive pulmonary disease to properly determine that pneumoconiosis hastened the miner's death. *See Copley v. Olga Coal Co.*, 6 BLR 1-181, 1-184 (1983); Decision and Order on Remand at 41; Director's Exhibit 9. We, therefore, affirm the administrative law judge's weighing of the medical opinions as rational and within his discretion as factfinder. *See Pickup, supra; Fagg, supra; Calfee, supra.*

Finally, employer's argument that the administrative law judge failed to recognize the effect of cerebral hemorrhage as an intervening cause of the miner's demise lacks merit inasmuch as such a determination requires him to substitute his own opinion for that of a qualified medical expert and to engage in medical speculation. *See Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 18 BLR 2-105 (7th Cir. 1994); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). Inasmuch as the administrative law judge's determination, that pneumoconiosis was a substantially contributing cause to the miner's death, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's Section 718.205(c)(2) finding. *See Pickup, supra*.

Accordingly, the Decision and Order on Remand Granting Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge