

BRB No. 00-0693 BLA

MAXINE F. LIVERMORE)	
(Widow of BILLY J. LIVERMORE))	
)	
Claimant-Petitioner))
)	
v.)	
)	
AMAX COAL COMPANY)	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 on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Paul (Rick) Rauch (McNamar, Fearnow & McSharar, P.C.), Indianapolis, Indiana, for claimant.

Richard A. Dean (Arter & Hadden), Washington, D.C., for employer.

Timothy S. Williams (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (1997-BLA-631) of Administrative Law Judge Donald W. Mosser denying benefits 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).² This claim is before the Board for the second time. In the initial Decision and Order, the administrative law judge found that the miner had at least thirty-eight years of coal mine employment and that the miner's death was due to pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b) and 718.205(2000). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's findings pursuant to Sections

¹Claimant is Maxine F. Livermore, the surviving spouse of the miner, Billy J. Livermore, who died on July 23, 1989. Director's Exhibits 1,8. The miner had previously filed a claim on April 19, 1973, which was denied by the Department of Labor on review on October 8, 1980. The miner filed another claim on March 31, 1986, which was ultimately denied by the Department of Labor on September 23, 1986. Director's Exhibit 26. The miner took no further action on his claim and it is not at issue herein. Claimant filed a survivor's claim on December 18, 1995. Director's Exhibit 1.

²The 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 C.F.R. Parts 718, 722, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

718.202(a)(2) and 718.203(b)(2000), but vacated the administrative law judge's finding pursuant to Section 718.205(c)(2000) and remanded the claim for the administrative law judge to reconsider the evidence relevant to that section. *Livermore v. Amax Coal Co.*, BRB No. 98-0819 BLA (Mar. 11, 1999)(unpub.).

On remand, the administrative law judge reconsidered the relevant evidence and found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2000). Accordingly, benefits were denied. On reconsideration, the administrative law judge affirmed his finding pursuant to Section 718.205(c)(2000) and the denial of benefits. On appeal, claimant contends that the administrative law judge erred in failing to find that the miner's anthracosis and/or coal workers' pneumoconiosis caused his death. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on appeal.

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 March 2, 2001, to which claimant, employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by the parties, and our review, we hold that the 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had 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 the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304(2000); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *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). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2000). *See Railey, supra*.

After consideration of the arguments raised on appeal, the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. In the previous appeal, the Board affirmed the administrative law judge's finding that the biopsy evidence established the existence of pneumoconiosis. Claimant contends that because the Board previously declined to address employer's contentions of error regarding the administrative law judge's findings that the medical opinion evidence established the existence of pneumoconiosis in the instant claim, the administrative law judge erroneously failed to determine whether the miner's "[coal workers' pneumoconiosis], proven under 20 C.F.R. §718.202(a)(4), contributed to or caused the miner's death." Claimant's Brief at 6-8. Specifically, claimant argues that the administrative law judge did not consider whether legal pneumoconiosis, which is a respiratory or pulmonary impairment arising out of coal mine employment, contributed to the miner's death. *See* 20 C.F.R. §718.201(2000).

Pursuant to Section 718.205(2000), after considering all of the medical opinions of record, the administrative law judge found that:

...[T]he opinions of Drs. Fino, Naeye, Tuteur and Kleinerman are well-reasoned and documented and entitled to greater weight. These physicians all concluded that the miner's death was not due to pneumoconiosis. In addition, the doctors determined there was no evidence the miner's death was due to any type of respiratory problems related to [the miner's] coal mine employment and that he would have died in the same manner even if he had never mined coal. Thus, the physicians ruled out pneumoconiosis as a factor in the miner's death, from both medical standards and a broader legal standpoint.

Decision and Order on Remand at 4-5. Inasmuch as the administrative law judge considered all of the medical opinions of record relevant to the issue of the cause of the miner's death and acted within his discretion in finding that the greater weight of the evidence does not demonstrate that the miner's death was caused or hastened by either clinical or legal pneumoconiosis, we reject claimant's contention of error. Decision and Order on Remand at 4-5; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Duke v. Director, OWCP*, 6 BLR 1-

673 (1983).

Claimant next contends that the case must be remanded for the administrative law judge to determine if the miner had pneumoconiosis and, if so, for the administrative law judge to award benefits because all of the physicians of record opined that the miner died as a result of his treatment for his respiratory condition. Claimant's Brief at 10-11. In support of his argument, claimant states that the "only question is whether [the miner] had [coal workers' pneumoconiosis]. If he had it, it caused his death because every physician determined that the treatment for his breathing problems caused [the miner's] death-this is incontrovertible." Claimant's Brief at 9. Contrary to claimant's statements, all of the physicians of record did not determine that the miner's treatments for his breathing problems caused his death. The administrative law judge noted that Drs. Caffrey, Tuteur, Naeye, Kleinerman and Fino opined that the miner's death may have been caused by the steroid treatments for the miner's respiratory problems, but that the miner was being treated for asthma which was not related to his coal dust inhalation and that the miner's death was in no way related to his coal dust inhalation. Decision and Order on Remand at 4; Employer's Exhibits 8, 10-13.

Dr. Jones opined that "if the [miner] had not suffered from black lung disease...he would not have required hospitalization, excessive anticoagulation and high dose steroids, all of which precipitated his...gastroesophageal hemorrhage." Claimant's Exhibit 1 at 7. The administrative law judge acted within his discretion in finding Dr. Jones' opinion entitled to little weight because he questioned the reliability of Dr. Jones' conclusions and the accuracy of his report and resulting conclusions on the basis of errors and misquotations in his report as identified by Drs. Tuteur, Kleinerman and Naeye in their depositions. Decision and Order on Remand at 4; *Lafferty, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge then acted within his discretion in assigning the greatest weight to the opinions of Drs. Fino, Naeye, Tuteur and Kleinerman, because their opinions are well-reasoned and documented. Decision and Order on Remand at 4-5; *Lafferty, supra*; *Clark, supra*; *King, supra*; *Wetzel, supra*. Further, on reconsideration, the administrative law judge found that Dr. Houser opined that the immediate cause of the miner's death was gastrointestinal bleeding which he stated was "probably" related to the treatment of his lung disease. Director's Exhibit 23 at 39. In his Decision and Order on Reconsideration, the administrative law judge rationally found this opinion to be equivocal and unpersuasive to establish claimant's burden on the issue of whether the miner's pneumoconiosis hastened his death. Decision and Order on Reconsideration at 3; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Inasmuch as the administrative law judge rationally found that the miner was not being treated for a respiratory condition which arose from his coal mine employment, we reject claimant's contention that the miner died as a result of the treatment of his

pneumoconiosis. Consequently, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2000) and the denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge