

BRB No. 07-0656 BLA

V. C.)	
(Widow of F. C.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LONGWALL MINING, INCORPORATED)	DATE ISSUED: 04/25/2008
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Survivor's Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Survivor's Benefits (2006-BLA-5079) of Administrative Law Judge Janice K. Bullard rendered 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 The administrative law judge found that the decedent was a miner, 20 C.F.R. §725.202(a), with 21 years of coal mine employment, and she determined claimant established that the miner had clinical pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.202(a), 718.203(a). The administrative law judge found, however, that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in 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 the 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).

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *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). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3^d Cir. 1989).²

¹ Claimant is the widow of the miner who died on October 12, 2004. Director's Exhibits 8, 13. The miner's initial claim was denied by the district director. The miner's second claim was pending at the time of his death. This claim was subsequently denied by the district director. Claimant filed a claim for survivor's benefits on November 15, 2004. Director's Exhibit 2.

² This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment occurred in Pennsylvania. Director's Exhibits 5, 6; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

The death certificate listed the miner's immediate cause of death as congestive heart failure due to or as a consequence of coronary artery disease due to or as a consequence of chronic obstructive pulmonary disease (COPD). Director's Exhibit 13. The record contains the reports of four physicians relevant to the cause of the miner's death. Dr. Fockler's October 28, 2004, report addresses the miner's treatment at the Windber Medical Center up to his death on October 12, 2004. In his report, Dr. Fockler stated that "non-Q wave MI/coronary artery disease" was the cause of the miner's death, and he also stated "COPD/black lung" was a contributing cause of death. Director's Exhibit 19 at 2. Dr. Fockler, who was the miner's treating physician, noted a medical history that included COPD "secondary to black lung." *Id.* at 1. Dr. Perper reviewed the miner's biopsy slide, medical records and reports of other physicians. Dr. Perper opined that "coal workers' pneumoconiosis was a substantial cause of [the miner's] pulmonary impairment and disability and ultimately contributed to and hastened his death." Claimant's Exhibit 5 at 23. Dr. Hurwitz disagreed, however, opining that any underlying lung disease played no role in the miner's death given "the clinical status of [the miner's] cardiovascular disease manifested by severe ischemic cardiomyopathy and progressive congestive heart failure ..." Employer's Exhibit 1 at 2. Dr. Tuteur also stated that the miner's death was not influenced by, caused by, or hastened by any coal mine dust related disease process, as the miner's pulmonary function was not impaired. Employer's Exhibit 2 at 7.

The administrative law judge declined to credit Dr. Fockler's opinion, finding that his professional qualifications are not in the record. She also found that there is no clarification as to the basis for his opinion that COPD secondary to black lung disease was a contributing cause of death, nor does the record indicate that he considered the miner's cigarette smoking history. The administrative law judge, therefore, declined to accord Dr. Fockler's opinion controlling weight notwithstanding that he was the miner's treating physician. The administrative law judge found Dr. Perper's opinion that pneumoconiosis "contributed to and hastened" the miner's death unreasoned and premised on several erroneous or vague factors. Specifically, the administrative law judge found that the record does not support Dr. Perper's statement that the miner had a limited smoking history, he disregarded the preponderance of the chest x-ray evidence that is negative for pneumoconiosis, and he did not thoroughly explain, in light of the most recent normal pulmonary function test, his finding that the miner had "objective pulmonary manifestations." Claimant's Exhibits 1, 5 at 12, 20; Director's Exhibit 18; Employer's Exhibits 1 at 2, 3, 4. Moreover, the administrative law judge found that, while the biopsy evidence shows the presence of pneumoconiosis, Dr. Perper conceded that this evidence does not *per se* establish its severity. Claimant's Exhibit 5 at 20. Finally, the administrative law judge found well-documented and reasoned the opinion of Dr. Hurwitz that any underlying lung disease played no role in the miner's death due to the severity of his cardiovascular disease, and she accorded "substantial weight" to his opinion, finding it supported by the miner's hospital treatment records. The

administrative law judge concluded, therefore, that claimant failed to establish that the miner's death was due to pneumoconiosis.

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death at Section 718.205(c). Claimant specifically argues that the administrative law judge erred in rejecting the opinions of the miner's treating physician, Dr. Fockler, and that of Dr. Perper. Claimant contends the administrative law judge erred in crediting Dr. Hurwitz's opinion inasmuch as Dr. Perper has superior qualifications and Dr. Hurwitz did not find clear evidence of pneumoconiosis.

We reject claimant's contentions of error. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002). In this case, the administrative law judge found that Dr. Fockler did not offer any explanation for his opinion that COPD secondary to black lung was a contributing cause of death. Decision and Order at 15. Substantial evidence supports this finding. Although Dr. Fockler treated the miner for COPD for many years, Director's Exhibit 17, there is no explanation in his reports concerning the relationship between the COPD and the miner's death due to a cardiac condition. The administrative law judge, therefore, permissibly determined that Dr. Fockler's opinion was not sufficiently reasoned. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3^d Cir. 1997); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Moreover, the administrative law judge acted within her discretion by rejecting Dr. Fockler's opinion because his professional qualifications are not in the record.³ *Webber*

³ We note that the administrative law judge erred in rejecting the opinions of both Dr. Fockler and Dr. Perper based on their failure to properly consider the miner's smoking history. The administrative law judge made no specific finding regarding the miner's smoking history, noting only that claimant testified that the miner stopped smoking in 1976 and had smoked one-half of a pack of cigarettes every three days. Tr. at 33-35. Dr. Fockler's treatment notes reflect his recognition of the miner's smoking history. Director's Exhibit 17 at 138. Similarly, Dr. Perper stated, consistent with claimant's testimony, that the miner's smoking history was "remote and limited." Claimant's Exhibit 5. As no physician attributed any part of the miner's respiratory or cardiac ailments to smoking, the administrative law judge erred in using this factor to discredit the opinions of Drs. Fockler and Perper. This error, however, is harmless, as the administrative law judge also provided valid reasons for rejecting their opinions regarding the cause of the miner's death. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

v. Peabody Coal Co., 23 BLR 1-123 (2006) (*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*).

The administrative law judge also acted within her discretion to find unreasoned Dr. Perper's opinion that pneumoconiosis "contributed to and hastened" the miner's death. *Sykes v. Itmann Coal Co.*, 7 BLR 1-820 (1985). Specifically, Dr. Perper maintained in his report that the miner's pneumoconiosis was "substantial" based in part on the miner's limited smoking history and objective pulmonary manifestations. Claimant's Exhibit 5 at 20. The administrative law judge reasonably found "vague and conclusory" Dr. Perper's statement that the miner exhibited "objective pulmonary manifestations" in view of the most recent pulmonary function study, dated April 23, 2003, which was interpreted as normal, and which values Dr. Perper acknowledged in his report. Claimant's Exhibit 5 at 12; Employer's Exhibit 1 at 2; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, the administrative law judge noted Dr. Perper's statement that the biopsy evidence in this case does not establish the severity of the miner's pneumoconiosis at the time of his death. Decision and Order at 16-17; *see* Claimant's Exhibit 5 at 20. The administrative law judge therefore rationally found that Dr. Perper's ultimate conclusion that pneumoconiosis "contributed to and hastened" the miner's death is not supported by its underlying documentation. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

We reject claimant's contention that the administrative law judge was required to credit the opinion of Dr. Perper because his credentials are superior to those of Dr. Hurwitz. Dr. Perper is Board-certified in anatomical pathology and forensic pathology. Claimant's Exhibit 4. Dr. Hurwitz is Board-certified in internal medicine with a subspecialty in cardiovascular disease. Employer's Exhibit 1 at 4. Assuming, *arguendo*, that Dr. Perper has superior qualifications to Dr. Hurwitz, the administrative law judge is not required to credit one doctor over another on this basis alone. *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In addition, the administrative law judge acted within her discretion in giving "substantial weight" to Dr. Hurwitz's opinion that any lung disease underlying the miner's cardiac condition played no role in the miner's death. The administrative law judge noted Dr. Hurwitz's acknowledgment that the miner had COPD and sufficient exposure to coal dust to have developed pulmonary disease, and she reasonably found his opinion regarding the cause of death more credible on the basis that it is fully supported by the miner's hospitalization records and the record as a whole.⁴ *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

⁴ Dr. Hurwitz noted that the miner's hospitalization records detail his treatment for and the progression of his congestive heart failure commencing with his December 2003 myocardial infarction. Employer's Exhibit 1; *see* Director's Exhibits 17, 18, 19.

The Board is not empowered to reweigh the evidence or to substitute its inferences for those of the administrative law judge. *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3^d Cir. 2002); *Worley*, 12 BLR at 1-23. As the administrative law judge's weighing of the medical opinions is rational and her findings are supported by substantial evidence, we affirm the administrative law judge's finding that the miner's death was not caused, substantially contributed to, or hastened by coal workers' pneumoconiosis pursuant to Section 718.205(c).⁵ As claimant failed to establish an essential element of her claim, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁵ As we affirm the administrative law judge's finding that the miner's death was not caused, substantially contributed to, or hastened by coal workers' pneumoconiosis, we need not address employer's contention raised in its response brief that the administrative law judge erred by finding the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(2), (4). *See generally Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984).