BRB No. 99-1133 BLA

JENNIE TRUJILLO (Widow of HENRY TRUJILLO)	)	
Claimant-Respondent	)	
v.	)	
P & M COAL MINING 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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

William C. Erwin, Raton, New Mexico, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-00484/00485) of Administrative Law Judge Thomas M. Burke awarding benefits on claims filed by the miner and the survivor 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 found, and the parties stipulated to, fifteen years of qualifying coal mine employment, and based on the date of filing, considered entitlement in both the miner's and survivor's claims pursuant to the provisions of 20 C.F.R. Part 718.[1] Decision and Order at 3-4; Hearing

[1]Claimant is Jennie Trujillo, the miner's widow. The miner, Henry Trujillo, filed a claim for benefits on February 13, 1990, which was denied by Administrative Law Judge Alfred

Transcript at 7. After determining that the miner's claim was a duplicate claim, the administrative law judge noted the proper standard and found that based on the newly submitted evidence, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 as the evidence was sufficient to establish the existence of pneumoconiosis and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). Decision and Order at 2-3, 6-15. The administrative law judge further found with respect to the survivor's claim that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 15-16. Accordingly, benefits were awarded in both the miner's and survivor's claims. On appeal, employer contends that the administrative law judge erred in failing to give proper weight to the contrary evidence at Sections 718.204(c)(4) and 718.205. Claimant responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

Lindeman on July 14, 1993 as the miner failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 23. The miner took no further action until he filed the present claim on July 11, 1997, which was denied by the district director on September 8, 1997 and January 5, 1998. Director's Exhibits 22, 24. The miner died on July 30, 1997 and claimant filed a survivor's claim on September 5, 1997, in which the district director awarded benefits on January 5, 1998. Director's Exhibits 1, 5, 16. Employer subsequently controverted and the district director forwarded both claims to the Office of Administrative Law Judges. Director's Exhibits 13, 24.

[2]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a) and 718.203 and his onset determinations are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 into the Act 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 the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Tenth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death.[3] *See Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996).

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 of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Initially, employer's contention that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), is without merit.[4] The administrative law judge fully

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit as the miner was employed in the coal mine industry in the state of New Mexico. *See* Decision and Order at 3; Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

Employer further contends that the administrative law judge erred in failing to give weight to the contrary evidence that establishes that the miner is not disabled as a result of pneumoconiosis and that the miner's death was not due to pneumoconiosis. Employer's Brief at 5-12. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988).

In the instant case, the administrative law judge, in addressing the miner's duplicate claim, permissibly determined that the newly submitted evidence of record was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204, and therefore was sufficient to establish a material change in conditions pursuant to Section 725.309.[5] *See Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge considered the relevant newly submitted medical opinion evidence of record and rationally found that the opinions were sufficient to establish claimant's burden of proof as he accorded greater weight to the opinion of Dr. James regarding the severity of claimant's respiratory impairment and reasonably found that his medical opinion was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204. Decision and Order at 14-15. In so finding, the administrative law judge, within his discretion as fact-finder, permissibly accorded significant weight to the medical opinion of Dr. James on the basis that he was claimant's treating physician, was present during the autopsy and as his conclusions were supported by the opinion of Dr. Perper, a reviewing pathologist. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Piccin*, *supra*; Decision and Order at 14-15. Contrary to employer's contention, the administrative law judge may credit the opinion of a treating physician over that of reviewing physicians as the length of time a physician has treated a miner is an important

[5]Contrary to employer's assertion, the record does contain a qualifying pulmonary function study which the administrative law judge permissibly credited based upon the recency of the evidence. *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 13; Claimant's Exhibit 3. Additionally, the newly submitted blood gas study, contrary to the administrative law judge's finding and employer's assertion, is qualifying. *See* 20 C.F.R. Part 718, Appendix C; 20 C.F.R. §718.204(c)(2); Director's Exhibit 9; Claimant's Exhibit 4. A remand is not required, however, as this evidence supports the administrative law judge's determination that the newly submitted evidence is sufficient to establish total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

factor in determining the value of the physician's opinion because of the correlative degree of the physician's familiarity with the patient. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Furthermore, the administrative law judge noted the existence of the contrary probative evidence in the record, but permissibly concluded that this evidence did not outweigh the evidence supportive of a total disability finding. *See Clark, supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order at 14-15. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Consequently, inasmuch as the administrative law judge permissibly found that the medical opinion of Dr. James was sufficient to establish total respiratory disability due to pneumoconiosis upon weighing all of the relevant evidence, we affirm the administrative law judge's findings pursuant to Section 718.204 and that claimant established a material change in conditions pursuant to Section 725.309 as they are supported by substantial evidence and in accordance with law. *See Brandolino, supra*; *Clark, supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock, supra*; *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986).

With respect to the survivor's claim, the administrative law judge, in the instant case, rationally found that the evidence of record was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *Piccin, supra*. The administrative law judge, contrary to employer's contention, properly considered the evidence of record and permissibly concluded that it was sufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205(c). *Pickup, supra*. The administrative law judge rationally accorded greater weight to the opinion of Dr. Perper as his conclusions were supported by the report of Dr. LaRosa, who performed the autopsy. *See Pickup, supra*; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Director's Exhibits 6, 7; Decision and Order at 15-16. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As employer makes no other specific challenge to the administrative law judge's findings on the merits, we affirm the administrative law judge's finding that the evidence of record is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 as it is supported by substantial evidence and is in accordance with law. *See Pickup, supra*; *Neeley, supra*; *Trumbo, supra*; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner’s claim and the survivor’s claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge