

BRB No. 99-0519 BLA

KATHRYN B. RUMLEY)
(Widow of ROBY R. RUMLEY))
)
 Claimant-Respondent)

v.)

BISHOP COAL COMPANY)
)
 Employer-Petitioner)

DATE ISSUED:

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 Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-BLA-0147) of Administrative Law Judge Lawrence P. Donnelly 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, adjudicating this claim pursuant to the permanent criteria set forth at 20 C.F.R. Part 718, credited Administrative Law Judge Stuart A. Levin's previous determination that the miner¹ worked in qualifying

¹ The miner, Roby R. Rumley, filed his first application for black lung benefits with the Social Security Administration on February 15, 1973, which was finally denied on November

coal mine employment for thirty-one years. The administrative law judge found that claimant² established the existence of pneumoconiosis arising out of coal mine employment and that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

20, 1979. Director's Exhibit 76. Subsequently, the miner filed a duplicate application for benefits on December 8, 1982, which was denied by Administrative Law Judge Robert A. Giannasi in a decision issued on September 4, 1987 and affirmed by the Board in *Rumley v. Bishop Coal Co.*, BRB No. 87-2891 BLA (Jun. 29, 1990)(unpub.); Director's Exhibit 76. Thereafter, Administrative Law Judge Stuart A. Levin awarded benefits on the miner's third application filed on July 22, 1991, but the Board vacated this award and remanded the case for further consideration, *Rumley v. Bishop Coal Co.*, BRB No. 93-2191 BLA (Oct. 26, 1994)(unpub.); Director's Exhibit 76. On remand, Administrative Law Judge Levin again awarded benefits on May 1, 1995, and the Board affirmed this decision. *Rumley v. Bishop Coal Co.*, BRB No. 95-1483 BLA (May 23, 1996) (unpub.), *aff'd on recon*, (Mar. 21, 1997)(unpub. Order); Director's Exhibit 76.

² Claimant, Kathryn B. Rumley, is the widow of Roby R. Rumley, the miner, who died on December 19, 1996. Director's Exhibits 6, 76. Claimant filed her application for benefits on January 3, 1997. Director's Exhibit 1.

On appeal, employer argues that, in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge failed to explain his findings, to provide reasoned decision-making, and to consider and weigh important evidence bearing on the credibility of the medical evidence. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he will not participate in this appeal.³

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits in a survivor's claim filed on or after January 1, 1982, a claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 718.205(a). Death will be considered due to pneumoconiosis if the evidence establishes 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. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

In challenging the administrative law judge's findings under Section 718.205(c), employer argues that Dr. Vasudevan's opinion contains the following eight flaws which

³ We affirm the administrative law judge's findings regarding length of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment inasmuch as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 15.

undermine his opinion that the miner's death was caused by pneumonia, respiratory failure, and complications from pneumoconiosis:

- a. he treated the miner only during the last year of the miner's life;
- b. he did not follow the miner closely during his final illness;
- c. he had only a historical, unconfirmed assumption that the miner had pneumoconiosis;
- d. his x-ray readings were equivocal as to the existence of pneumoconiosis;
- e. he was under the mistaken impression that the miner's pneumoconiosis was "extensive" despite the pathological confirmation that the pneumoconiosis was "mild."
- f. he indicated that his historical notation of pneumoconiosis was to recover the payment of his medical fees;
- g. his pathological expertise is diminished since he is not a pathologist; and
- h. he was under the erroneous impression that the miner had never smoked but later conceded that smoking may have contributed to the miner's symptoms.

Employer's Brief at 6.

Employer's arguments lack merit. The administrative law judge did not rely on Dr. Vasudevan's treating physician status as a reason for crediting his opinion. Moreover, contrary to employer's argument, Dr. Vasudevan relied upon the pathology reports, not x-ray readings or historical assumptions to diagnose the presence of pneumoconiosis. Decision and Order at 3; Director's Exhibit 12; Claimant's Exhibit 2. Furthermore, Dr. Vasudevan testified during his deposition on March 27, 1998 that the miner's coal workers' pneumoconiosis "was mild in a given area, but extensive and severe because of the extent of [its] involvement" in "several parts of the lung, including the visceral pleura, hilar nodes, and so many places." Claimant's Exhibit 2 at 29. Also, during his deposition, Dr. Vasudevan learning that the miner had a smoking history of forty years, nevertheless, testified that only absent autopsy findings would he opine that the miner died of pneumonia and respiratory failure caused by chronic obstructive pulmonary disease due to smoking. Claimant's Exhibit 2 at 32. Dr. Vasudevan is Board-certified in internal, pulmonary, and critical care medicine, thus, he possesses sufficient pulmonary expertise to render an opinion as to whether pneumoconiosis substantially contributed to the miner's death. Director's Exhibit 12; Claimant's Exhibit 2. Inasmuch as all of employer's assertions are without merit, they are rejected.

Employer also avers that the administrative law judge's failure to explain why he found the opinions of Drs. Vasudevan and Stefanini to be documented, well reasoned, and credible fails to comply with the requirement of the Administrative Procedures Act (APA) that an administrative law judge fully explain his findings of fact. *See* 5 U.S.C.

§557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). We disagree. Contrary to employer's argument, the administrative law judge permissibly found that the opinions of Drs. Vasudevan and Stefanini were documented, well reasoned, credible, and outweighed the opinions of Dr. Kleinerman, Naeye, Fino, Bush, Dahhan and Repsher because they were "supported by positive x-ray readings of record, which documented Category 2 pneumoconiosis [and] the weight of the evidence shows that the pneumoconiosis was not as minimal as the Employer's experts set forth, and . . . was sufficient to contribute to the Miner's death," see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); see *Pulliam v. Director, OWCP*, 7 BLR 1-846, 1-851 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229, 1-232 (1984); Decision and Order at 18.

Employer next asserts that the administrative law judge erred by relying on positive x-ray interpretations as a basis to credit the opinions of Drs. Vasudevan and Stefanini because x-ray interpretations are not determinative of the cause of death. Relying on the autopsy evidence, confirming the presence of pneumoconiosis and supporting the positive x-ray readings by several dually qualified physicians, the administrative law judge reasonably found that the miner's "pneumoconiosis was not as minimal as the Employer's experts state[d]." Decision and Order at 16-17. It was not therefore irrational for the administrative law judge to find that the opinions of Drs. Vasudevan and Stefanini, as supported by Dr. Perper,⁴ were more probative than the contrary opinions of Drs. Kleinerman, Naeye, Fino, Bush, Dahhan, and Respher because the former physicians' opinions were supported by x-ray interpretations demonstrating the existence of Category 2 pneumoconiosis. See *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); Decision and Order at 18. Hence, the administrative law judge reasonably found that the opinions of Drs. Kleinerman, Naeye, Fino, Bush, Dahhan, and Respher that the miner's pneumoconiosis was too mild to have contributed to his death were unpersuasive. See *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).

⁴ In a report dated May 4, 1997, Dr. Perper opined that "chronic lung disease and superimposed pneumonia are substantial and sufficient causes of death. However, the contribution of coal workers' pneumoconiosis cannot be adequately evaluated without a full review of occupational and clinical history and records of the patient." Director's Exhibit 8.

Employer contends that the administrative law judge impermissibly ignored the fact that the allegation that pneumoconiosis suppressed the immune system espoused by Dr. Stefanini was refuted by Drs. Kleinerman, Fino, Repsher, and Bush.⁵ Employer's contention lacks merit. The administrative law judge stated, "the experts disagreed on whether pneumoconiosis suppresses or stimulates the immune system," and, within a permissible exercise of his discretion, rejected the opinions of Drs. Kleinerman, Fino, Repsher, and Bush because these physicians relied upon articles and/or studies that were not conclusive on this issue or not relevant to the circumstances of the miner in this case. *See Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985); Decision and Order at 17.

Employer avers that, although the administrative law judge noted the respective qualifications of the various physicians, he failed to weigh the qualifications of Drs. Vasudevan and Stefanini as compared to those of Drs. Kleinerman and Naeye. We disagree. The administrative law judge's finding that the qualifications of Drs. Vasudevan and Stefanini were "on par" with employer's experts is supported by substantial evidence inasmuch as Dr. Vasudevan, like Dr. Fino, is Board-certified in internal and pulmonary medicine and Dr. Stefanini, like Drs. Kleinerman and Naeye, is Board-certified in pathology and in the subspecialties of anatomic pathology and clinical pathology. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); Decision and Order at 17; Director's Exhibit 12; Claimant's Exhibits 1, 2; Employer's Exhibits 1-4, 8. Hence, we reject employer's argument.

Inasmuch as the administrative law judge's determination, that the preponderance of the evidence established that pneumoconiosis was a substantially contributing cause to the miner's death, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's Section 718.205(c) finding. *See Shuff*,

⁵ Dr. Stefanini reviewed the medical evidence and opined, "While the cause of death was bilateral bronchopneumonia superimposed to chronic lung disease, the findings of coal workers' pneumoconiosis were of sufficient severity to implicate coal workers' pneumoconiosis as a contributing cause to this death by decreasing the respiratory space and because of the depression of the immune system... ." Claimant's Exhibit 1.

On the contrary, Dr. Bush concluded that "impairment of the immune system by coal workers' pneumoconiosis and the silica that is deposited with the black coal dust pigment cannot be considered more than speculative and is well outside the realm of reasonable medical certainty." Employer's Exhibit 5. Similarly, Dr. Kleinerman opined, "the minimal extent of simple CWP such as was present in [the miner's] lung does not cause an associated immunodepression nor increased susceptibility to infection." Employer's Exhibit 1.

supra; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 816, 17 BLR 2-135, 2-140 (6th Cir. 1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

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

SO ORDERED.

BETTY J. HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge