

BRB No. 00-0587 BLA

EMMA L. CARNEVALE)
(Widow of LEONARD F. CARNEVALE))
)
 Claimant-Petitioner)
)
 v.)
)
 BASIN RESOURCES, INCORPORATED) DATE ISSUED:
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Jonathon Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Douglas Thomas (Ruegseggar Thomas, L.L.C.), Denver, Colorado, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-BLA-0230) of Administrative Law Judge Robert D. Kaplan on a 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).¹ In this survivor's claim, the administrative law judge accepted the

¹ 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20

parties' stipulations as to the existence of pneumoconiosis arising out of coal mine employment and a coal mine employment history of at least thirty-two and one-half years, 20 C.F.R. §§718.202(a); 718.203, but found the evidence of record insufficient to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205. Accordingly, benefits were denied. Claimant appeals, asserting that the administrative law judge erred in finding that the miner's death was not hastened by his pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not respond in this appeal.²

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which the parties have responded.³ Based on the responses of the parties and our review, we hold that the

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

² We affirm the findings of the administrative law judge on the length of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The Director and employer in briefs dated March 5, 2001 and March 21, 2001,

disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 applicable law, they are binding upon this Board and may not be disturbed. 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).

respectively, assert that the regulations at issue in the lawsuit do not affect the outcome of this case. In a brief dated March 13, 2001, claimant asserts that while the amended regulation at 20 C.F.R. §718.205(c) does not affect the outcome of this claim, the amended regulation at 20 C.F.R. §718.104 does. However, in light of the fact that Section 718.104 as amended applies only to medical opinion evidence created after January 19, 2001, it does not affect the outcome of this claim. 20 C.F.R. §718.101(b).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that death was hastened by pneumoconiosis.⁴ 20 C.F.R. §§718.202(a), 718.203, 718.205(c). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988); see *Northern Coal Co. v. Director, OWCP, [Pickup]*, 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996).

Claimant argues that the opinions of Drs. Shapiro, Balkissoon and Green, as buttressed by the opinion of Dr. Kleinerman, establish that the miner's death was hastened by pneumoconiosis because they show that the miner's coal worker's pneumoconiosis and the pulmonary impairment he suffered therefrom hastened his death by preventing the surgical treatment of his lung cancer.⁵

On April 26, 1996, Dr. Shapiro, the miner's treating pulmonologist, advised that pneumonectomy was required due to the size of the miner's tumor, but that surgical intervention would be "marginal" because of the miner's poor pulmonary function, evidenced by his reduced FEV1 value, and that the miner therefore chose to have radiation treatment. Director's Exhibit 5; Decision and Order at 4-5. Dr. Balkissoon, an internist, stated that in his opinion coal workers' pneumoconiosis did not hasten the miner's death, and that even if it could be argued that the miner's decreased pulmonary reserve may have hastened death, the miner's cancer was well-advanced at the time of diagnosis and his prognosis was extremely poor regardless of his baseline pulmonary function. A year later, Dr. Balkissoon issued a second report, dated June 25, 1998. Responding to the question of whether pneumoconiosis

⁴ Since the miner's last coal mine employment took place in Colorado, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁵ Claimant concedes that the primary cause of the miner's death on October 6, 1996, was lung cancer, which was caused by smoking. See Director's Exhibit 4 (Death Certificate); Decision and Order at 5.

hastened the miner's death, Dr. Balkissoon replied that due to the extensive nature of the miner's cancer, his death was likely imminent and that "his [the miner's] underlying compromised lung function may have hastened his death by days to weeks, but [is] unlikely to have hastened it by months to years." Decision and Order at 6. Director's Exhibit 16. By letter dated March 11, 1999, Dr. Green, a pathologist, confirmed that the miner's death was due to carcinoma of the lung with extensive metastasis, but opined, on reviewing the miner's medical records, that the miner's poor pulmonary function, due in part to coal dust exposure, precluded surgical removal of his cancerous tumor, thus reducing the miner's chance for a complete cure or an extended remission. Dr. Green went on to state that the miner's chances for survival would have been influenced by the state of the progression of his cancer, but that based on the medical evidence which revealed no evidence that the tumor was too advanced for surgical removal, he would assume that the miner had a reasonable chance for long term survival. Claimant's Exhibit 5. On reviewing the medical evidence and the opinions of the other physicians, Dr. Kleinerman, a pathologist, opined that coal workers' pneumoconiosis did not in any way cause, contribute to, or hasten the miner's death, that coal workers' pneumoconiosis did not contribute to the miner's tobacco induced lung cancer, and that the decision to not perform surgery was based on the strategic location of the miner's tumor and did not hasten the miner's death by limiting his options for treatment of his cancer. Addressing Dr. Green's opinion, Dr. Kleinerman rejected Dr. Green's finding that coal workers' pneumoconiosis hastened the miner's death by limiting his cancer treatment options, *i.e.*, surgery, as medically presumptuous, lacking in supportive evidence, inappropriate, and without sound medical foundation. Employer's Exhibit 5. Dr. Repsher, a pulmonologist, agreed with Dr. Kleinerman's findings, stating that the miner was not a surgical candidate in that he was suffering from Stage 3B bronchogenic cancer, which has no hope whatsoever for potential surgical cure, and that Dr. Green's statements and conclusions were incredibly absurd and that he had no understanding of the clinical aspects of bronchogenic cancer. Employer's Exhibit 6. Further, both Drs. Kleinerman and Repsher rejected Dr. Balkissoon's opinion that coal workers' pneumoconiosis may have hastened the miner's death. Employer's Exhibits 5, 6.

Noting that reliance on the opinions of Drs. Kleinerman and Repsher might be problematic in light of their finding that pneumoconiosis was not severe enough to hasten death, the administrative law judge concluded that it was unnecessary to further consider these opinions, as claimant, nonetheless, failed to carry her burden of establishing death due to pneumoconiosis based on the opinions of Drs. Green, Balkissoon and Shapiro. In evaluating the medical opinions, the administrative law judge permissibly accorded little weight to Dr. Balkissoon's opinion because Dr. Balkissoon wavered between finding that pneumoconiosis did not hasten death and that it "may" have hastened death. Decision and Order at 7; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). The administrative law judge accorded no weight to the opinion of Dr. Green, because Dr. Green had not stated unequivocally that a

pneumectomy would have extended the miner's life; rather, the administrative law judge found that Dr. Green merely assumed that it would have done so. Further, the administrative law judge noted that this supposition was based on Dr. Green's opinion that the miner's tumor was not too advanced for surgical removal and would have extended the miner's life. Decision and Order at 7. However, in light of the fact that Dr. Balkissoon had found that the miner's cancer was well-advanced at the time of diagnosis and that his prognosis was extremely poor, regardless of his baseline pulmonary function, the administrative law judge permissibly found that Dr. Green's opinion was entitled to no weight. Decision and Order at 7.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, as the administrative law judge permissibly found the opinions of Drs. Green, Balkissoon and Shapiro insufficient to establish claimant's burden of proof that the miner's death was caused or hastened by pneumoconiosis that finding is affirmed. 20 C.F.R. §718.205(c)(5); *see Pickup, supra*; *Justice, supra*; *Campbell, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

Administrative Appeals Judge