

BRB No. 00-0745 BLA

DOROTHY SIZEMORE)
(Widow of RAY SIZEMORE))
)
 Claimant-Petitioner)

v.)

ROCKET COAL COMPANY)

DATE

ISSUED:

and)

AMERICAN RESOURCES INSURANCE)
COMPANY)

Employer/Carrier-)
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 Rudolf L. Jansen,
Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.),
Barbourville, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits (99-BLA-0828) of

¹ The miner, Ray Sizemore, filed a claim on March 8, 1976 which was denied by the

Administrative Law Judge Rudolf L. Jansen 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 The administrative law judge accepted the parties' stipulation of twenty-three and one-half years of coal mine employment, but found the evidence of record insufficient to establish either the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(1)-(4); 718.205.³

district director on April 18, 1979. Director's Exhibit 32 at 1, 25 . No Appeal was taken from that decision. Director's Exhibit 32 at 1. The miner filed a second claim on April 29, 1991, which was denied on October 1, 1991. Director's Exhibit 33 at 14, 16. Again, the miner did not appeal that decision. The miner died on June 10, 1997. Claimant, Dorothy Sizemore, the widow of the miner, filed this survivor's claim on June 5, 1998. Director's Exhibit 1.

² 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 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ On appeal, claimant asserts that employer had contested that the miner was a coal miner under the Act and that she is an eligible dependent survivor. In response to the administrative law judge's questioning, however, employer withdrew its controversion of these issues at the hearing, *see* Hearing Transcript at 13-15.

Accordingly, benefits were denied. Claimant appeals, asserting that the Decision and Order is not supported by substantial evidence. 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 he will not respond in this 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 the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the brief submitted by the Director and our review, we hold that the disposition of this case is not impacted by the challenged regulations and 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).

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, 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 See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *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 Sixth Circuit, under whose jurisdiction the instant case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that

⁴ The presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.303 is not applicable to any claim filed on or after January 1, 1982. 20 C.F.R. §718.303. 30 U.S.C. §921(c)(2).

pneumoconiosis was a substantially contributing cause of the miner's death. *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).⁵

Claimant argues that the miner's death was due to pneumoconiosis because the miner's lung cancer meets the definition of pneumoconiosis as defined by the Act, *see* 20 C.F.R. §718.201(a)(2), and that the administrative law judge erred in failing to determine whether the miner's lung cancer constituted pneumoconiosis as defined by the Act. In response, employer contends that claimant failed to submit any medical evidence which showed that lung cancer met the definition of pneumoconiosis.

For purposes of the Act the definition of pneumoconiosis encompasses both "clinical" and "legal pneumoconiosis". Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconiosis; legal pneumoconiosis includes any chronic disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(1), (2). "Arising out of coal mine employment," 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).

Addressing the evidence, the administrative law judge found that Dr. James, the miner's treating physician, opined that pneumoconiosis contributed to the miner's death in a two sentence letter dated September 16, 1998, but did not provide any reasoning or basis for that opinion. Director's Exhibit 17. The administrative law judge noted that Dr. Broudy, who was Board-certified in internal medicine and pulmonary disease, opined that the miner did not have pneumoconiosis and that his death was not caused by, contributed to, or hastened by pneumoconiosis. Rather, Dr. Broudy opined that the miner's death was due to metastatic carcinoma of the lung caused by cigarette smoking. Employer's Exhibit 1. The death certificate completed by Dr. James on June 10, 1997, listed the cause of death as secondary carcinomatosis due to "lung carcinoma." No mention was made of black lung disease. Director's Exhibit 8. The administrative law judge further noted that the record contained hospitalization reports from May and June of 1997 diagnosing lung cancer, secondary carcinoma metastasis to liver and brain, pancytopenia, dehydration, thrombocytopenia, acute exacerbation of chronic obstructive pulmonary disease, bronchitis,

⁵ Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

severe anemia, diabetes mellitus, black lung, hyponatremia, coronary artery disease and hypertension. Director's Exhibit 10. Additionally the administrative law judge noted that Dr. Wicker diagnosed 0/1 pneumoconiosis due to exposure to coal dust in 1991 and that Dr. Becknell diagnosed category 0/1 pneumoconiosis in 1976.

In finding that claimant failed to establish the existence of pneumoconiosis, the administrative law judge accorded greater weight to the opinion of Dr. Broudy because it was better documented and reasoned and because of Dr. Broudy's superior credentials. The administrative law judge accorded little weight to Dr. James's opinion because his brief letter stating that the miner had pneumoconiosis was not supported by any medical evidence and was not reasoned. This was proper. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Likewise, in determining that claimant failed to show that the miner's death was due to pneumoconiosis, the administrative law judge credited the report of Dr. Broudy over the report of Dr. James as it was more probative. Because the administrative law judge found the evidence diagnosing pneumoconiosis and attributing death to it unreasoned, the administrative law judge properly found that the miner did not have pneumoconiosis and that his death was not due to pneumoconiosis. Moreover, we reject claimant's argument that lung cancer meets the definition of pneumoconiosis in the instant case as claimant presented no medical evidence showing that lung cancer arose out of coal mine employment, or was significantly related to or substantially aggravated by coal mine employment, and presented no evidence that pneumoconiosis contributed to, caused, or hastened the miner's death due to pneumoconiosis. 20 C.F.R. §§718.201, 718.205(c); see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). *Brown, supra*. Accordingly, claimant failed to establish the required nexus between the miner's lung disease and his coal mine employment and between the miner's lung disease and his death. 20 C.F.R. §§718.201, 718.205(c). We, therefore, reject claimant's argument that lung cancer meets the definition of pneumoconiosis and affirm the administrative law judge's finding that the existence of pneumoconiosis and death due to pneumoconiosis were not established. 20 C.F.R. §§718.201, 718.202(a)(4), 718.205(c).

Claimant next argues that dispositive weight should have been given to the opinion of Dr. James, as the miner's treating physician, rather than the opinion of Dr. Broudy, a reviewing physician, who never saw or examined the miner prior to his death. The administrative law judge was not, however, required to accord greater weight to a treating physician's opinion where he found it unreasoned. See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730, 1-733 (1983). The administrative law judge, therefore, permissibly relied on Dr. Broudy's opinion, because it was well reasoned and documented, and because of his superior

credentials in the field of pulmonary medicine. Decision and Order at 9; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Finally, claimant argues that the x-ray evidence, along with the miner's 25 year coal mine employment history, supports her claim that pneumoconiosis as defined by the Act (lung cancer) substantially contributed to the miner's death. Claimant characterizes the evidence as consisting of five positive x-ray readings.⁶ See Director's Exhibits 11, 25, 33. Four of those five readings were classified as 0/1, however, which is consistent with the ILO-U/C interpretation for a negative reading.⁷ See 20 C.F.R. §718.102(b)(2000); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987). We reject, therefore, claimant's argument that the x-ray evidence supports a finding of the existence of pneumoconiosis. Nor, contrary to claimant's argument does the miner's 25 years of coal mine employment alone support a finding of the existence of pneumoconiosis. See *Hicks, supra*; *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

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 if the administrative law judge's findings are supported by substantial evidence. See *Clark, supra*; *Anderson, supra*. Consequently, as the administrative law judge rationally found the evidence did not establish the existence of pneumoconiosis as defined by the Act and was insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death, that finding is affirmed.

Accordingly, the Decision and Order - Denying Benefits of the administrative law

⁶In addition, there were six negative readings of 0/0, and two readings which make no mention of pneumoconiosis. See Director's Exhibits 10, 12, 13, 14, 15, 26, 33.

⁷The ILO-U/C system is a system for classifying "the radiological appearances seen in all types of pneumoconiosis." *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconiosis*, International Labour Office, p.v (Revised Ed. 1980); 20 C.F.R. §718.102(b)(2000).

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