

BRB No. 07-0594 BLA

P.P.)
(Widow of B.P.))
)
Claimant-Respondent)
)
v.)
)
ROARING CREEK COAL COMPANY) DATE ISSUED: 04/30/2008
)
and)
)
WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)
)
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 – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Renaee Reed Patrick (Legal Clinic, Washington and Lee University),
Lexington, Virginia.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia,
for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits of Administrative Law Judge Daniel L. Leland (2004-BLA-06314) rendered 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).¹ The administrative law judge accepted employer's concession that the miner suffered from simple coal workers' pneumoconiosis. The administrative law judge further found that the evidence was sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

Employer appeals, alleging that the administrative law judge erred in according greater weight to the opinions of Drs. Green and Cohen, that pneumoconiosis hastened the miner's death, over the contrary opinions of Drs. Oesterling, Crouch and Renn, that the miner's death was unrelated to pneumoconiosis or coal dust exposure. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30

¹ The deceased miner filed two claims for benefits prior to his death. His first claim was filed with the Social Security Administration (SSA) on March 14, 1973. Director's Exhibit 1. Following an SSA denial on September 4, 1973, the miner elected review of his claim by the Department of Labor (DOL). *Id.* The DOL denied benefits on January 2, 1980 on the grounds that the evidence failed to establish any of the requisite elements of entitlement. *Id.* The miner filed his second claim, a duplicate claim, on November 22, 1995. Director's Exhibit 2. In a Decision and Order dated September 8, 1998, Administrative Law Judge Michael P. Lesniak determined that the miner was totally disabled by a respiratory or pulmonary impairment and, therefore, found that he had demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Judge Lesniak, however, determined that the evidence was insufficient to establish the existence of pneumoconiosis and that claimant was totally disabled due to pneumoconiosis. *Id.* The miner appealed, and the Board affirmed Judge Lesniak's denial of benefits. *[B.P.] v. Roaring Creek Coal Co.*, BRB No. 98-1659 BLA (Nov. 8, 1999) (unpub.). The miner took no further action with regard to the denial of his claim and later died on October 19, 2002. Director's Exhibit 10. Claimant, the miner's widow, filed her survivor's claim on January 31, 2003. Director's Exhibit 4. The district director issued a Proposed Decision and Order awarding benefits on March 31, 2004. Director's Exhibit 23. Employer requested a hearing, which was held on October 19, 2006. Director's Exhibit 24. At the hearing, employer conceded that the miner suffered from simple coal workers' pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203. Hearing Transcript at 6.

² Because claimant's coal mine employment occurred in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge’s Decision and Order, the briefs of the parties and the evidence of record, we conclude that substantial evidence supports the administrative law judge’s award of benefits. We specifically reject employer’s assertion that the administrative law judge erred in failing to explain how he resolved the conflict in the evidence, between the medical opinions of Drs. Green, Cohen, Crouch, Oesterling and Renn, as to whether clinical or legal pneumoconiosis hastened the miner’s death from heart disease.

To establish entitlement to survivor’s benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor’s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner’s death, or was a substantially contributing cause or factor leading to the miner’s death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

The miner’s medical records show that the miner received treatment for heart disease, pulmonary hypertension (cor pulmonale), severe restrictive and obstructive lung impairment, chronic obstructive pulmonary disease, and interstitial lung disease, prior to his death. Director’s Exhibits 14, 15. The death certificate signed by the miner’s treating physician, Dr. High, states that he died as the result of cardiac arrest due to coronary artery disease. Director’s Exhibit 10. An autopsy was performed by Dr. Franyutti, on October 19, 2002, and identified the following: 1) moderate size pneumoconiotic fibrotic areas containing anthraco-silicotic nodules in subserosal areas, lung parenchyma and hilar lymph nodes with birefringent crystals and areas of simple coal workers’ pneumoconiosis; 2) interstitial fibrosis; 3) focal organizing pneumonitis; 4) bilateral pulmonary emphysema; 5) serosal fibrosis; and 6) fibrous adhesions. Director’s Exhibits 13, 14. Dr. Franyutti did not provide a cause of death. Director’s Exhibit 14.

See Kopp v. Director, OWCP, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibits 1, 2.

Dr. Green, a Board-certified pathologist, reviewed the autopsy slides and reported moderately severe simple coal workers' pneumoconiosis and a single lesion of progressive massive fibrosis measuring one centimeter, along with moderately severe centrilobular/focal emphysema, moderately severe chronic bronchitis, pulmonary vascular changes consistent with pulmonary hypertension, and congestive heart failure. Claimant's Exhibit 1. Dr. Green noted that the miner had twelve years of coal mine employment and that he had smoked one pack of cigarettes a week from age sixteen to eighteen. *Id.* In view of the miner's "negligible" smoking history, Dr. Green found it reasonable to conclude that the cause of the miner's emphysema was exposure to coal dust. *Id.* Dr. Green opined that all of the lesions identified on autopsy collectively contributed to the miner's severe respiratory condition prior to death. *Id.* He further stated:

Progressive massive fibrosis (PMF) is of and by itself associated with increased mortality and premature death. In addition, the simple pneumoconiosis present would, in my opinion, have contributed to death by impairing his pulmonary function and causing the documented hypoxemia, which would put an additional burden on an already compromised heart due to ischemic heart disease. However, perhaps the most important mechanism whereby the pneumoconiosis contributed to his death was through the extra strain put on the right ventricle, which showed clinical evidence of cor pulmonale. I thus conclude that the pneumoconiosis contributed to [the miner's] death through abnormalities in pulmonary function and hypoxemia and by contributing to pulmonary hypertension (cor pulmonale).

Claimant's Exhibit 1.

Dr. Crouch, a Board-certified pathologist, reviewed the autopsy slides and opined that the miner's lungs showed simple coal workers' pneumoconiosis characterized by very small coal dust macules, rare nodules with variable fibrosis, and one silicotic nodule. Employer's Exhibit 1. Dr. Crouch testified that the silicotic nodule was not of sufficient size to warrant a diagnosis of complicated pneumoconiosis or massive fibrosis. Employer's Exhibit 3 at 41. As noted by the administrative law judge, Dr. Crouch found severe emphysema but "averred that there is no correlation between the extent and severity of coal dust deposition and the destruction or severity of the emphysema, and therefore coal dust exposure could not have caused a pulmonary impairment or caused, contributed to, or hastened the miner's death." Decision and Order at 3; Employer's Exhibit 1.

Dr. Oesterling, a Board-certified pathologist, also reviewed the autopsy slides and diagnosed that the miner suffered from "mild to moderate micronodular interstitial coal

workers' pneumoconiosis." Employer's Exhibit 4. Dr. Oesterling opined that the "level of disease process was in no way sufficient to have altered pulmonary function to appoint [sic] that coalworkers' pneumoconiosis could have contributed to, hastened or caused [the miner's] death." *Id.* Dr. Oesterling also found significant panlobular emphysema progressing to bullous emphysema. *Id.* He stated that "this form of [panacinar] emphysema is not associated with [coal] dust exposure and the coal dust present in these sections is very modest." *Id.* Dr. Oesterling opined that the miner's emphysema, unrelated to coal dust exposure, produced lifetime respiratory disabilities and destroyed a "significant portion of the vascular bed of the [miner's] lungs." *Id.* He described that the destruction of the capillaries in the vascular bed increased the workload for the right side of the heart and lead to pulmonary hypertension, *i.e.*, cor pulmonale. *Id.*

Dr. Cohen reviewed the autopsy protocol, the reports of Drs. Green and Crouch, along with their deposition testimony, two pulmonary function studies and two arterial blood gas studies, and the miner's medical records, consisting of 148 pages, from Davis Memorial Hospital and the University of Pittsburgh Hospital. Director's Exhibits 14, 15; Claimant's Exhibit 3. Dr. Cohen opined that the miner suffered from simple coal workers' pneumoconiosis and a moderately severe obstructive respiratory impairment due to chronic bronchitis and emphysema, which he attributed, in significant part, to coal dust exposure. *Id.* Dr. Cohen opined that the miner was totally disabled from a respiratory standpoint prior to his death, and that his respiratory condition, due to coal dust exposure, hastened the miner's death from a heart attack. *Id.* Dr. Cohen explained that, when the miner was admitted to the hospital in July 2002, "there was no doubt he had severe end stage lung disease with pulmonary hypertension and cor-pulmonale" caused, in significant part, by coal dust exposure. *Id.* He opined that the miner was at a high risk for cardiac arrest, "as the heart has great difficulty pumping the blood through the scarred and damaged lungs" and is "susceptible to developing abnormal rhythms due to fluctuations in oxygen levels." *Id.* Dr. Cohen concluded that, within a reasonable degree of medical certainty, chronic obstructive pulmonary disease and coal workers' pneumoconiosis hastened the miner's death from cardiac arrest and coronary artery disease. *Id.*

Dr. Renn reviewed Dr. Crouch's report, along with the autopsy report, and opined that the miner's pneumoconiosis was too mild to have contributed to the miner's death. Employer's Exhibit 7. He opined that the type of emphysema seen in the miner's lungs was consistent with smoking and not coal dust exposure. *Id.* Dr. Renn attributed the miner's cor pulmonale to left ventricle heart dysfunction and opined that the miner's death was in no way related to pneumoconiosis or coal dust exposure. *Id.*

In weighing these conflicting opinions, the administrative law judge properly noted that the autopsy prosector, Dr. Franyutti, did not address the cause of the miner's death. Decision and Order 3. The administrative law judge stated that he gave no weight

to the opinion of Dr. High, claimant's treating physician, that the miner's death was hastened by pneumoconiosis because the doctor did not explain how she reached her diagnosis. Decision and Order at 6. The administrative law judge then assigned greater weight to the opinions of Drs. Green and Cohen because of their superior credentials and the fact that he accepted their finding that the miner's emphysema was due to coal dust exposure, contrary to the findings of Drs. Crouch and Oesterling. *Id.* Noting that "Dr. Green is an expert on pulmonary pathology and served on the committee that established the standards for coal workers' pneumoconiosis," the administrative law judge gave controlling weight to his opinion in comparison to those of Drs. Crouch and Oesterling, whose expertise in the pathology of coal workers' pneumoconiosis he considered to be inferior to that of Dr. Green. *Id.* The administrative law judge also gave less weight to Dr. Renn's opinion, in comparison to Dr. Cohen's opinion, noting that Dr. Cohen reviewed numerous medical records prior to offering his opinion, while Dr. Renn based his opinion only on a review of Dr. Cohen's report. *Id.*

Employer generally asserts that the administrative law judge failed to provide any explanation for the weight accorded the conflicting evidence, other than to rely on a comparison of the physicians' credentials. Employer specifically contends that the administrative law judge erred in giving greater weight to Dr. Green's opinion as to the role of pneumoconiosis in the miner's death, based on his superior qualifications, when the administrative law judge did not credit Dr. Green's opinion as to the presence of complicated pneumoconiosis. Employer's Brief at 5-16. We disagree.

The administrative law judge properly considered whether claimant was entitled to an irrebuttable presumption that the miner's death was due to pneumoconiosis based on Dr. Green's diagnosis of PMF.³ See 20 C.F.R. §§718.304; 718.205(c); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). The administrative law judge, however, determined that claimant did not satisfy her burden of proving that she was entitled to invoke that presumption. The administrative law judge stated that "as only one of the four pathologists in the record found massive lesions in the miner's lungs that were greater than one centimeter in diameter, I find that a preponderance of the evidence does not invoke the [20 C.F.R.

³ The regulation at 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

§718.304] presumption.”⁴ Decision and Order at 7 n.3. Employer finds it incongruous that the administrative law judge would chose *not* to credit Dr. Green’s diagnosis of a one centimeter lesion of progressive massive fibrosis, to invoke the irrebuttable presumption of death due to pneumoconiosis, but still credit Dr. Green’s opinion that the miner’s death was hastened by simple coal workers’ pneumoconiosis and emphysema due to coal dust exposure. Employer’s Brief at 6-7.

We see no error in the administrative law judge’s credibility determination. Employer’s reliance on case law that states that an administrative law judge may discredit a physician’s opinion that conflicts with a finding of the administrative law judge, is inapposite to the facts presented in this case. Employer’s Brief at 14, citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Scott v. Mason Coal Co.*, 289 F.3d 263, 268, 22 BLR 2-372, 2-382 (4th Cir. 2002). Contrary to employer’s assertion, Dr. Green’s opinion that claimant has one large lesion of PMF does not contradict the administrative law judge’s finding that claimant has simple coal workers’ pneumoconiosis. Claimant’s Exhibit 1. Employer’s argument is misleading in that employer suggests that the only basis for Dr. Green’s opinion, that pneumoconiosis hastened the miner’s death, was his diagnosis of large lesion of PMF. Employer’s Brief at 6. Employer ignores, however, that Dr. Green specifically addressed the role of simple pneumoconiosis in the miner’s death and stated that simple pneumoconiosis hastened the miner’s death due to heart disease. Claimant’s Exhibit 1. It is this aspect of Dr. Green’s opinion upon which the administrative law judge permissibly relied, as being reasoned and documented, and supportive of claimant’s burden of proof at Section 718.205(c). See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Furthermore, contrary to employer’s contention, the administrative law judge did not err in his treatment of the opinions of Drs. Crouch or Oesterling. The administrative law judge recognized that a conflict existed as to the etiology of the miner’s emphysema, and properly noted that both Dr. Oesterling and Dr. Crouch attributed the miner’s emphysema to smoking based on the location of the emphysema in the lungs in relation to coal dust deposition. Decision and Order at 6. The administrative law judge, however, permissibly found Dr. Crouch’s opinion less persuasive in view of claimant’s remote and minimal smoking history. *Id.* As noted by the administrative law judge, even Dr. Crouch conceded that “the miner’s smoking history was extremely light for the amount of

⁴ We affirm the administrative law judge’s finding that claimant was unable to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 as that finding is unchallenged. *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

emphysema in the miner's lungs." *Id.* The administrative law judge also properly found Dr. Oesterling's opinion less persuasive as to the etiology of claimant's emphysema since the doctor did not indicate whether he was even aware of the miner's smoking and work histories. *Clark*, 12 BLR at 1-151; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Lastly, the administrative law judge acted properly in assigning less weight to Dr. Renn's opinion because the doctor did not personally review all of the medical evidence in the record, as did Dr. Cohen. Decision and Order at 6. Although employer contends that Dr. Renn had an accurate picture of the miner's condition based on the summary provided by Dr. Cohen and the findings listed on autopsy, we note that Dr. Cohen did not summarize the entirety of the medical record he reviewed. *Id.* Dr. Cohen's report condensed 148 pages of medical records into five pages in his written report. *Id.* Because Dr. Renn's opinion was based on a limited review of the medical record, in comparison to Dr. Cohen's opinion, the administrative law judge reasonably found that Dr. Cohen's opinion was better documented and reasoned. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 6. Moreover, the administrative law judge permissibly determined that Dr. Cohen's opinion was more credible since Dr. Renn, unlike Dr. Cohen, has "not published any articles or conducted research on occupational lung diseases." Decision and Order at 6; see *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

It is the administrative law judge's role to evaluate the weight and credibility of the medical opinion evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Clark*, 12 BLR at 1-151. In this case, the administrative law judge carefully considered the documentation, reasoning, and thoroughness of the physicians' opinions, along with their credentials, and substantial evidence supports the administrative law judge's decision to credit the opinions of Drs. Green and Cohen, that the miner's death was hastened by pneumoconiosis. See *Mays*, 176 F.3d at 764, 21 BLR at 2-606; *Underwood*, 105 F.3d at 949, 21 BLR at 2-2-28. Employer's assertions of error on appeal amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law

judge's finding that claimant satisfied her burden of proof under Section 718.205(c) and his award of survivor's benefits.⁵

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵ Employer summarily states, in one sentence in its brief, that “[g]iven the denial of benefits from 1998, the survivor is collaterally estopped from claiming pneumoconiosis contributed to pulmonary disability.” Employer’s Brief at 5, citing *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). Contrary to employer’s assertion, because total disability due to pneumoconiosis is not an element to be proven in a survivor’s claim, the doctrine is not applicable. *See* 20 C.F.R. §718.205(c); *see generally Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).