

BRB Nos. 12-0230 BLA
and 12-0230 BLA-A

NORA COLLINS)	
(Widow of JOHNNIE COLLINS))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
POND CREEK MINING COMPANY)	DATE ISSUED: 04/22/2013
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in Interest)	DECISION and ORDER

Appeal of the Decision and Order on Fourth Remand - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals,¹ and employer cross-appeals, the Decision and Order on Fourth Remand - Denying Benefits (1998-BLA-01295) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) with respect to a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).² This case has a lengthy procedural history, as detailed in our last decision, *see Collins v. Pond Creek Mining Co.*, BRB Nos. 10-0377 BLA, 10-0377 BLA-A (Mar. 24, 2011) (unpub.), and is on appeal before the Board for the fifth time. After the Board affirmed the denial of benefits in claimant's second appeal, the United States Court of Appeals for the Fourth Circuit³ vacated the denial, and remanded the case for further findings. Because the miner was receiving benefits at the time of his death pursuant to a final judgment finding that the miner was totally disabled due to pneumoconiosis, the court held that employer was collaterally estopped from relitigating the issue of pneumoconiosis in this survivor's claim. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006); Director's Exhibit 31. The court remanded the case for a reassessment of the conflicting medical opinions of record on the issue of the cause of the miner's death under the "rigorous" standard outlined by the court in *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995). *Collins*, 468 F.3d at 224, 23 BLR at 2-412. Following two successive decisions requiring remand, the Board vacated the denial of benefits in the last appeal, and directed reassignment to a new administrative law judge for a fresh look at the evidence, with instructions to specifically address whether the medical opinions of Drs. Younes and Gaziano are reasoned, documented and sufficient to establish that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(5). On remand, the case was reassigned to the administrative law judge, who found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). Accordingly, benefits were denied.

In the present appeal, claimant challenges the administrative law judge's weighing of the evidence on the issue of the cause of the miner's death at Section 718.205(c). Employer responds, urging affirmance of the denial of benefits, and cross-appeals,

¹ Claimant is the widow of the miner, who died on September 16, 1997. Director's Exhibits 1, 12. Claimant filed her claim for survivor's benefits on September 29, 1997. Director's Exhibit 1.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant filed her survivor's claim prior to January 1, 2005. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because the miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 2.

contending that the administrative law judge erred in according either no weight or little weight to the opinions of those physicians who did not diagnose pneumoconiosis.⁴ The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the denial of benefits and remand the case for further findings.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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 survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 969 F.2d 977, 980, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Claimant contends that the administrative law judge erred in finding that the opinions of Drs. Younes⁵ and Gaziano⁶ were insufficiently documented and reasoned to

⁴ Employer concedes that its arguments on cross-appeal need not be reached if the Board affirms the denial of benefits. Employer's Brief at 32.

⁵ Dr. Younes treated the miner from November 20, 1994 until his death on September 16, 1997. In a letter dated November 10, 1997, Dr. Younes indicated that the miner had chronic respiratory failure secondary to severe coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD); that his respiratory condition was very severe, with frequent exacerbations and hospitalizations; and that by 1997 it was so severe that he required hospitalization once or twice a month. Dr. Younes described the course of the miner's last hospitalization for respiratory arrest, and concluded that: "There is no question that [the miner's] severe Pneumoconiosis is a major contributing factor to his death. The evidence for Pneumoconiosis is his long work history in the coal mines for 42 years, the findings of severe Coal Worker's Pneumoconiosis on his chest x-ray, and the severe Pulmonary Disability he had." Director's Exhibit 13. On the death certificate, Dr. Younes listed cardiac arrest due to respiratory failure as the immediate

support a finding that the miner's death was due to pneumoconiosis. Claimant's Brief at 35-45. Claimant asserts that the treatment notes of Dr. Mian, the miner's cardiologist, the treatment notes of Dr. Younes, and the miner's hospitalization records provide the necessary documentation for Dr. Younes' conclusions. Additionally, claimant maintains that the opinions of Drs. Morgan⁷ and Jarboe,⁸ that the miner's chronic obstructive pulmonary disease (COPD) was a contributing cause of death,⁹ when "corrected" to

cause of death, with coal workers' pneumoconiosis listed under "other significant conditions contributing to death but not resulting in the underlying cause." Director's Exhibit 12.

⁶ Dr. Gaziano stated that the miner died as a result of "cardio-pulmonary failure on a background of severe heart and lung diseases," and that "coal workers' pneumoconiosis was a significant contributing factor in his death." Decision and Order at 7; Director's Exhibit 15.

⁷ Dr. Morgan diagnosed smoking-induced COPD but found no clinical pneumoconiosis, and he attributed the miner's death to an arrhythmia. While he stated that the miner's "final admission and subsequent events as described by Dr. Younes are not compatible with his dying from respiratory failure ...[which] comes on gradually and slowly gets worse," Dr. Morgan opined that the miner's COPD caused severe hypoxemia, a condition recognized as making someone more prone to developing an arrhythmia, and making the arrhythmia more difficult to treat. Employer's Exhibit 7 at 7.

⁸ Dr. Jarboe diagnosed severe COPD due to smoking alone, and opined that the miner died from a combination of severe respiratory insufficiency due to COPD and heart disease. Employer's Exhibit 2.

⁹ While Dr. Castle also concluded in his report that the miner's death was due to cardiac disease and smoking-induced COPD, Employer's Exhibit 6, Dr. Castle testified at deposition that the miner's death was the result of a cardiac arrhythmia and not pulmonary failure. Employer's Exhibit 8 at 25. Due to its internal inconsistency, claimant agrees with the administrative law judge's determination that the opinion of Dr. Castle was entitled to no weight. Claimant's Brief at 33-34; Decision and Order at 11-12; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Claimant additionally maintains that, consistent with the Fourth Circuit's remand instructions herein and its decision in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), the opinions of Drs. Younes and Gaziano necessarily outweigh the opinions of the physicians that did not diagnose pneumoconiosis. Thus, claimant asserts that the administrative law judge properly accorded no weight to the opinions of Drs. Fino, Jarboe, Dahhan and Spagnolo, but erred in according "little weight" to the opinion of Dr. Zaldivar. Claimant's Brief at 41-47.

attribute the COPD to coal dust exposure, also provide support for the opinions of Drs. Younes and Gaziano. Claimant's Brief at 28-32, 34-35. The Director maintains that the administrative law judge lacks authority to "correct" a medical opinion, but agrees that the administrative law judge should have considered that the opinions of Drs. Morgan, Castle and Jarboe explain how COPD contributed to the miner's death and provide support for the conclusions of Drs. Younes and Gaziano. Director's Response at 2-3. The Director reasons that, based on the finding of totally disabling legal pneumoconiosis in the miner's claim, the miner's COPD is due, as a matter of law, to coal dust exposure. The Director also argues that the administrative law judge erred in failing to consider that Dr. Nadorra's hospital report, dated September 7, 1997, supports the conclusion that the miner's COPD contributed to his death. Director's Response at 3-4. This report noted the miner's history of "chronic obstructive pulmonary disease - coal workers' pneumoconiosis with chronic respiratory failure....[t]he patient is felt to have end-stage chronic obstructive pulmonary disease," and concluded that "[a]ggressive cardiac workup is not recommended, given patient's end-stage lung condition." Director's Exhibit 14 at 3.

It is the province of the administrative law judge to assess the evidence of record and determine if a medical opinion is sufficiently documented and reasoned to satisfy claimant's burden of proof. *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). A reasoned opinion is one in which the administrative law judge, in the exercise of his discretion as fact finder, finds the underlying documentation adequate to support the physician's conclusions, *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The Board cannot substitute its conclusions for the rational inferences made by the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

We conclude that, in this case, the administrative law judge rationally determined that the opinions of Dr. Younes was insufficiently documented and reasoned. While he agreed that the miner's treatment notes and hospital records evinced an ongoing and severe respiratory impairment up until the miner's death from cardiorespiratory failure, the administrative law judge declined to assume that this evidence constituted the documentation for Dr. Younes' opinion. Although Dr. Younes stated the bases for his diagnosis of pneumoconiosis, the administrative law judge correctly determined that he failed to identify the specific documentary support underlying his conclusion that pneumoconiosis was a "major contributing factor" in the miner's death. In view of this failure, the administrative law judge rationally determined that Dr. Younes' opinion was undocumented, despite his status as the miner's treating physician. *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); *see also Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

Next, the administrative law judge properly observed that the existence of a pulmonary impairment caused by coal dust exposure does not produce “a foregone conclusion that this *same* pulmonary impairment caused [the] miner’s death.” Decision and Order at 6. He therefore permissibly discounted Dr. Younes’ opinion as unreasoned and conclusory under applicable Fourth Circuit precedent, since it lacked any explanation of “*how* [the] miner’s pulmonary impairment contributed to his death.” *Id.*; see *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000). The administrative law judge also rationally found that the death certificate signed by Dr. Younes was insufficient to establish that pneumoconiosis hastened the miner’s death, absent a reasoned and documented explanation for why he listed coal workers’ pneumoconiosis under “other significant conditions contributing to death but not resulting in the underlying cause.” Decision and Order at 7; Director’s Exhibit 12; see *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Similarly, the administrative law judge determined that Dr. Gaziano did not set forth the bases for his opinion that the miner died as a result of cardio-pulmonary failure on a background of severe heart and lung diseases, nor did he identify the contents of the “case file” he reviewed. Decision and Order at 7; Director’s Exhibit 15. Because Dr. Gaziano did not provide the underlying documentation for his findings, the administrative law judge could not determine whether it supported his unexplained conclusion that “[coal workers’ pneumoconiosis] was a significant contributing factor” in the miner’s death. Thus, the administrative law judge properly found that the opinion was neither well-documented nor well-reasoned. Decision and Order at 7; see *Sparks*, 213 F.3d at 186, 22 BLR at 2-251; *Hicks*, 138 F.3d at 533-35, 21 BLR at 2-336-40; *Akers*, 131 F.3d at 441, 21 BLR at 2-274-76.

As substantial evidence supports the administrative law judge’s findings, we affirm his conclusion that the opinions of Drs. Younes and Gaziano, even if uncontradicted, are insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). Decision and Order at 15; see *Sparks*, 213 F.3d at 192, 22 BLR at 2-264.¹⁰

We reject the Director’s suggestion that the administrative law judge was obligated to consider Dr. Nadorra’s hospital notation, and the opinions of Drs. Jarboe, Castle and Morgan, as supportive of the diagnoses of Drs. Younes and Gaziano. Dr. Nadorra merely reported a history of coal workers’ pneumoconiosis and did not state

¹⁰ We are unpersuaded by the Director’s view that the administrative law judge’s analysis denotes a misapplication of the court’s holding in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

whether the miner's COPD was related to coal dust exposure, while Drs. Jarboe, Castle and Morgan all attributed the COPD to smoking. *See* Director's Exhibit 14; Employer's Exhibits 2, 6-8.

The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988). In this case, as the administrative law judge's credibility findings are fully explained, supported in the record, and rational, we affirm his ultimate conclusion that claimant has not met her burden of proof, and we decline to remand this case for a fifth time.

Accordingly, the Decision and Order on Fourth Remand - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues, as I agree with the Director's position in this case. Relying on *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000), the administrative law judge discounted the opinions of Drs. Younes and Gaziano because he found that they failed to explicitly identify the documentation underlying their conclusions, and failed to explain how pneumoconiosis hastened, or was a substantially contributing cause of, the miner's death. The Director correctly notes, however, that an administrative law judge is not legally compelled to discredit an opinion that lacks a thorough explanation under Fourth Circuit case law. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162 (4th Cir. 2000). Moreover, the record in *Sparks* contained no proof of the severity of the miner's pneumoconiosis at the time of his death, whereas, in this case, the final judgment in the miner's claim established that the miner's totally disabling COPD constituted legal

pneumoconiosis as a matter of law, and the record contains ample documentation of the severity of the miner's pneumoconiosis. The treatment notes of Dr. Younes, a Board-certified internist and pulmonologist, reflect nineteen examination entries over a three-year period ending in the miner's death, Director's Exhibit 13, and the miner's hospital records reflect multiple exacerbations of the miner's COPD. Director's Exhibit 14. During the miner's final hospitalization for cardiopulmonary failure, Dr. Nadorra reported that his COPD was "end-stage" and, in view thereof, indicated that "[a]ggressive cardiac workup [was] not recommended." *Id.* Lastly, Dr. Morgan's opinion, that the miner's COPD caused severe hypoxemia, a condition recognized as making someone more prone to developing an arrhythmia, and making the arrhythmia more difficult to treat, Employer's Exhibit 7 at 7, and Dr. Jarboe's opinion, that the miner died from a combination of severe respiratory insufficiency due to COPD and heart disease, Employer's Exhibit 2, lend support to the conclusions of Drs. Younes and Gaziano that pneumoconiosis hastened the miner's death. I would, therefore, vacate the administrative law judge's denial of survivor's benefits, and remand this case for a reevaluation of the opinions of Drs. Younes and Gaziano, in conjunction with the evidence discussed above.

BETTY JEAN HALL
Administrative Appeals Judge