

BRB No. 97-0963 BLA

CORINE WELLS)		
(Widow of CHARLES WELLS))		
)		
Claimant-Respondent)		
)		
v.)		
)		
RAY COAL COMPANY)		
)		
Employer-Petitioner)		
)		
DIRECTOR, OFFICE OF WORKERS')	DATE	ISSUED:
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Allen B. Roberts (Clark & Roberts Law Office), Manchester, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-0142) of Administrative Law Judge Gerald M. Tierney awarding benefits 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). The administrative law judge adjudicated the claim, filed on March 20, 1994, pursuant to the provisions at 20 C.F.R. Part 718, and found that the weight of the evidence established death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in failing to adjudicate the issue of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) based upon the record as a whole, and erred in finding that the evidence established the miner's

death was hastened by pneumoconiosis pursuant to Section 718.205(c). Claimant responds,¹ urging affirmance of the administrative law judge's findings pursuant to Section 718.205(c) and arguing that application of the doctrine of collateral estoppel precludes relitigation of the issue of pneumoconiosis in this claim. Employer has filed a reply brief, and the Director, Office of Workers' Compensation Programs (the Director), 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 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's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis, and that the miner had pneumoconiosis which arose out of coal mine employment.² See 20 C.F.R. §§718.205(c), 718.202(a), 718.203; see *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 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).

Employer initially contends that the administrative law judge erred in failing to conduct a *de novo* review of all of the evidence of record on the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), rather than relying on Administrative Law Judge Robert E. Kendrick's weighing of the evidence on this issue in the living miner's claim. Employer further argues that the later evidence in the survivor's claim, consisting of CT scans, numerous x-rays, and the medical records of Drs. Dineen and Tannir, does not document the presence of pneumoconiosis. Lastly, employer contends that the administrative law judge, in finding that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c), erred in relying on the equivocal, generalized, and unsupported opinion of Dr. Tannir rather than crediting the contrary

¹Claimant Corine Wells is the widow of the deceased miner, Charles Wells, who died on July 4, 1993. Director's Exhibit 2.

²This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

opinion of Dr. Kraman that death was due solely to lung cancer and was unrelated to pneumoconiosis.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge properly determined that the weight of the evidence in the living miner's claim, all contained in Director's Exhibit 21, established that the miner was totally disabled by pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204, based on Judge Kendrick's final judgment awarding benefits, which the administrative law judge found well reasoned.³ Decision and Order at 2; Director's Exhibit 21. The administrative law judge then reviewed the evidence developed in the survivor's claim and reasonably determined that it did not contradict Judge Kendrick's findings. The x-ray interpretations were not classified pursuant to 20 C.F.R. §718.102, and the administrative law judge found that there was no indication that the readers were examining them for the presence of pneumoconiosis. Decision and Order at 3. Further, the administrative law judge accurately determined that the CT scans showed cancer as well as nodular densities and fibrotic changes. Decision and Order at 3; Director's Exhibit 3. The administrative law judge noted that Judge Kendrick relied primarily on the opinion of the miner's treating physician, Dr. Dineen, in finding that the miner suffered from disabling occupational pneumoconiosis, see Director's Exhibit 21, and determined that Dr. Dineen's later treatment notes referenced the miner's severe obstructive airway disease and emphysema, as documented by the results of a December 1, 1992 pulmonary function study. Decision and Order at 2-3; Director's Exhibit 4. The administrative law judge acknowledged the admission of Dr. Tannir, who treated the miner for cancer from 1989 until his death, that the miner's death certificate listed only cancer as a cause of death, but determined that Dr. Tannir's deposition testimony more fully explained his overall opinion that the presence of the miner's pneumoconiosis caused faster deterioration of lung function and hastened death, which the administrative law judge found consistent with his and Dr. Dineen's treatment

³We note that Judge Kendrick did not apply the "true doubt" rule in weighing the evidence at Sections 718.202 and 718.203(b), but found that the miner established the existence of pneumoconiosis arising out of coal mine employment by a preponderance of the evidence, see Decision and Order at 12-15, the same standard of proof applicable to the survivor's claim. 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). Thus, we agree with claimant's argument that principles of *res judicata* apply to preclude a reweighing of the evidence contained in the final judgment awarding benefits in the miner's claim on the issues of the existence of pneumoconiosis and etiology.

notes referencing severe chronic obstructive pulmonary disease as well as lung cancer.⁴ Decision and Order at 2-3; Director's Exhibits 2, 3; Claimant's Exhibit 1. The administrative law judge acted within his discretion as trier of fact in according greatest weight to Dr. Tannir's opinion because he was a treating physician who explained how pneumoconiosis

⁴Employer argues that Dr. Tannir was merely asked to assume the existence of pneumoconiosis at his deposition, and that Dr. Tannir's treatment notes do not document the presence of pneumoconiosis, but include references to lung cancer, chronic bronchitis, emphysema, extensive tuberculosis, and chronic obstructive pulmonary disease attributed in one note to tobacco abuse. Employer's Brief at 9; Director's Exhibit 3. At his deposition, however, Dr. Tannir indicated that he received medical records from Dr. Dineen when he began treating the miner, at which time the miner had multiple medical problems including pneumoconiosis. Claimant's Exhibit 1 at 6. While Dr. Dineen's records from 1990 through 1992 do not explicitly mention pneumoconiosis, Director's Exhibit 4, he previously diagnosed multiple respiratory problems including silicosis and occupationally-related tuberculosis. Director's Exhibit 21, Deposition at 8-14. Dr. Tannir ultimately concluded that pneumoconiosis actually hastened the miner's death. Claimant's Exhibit 1 at 4-5.

hastened death, see generally *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); and little weight to the contrary opinion of Dr. Kraman,⁵ that the miner's death was not caused or hastened by pneumoconiosis, because he never examined the miner and failed to explain the basis for his conclusions.⁶ Decision and Order at 3-4; see generally *Onderko, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpublished); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). The administrative law judge's findings and inferences pursuant to Section 718.205(c) are supported by substantial evidence, in accordance with applicable law, see *Brown, supra*, and are affirmed. Consequently, we affirm his award of benefits.

⁵We reject employer's assertion that because Dr. Kraman was a consultant for the Department of Labor, he should have been considered an objective reviewer of the evidence. The administrative law judge acknowledged Dr. Kraman's status, but was not required to accord greater weight to his opinion on that basis alone. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

⁶Employer correctly notes that the Department of Labor provided Dr. Kraman with the treatment notes of Drs. Dineen and Tannir, and informed him that the miner was a black lung beneficiary at the time of his death. Thus, the administrative law judge erred in stating that there was no indication Dr. Kraman was aware that the miner had been receiving benefits. See Decision and Order at 3; Director's Exhibit 5. This error is harmless, however, inasmuch as the administrative law judge provided valid alternative reasons for discounting Dr. Kraman's opinion. See generally *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge