



BRB Nos. 16-0357 BLA
and 16-0358 BLA

WILMA JEAN GIBSON (Widow of and)
o/b/o Estate of STANLEY GIBSON))

Claimant-Respondent)

v.)

TROJAN MINING)

and)

TRAVELERS INSURANCE COMPANY)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 04/27/2017

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg,
Kentucky, for claimant.

Clayton Daniel Scott (Porter, Schmitt, Banks & Baldwin), Paintsville,
Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-05329, 2015-BLA-05767) of Administrative Law Judge John P. Sellers, III, awarding benefits in a miner's subsequent claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹

The administrative law judge credited the miner with twelve years and one month of coal mine employment,² and adjudicated the miner's claim under 20 C.F.R. Part 718. The administrative law judge found that new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits of the claim, the administrative law judge found that the evidence established that the miner had both clinical and legal pneumoconiosis³ arising out of his coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge also found that the evidence established that the miner was totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge therefore awarded benefits in the miner's claim. Consequently, he awarded benefits in

¹ The miner's first claim, filed on March 17, 1997 was denied by the district director on July 18, 1997, based on the miner's failure to establish the existence of pneumoconiosis or total disability. Miner's Claim, Director's Exhibit 1-82, 1-4. No further action was taken on the claim. The miner filed this subsequent claim on February 24, 2011, but died on October 31, 2013, while the claim was pending before the administrative law judge. Miner's Claim, Director's Exhibit 3; Survivor's Claim, Director's Exhibit 5. Claimant, the miner's widow, was appointed as administrator of the miner's estate and is pursuing his claim. Claimant's Exhibit 3. Claimant filed this survivor's claim on May 16, 2014. Survivor's Claim, Director's Exhibit 2.

² The miner's coal mine employment was in Kentucky. Miner's Claim, Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

³ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

the survivor's claim pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), under which the survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis.

On appeal in the miner's claim, employer asserts that the administrative law judge erred in finding that the miner had legal pneumoconiosis, and that his totally disabling impairment was due to pneumoconiosis. Employer also argues that because the administrative law judge erred in awarding benefits in the miner's claim, claimant is not automatically entitled to survivor's benefits pursuant to Section 932(l). Claimant responds, urging affirmance of the awards of benefits. The Director, Office of Workers Compensation Programs, did not file a response.⁴

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).

The Miner's Claim

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer first argues that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Alam, Thomas, Broudy and Fino. Decision and Order at 23-29. Only Dr. Alam, the miner's treating physician, diagnosed legal

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1), and a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We also affirm the administrative law judge's unchallenged determination in the miner's claim that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *Id.*

pneumoconiosis, in the form of chronic bronchitis, severe emphysema and shortness of breath due to both smoking and coal mine dust exposure. Miner's Claim, Director's Exhibit 10; Claimant's Exhibit 4. The administrative law judge determined that Dr. Alam's opinion was entitled to "substantial weight," noting that he relied on accurate smoking and employment histories, that he was the only physician to review the miner's autopsy evidence, and that his opinion was supported by the objective evidence. Decision and Order at 26, 29. The administrative law judge discounted the contrary opinions of Drs. Broudy and Fino, finding them unpersuasive, and discounted Dr. Thomas's opinion, which did not address the causes of the miner's impairments. *Id.* at 26-29. Accordingly, the administrative law judge found that the weight of the evidence established that the miner had legal pneumoconiosis. *Id.* at 28-29.

Employer contends that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Fino.⁵ Employer's Brief at 10-13. Dr. Broudy diagnosed the miner as having a mild restrictive defect and a severely reduced diffusion capacity that were consistent with, and most likely related to, congestive heart failure. Miner's Claim, Director's Exhibit 13 at 4. In discounting Dr. Broudy's opinion, the administrative law judge concluded that he offered "no explanation or objective evidence" for his belief that the miner's impairments "were neither caused nor significantly contributed to by [the miner's] over 12 years of regular coal dust exposure, but [were] due, rather, exclusively to his congestive heart failure." Decision and Order at 26. The administrative law judge also noted that the record contained CT scan, x-ray, medical-opinion and autopsy evidence that the miner had chronic obstructive pulmonary disease and emphysema, but that Dr. Broudy did not "fully address" those conditions and their causes. *Id.*

Employer argues that Dr. Broudy offered an explanation and objective evidence for his opinion, citing Dr. Broudy's deposition testimony that his findings of a mild restrictive deficit and marked reduction in diffusion capacity were consistent with the miner's history of congestive heart failure, and that he saw signs of congestive heart failure when he examined the miner. Employer's Brief at 12; Miner's Claim, Director's Exhibit 12 at 11-13. This argument lacks merit. The administrative law judge discounted Dr. Broudy's opinion not for a failure to explain his belief that congestive heart failure caused the miner's impairments, but for Dr. Broudy's failure to explain adequately why the miner's impairments were not significantly related to, or substantially aggravated by, his twelve years and one month of coal mine dust exposure. *See* 20 C.F.R.

⁵ We affirm the administrative law judge's unchallenged determinations that Dr. Alam's opinion diagnosing legal pneumoconiosis is entitled to "substantial weight," and that Dr. Thomas's opinion is entitled to little weight because it is silent on the etiology of the miner's impairments. *See Skrack*, 6 BLR at 1-711; Decision and Order at 26.

§718.201(a)(2), (b); Decision and Order at 26. That credibility determination was permissible. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Moreover, employer does not dispute the administrative law judge's determination that Dr. Broudy did not address relevant CT scan, x-ray, medical-opinion and autopsy evidence. Discrediting Dr. Broudy's opinion on that basis was also reasonable. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

As for Dr. Fino, his initial report cited the miner's mild restriction and severe reduction in diffusing capacity, as well as irregular opacities on the miner's x-ray, and concluded that the miner had interstitial pulmonary fibrosis. Miner's Claim, Director's Exhibit 11 at 36-37. Dr. Fino noted that the x-ray, which he performed and interpreted, showed "no rounded opacities and no abnormalities in the upper lung zones." *Id.* In Dr. Fino's opinion, coal mine dust does not cause irregular opacities such as those seen in the miner. *Id.* at 37-41. Dr. Fino thus concluded that the miner's pulmonary fibrosis was idiopathic, unrelated to coal dust exposure, and that the miner did not have coal dust-related pneumoconiosis. *Id.* at 41. In a supplemental report prepared after the miner's death, Dr. Fino opined that the "rapid progression" of the miner's lung disease "is not consistent with any type of fibrosis related to coal mine dust[.]" Employer's Exhibit 2 at 4.

In its brief on appeal, employer summarizes Dr. Fino's opinion and argues that the administrative law judge's finding of legal pneumoconiosis should be vacated, but does not point to any error made by the administrative law judge in discrediting Dr. Fino's opinion. Employer's Brief at 13. Because employer has not argued that any of the administrative law judge's reasons for discrediting Dr. Fino's opinion were improper, we affirm the administrative law judge's discrediting as unchallenged.⁶ See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁶ The administrative law judge provided several reasons for discounting Dr. Fino's opinion. Decision and Order at 27-28. Among them was Dr. Fino's reliance on his own x-ray interpretation, which employer did not admit into the record. *Id.* at 27; see *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-109 (2006) (en banc). In addition, the administrative law judge discredited Dr. Fino's opinion for dismissing pneumoconiosis based on the shape and location of the opacities he saw on the miner's x-ray, even though the regulations do not require any particular shape or location for x-ray opacities to support a diagnosis of pneumoconiosis. Decision and Order at 27-28; see 20 C.F.R. §718.102(d). The administrative law judge also cited Dr. Fino's belief that the "rapid progression" of the miner's disease was inconsistent with fibrosis due to coal mine dust exposure; Dr. Fino's failure to review the autopsy evidence; and Dr. Fino's inability to

Given the unchallenged determinations that Dr. Alam's opinion diagnosing legal pneumoconiosis was credible and Dr. Thomas's opinion was not probative, and the administrative law judge's reasonable discrediting of the opinions of Drs. Broudy and Fino as not credible, we affirm the administrative law judge's finding that claimant established that the miner had legal pneumoconiosis, pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4). Decision and Order at 28-29.

Next, employer argues that the administrative law judge erred in finding that the evidence established that the miner was totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). To establish that the miner was totally disabled due to pneumoconiosis, claimant must establish that pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of a miner's total disability if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-153 (6th Cir. 2012).

The administrative law judge determined that Dr. Alam's opinion, that at least thirty percent of the miner's pulmonary disability was related to his coal mine employment,⁷ and that "coal dust exposure substantially aggravated his underlying lung condition," established that pneumoconiosis substantially contributed to the miner's disability. Claimant's Exhibit 4; Decision and Order at 31. The administrative law judge gave "little, if any," weight to the contrary opinions of Drs. Broudy and Fino, noting that neither physician diagnosed the miner with clinical or legal pneumoconiosis. Decision and Order at 31-32; Miner's Claim, Director's Exhibits 11 at 22-23, 13 at 4-5. The administrative law judge also noted that Dr. Thomas's opinion "expressed certainty" that pneumoconiosis contributed to the miner's impairment, but did not characterize the degree of the contribution, and thus did not establish disability causation. Decision and Order at 31; Claimant's Exhibit 5. The administrative law judge therefore found that the weight of the medical opinion evidence established that pneumoconiosis was "a substantial contributing factor" in the miner's totally disabling impairment. Decision and Order at 32.

persuasively explain his view that coal mine dust modifies pulmonary fibrosis but does not cause it. Decision and Order at 28.

⁷ Dr. Alam attributed the rest of the miner's disability to coronary disease and the miner's "history of tobacco abuse." Claimant's Exhibit 4.

Employer argues that Dr. Alam’s opinion does not establish disability causation because Dr. Alam referred only to the contribution of *coal dust exposure* to the miner’s impairment, and did not state that *pneumoconiosis* was a substantially contributing cause, as required by 20 C.F.R. §718.204(c). Employer’s Brief at 13-15. We disagree. Dr. Alam diagnosed the miner as having a totally disabling respiratory impairment, and a respiratory impairment arising out of dust exposure in his coal mine employment (i.e., legal pneumoconiosis). See 20 C.F.R. §§718.201(a)(2), (b), 718.204(b)(1), (2). The administrative law judge credited Dr. Alam on both of those opinions. Thus, although Dr. Alam’s reference to the substantially aggravating effect of coal dust exposure did not track the language of 20 C.F.R. §718.204(c), the administrative law judge could rationally conclude from Dr. Alam’s opinion that the miner’s pneumoconiosis — which arose from coal dust exposure — was a substantially contributing cause of the miner’s disabling impairment. See *Dixie Fuel Co. v. Director, OWCP [Hensley]*, 820 F.3d 833, 848, 25 BLR 2-799, 2-817-18 (6th Cir. 2016). We thus affirm the administrative law judge’s determination that Dr. Alam’s opinion supports a finding of disability causation, pursuant to 20 C.F.R. §718.204(c).⁸

Employer also contends that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Fino that the miner was not totally disabled due to pneumoconiosis. Employer’s Brief at 17. We disagree. The administrative law judge reasonably discredited their opinions because neither doctor diagnosed the miner as having pneumoconiosis, contrary to the administrative law judge’s findings. Decision and Order at 31-32. See *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev’d on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

Because the administrative law judge reasonably credited Dr. Alam’s opinion and discredited the contrary opinions of Drs. Broudy and Fino, we affirm his finding that the evidence established that the miner was totally disabled due to pneumoconiosis, pursuant

⁸ Employer also argues that because Dr. Alam opined in 2011 that fifty percent of the miner’s disability could be attributed to pneumoconiosis, and then opined in 2014 that thirty percent of the miner’s disability was due to coal dust exposure, Dr. Alam’s opinion was contrary to the regulations, which establish that pneumoconiosis is a latent and progressive disease. Employer’s Brief at 15; see 20 C.F.R. §718.201(c). This argument lacks merit. Even if Dr. Alam thought pneumoconiosis was a smaller factor in the miner’s impairment in 2014 than it was in 2011, it does not necessarily follow from that opinion that Dr. Alam believed the miner’s pneumoconiosis had stopped progressing or reversed itself.

to 20 C.F.R. §718.204(c). We therefore further affirm the award of benefits in the miner's claim.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(l): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Decision and Order at 33. Employer does not challenge those findings, which we affirm. *See Skrack*, 6 BLR at 1-711. We therefore affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(l). 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge