

BRB Nos. 04-0134 BLA
and 04-0134 BLA-A

EUFEMIA MONTOYA)	
(Widow of JOSE E. MONTOYA))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	DATE ISSUED: 08/20/2004
)	
VALLEY CAMP OF UTAH,)	
INCORPORATED)	
)	
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 Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

William E. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals, and employer cross-appeals, the Decision and Order Denying Benefits (2001-BLA-0141) of Administrative Law Judge Pamela Lakes Wood 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).² Initially, the administrative law judge found that the miner was receiving benefits at the time of his death based on an award of benefits dated June 18, 1996.³ Decision and Order at 4. Addressing claimant's Motion for Partial Summary Judgment, the administrative law judge denied this motion, finding that the doctrine of collateral estoppel is not applicable in the present case. Decision and Order at 8-9. Based on claimant's 2000 filing date, the administrative law judge adjudicated this survivor's claim pursuant to 20 C.F.R. Part 718, and credited the miner with twenty-seven years of coal mine employment. Decision and Order at 9. Addressing the merits of entitlement in this survivor's claim, the administrative law judge found that the preponderance of medical evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine pursuant to 20 C.F.R. §718.202(a) and 718.203(b). Decision and Order 13-14. However, the administrative law judge found the medical evidence insufficient to establish that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

¹ Claimant is the widow of the miner, Jose E. Montoya, who died on September 24, 1998. Director's Exhibits 1, 4.

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ The miner filed his initial application for benefits with the Social Security Administration (SSA) on February 23, 1972, which was finally denied by SSA on May 29, 1979. Director's Exhibit 17. During the pendency of the SSA claim, the miner filed an application for benefits with the Department of Labor (DOL) on May 5, 1975. *Id.* By Order dated November 14, 1980, DOL denied benefits. *Id.*

The miner filed a second application for benefits with DOL on January 23, 1986, which was finally denied by the district director by Order dated March 21, 1986. Director's Exhibit 18. The miner filed a third application for benefits on February 26, 1996. Director's Exhibit 19. The district director found the miner entitled to benefits, a determination which employer did not challenge, and by Order dated June 18, 1996 the district director awarded benefits. *Id.*

On appeal, claimant contends that the administrative law judge erred in denying benefits. In particular, claimant argues that while the administrative law judge was correct in finding that the evidence was sufficient to establish the existence of pneumoconiosis, she nonetheless erred in weighing the medical opinion evidence as she failed to accord enhanced weight to the opinion of Dr. Nichols, claimant's treating physician. Claimant further challenges the administrative law judge's finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis, or that pneumoconiosis hastened the miner's death, arguing that the administrative law judge erred in her weighing of the medical evidence of record. In a combined response brief and Cross-Petition for Review and brief, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. In addition, employer generally notes its disagreement with the administrative law judge's finding that the medical evidence was sufficient to establish the existence of pneumoconiosis because employer asserts that the administrative law judge merely found that the medical opinion evidence was in equipoise. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not respond on the merits of claimant's appeal.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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). In survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if it was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if 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 hastened the miner's death. 20 C.F.R. §718.205(c)(5); *see Northern Coal Co. v.*

⁴ The parties do not challenge the administrative law judge's decision to credit claimant with twenty-seven years of coal mine employment, or her findings pursuant to 20 C.F.R. §718.202(a)(2) and (3). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Director, OWCP [Pickup], 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge considered the relevant medical evidence and found that claimant failed to establish, by a preponderance of the evidence, that the miner's death was due to pneumoconiosis or that pneumoconiosis was a contributory or hastening factor in the miner's death pursuant to Section 718.205(c). Decision and Order at 15. Specifically, the administrative law judge found that Dr. Repsher opined that the miner's death was not hastened by coal workers' pneumoconiosis and that Drs. Castle and Rosenberg opined that the miner's death was neither quickened nor hastened by his underlying lung disease. Decision and Order at 15; Employer's Exhibits 2, 4, 8, 9, 11-13, 16. In addition, the administrative law judge did not credit the opinions of Drs. Nichols and James, that the miner's pneumoconiosis hastened his death in that it prevented the miner from being a surgical candidate for treatment of his gastric cancer, as this conclusion was not supported by the weight of the medical evidence of record. Decision and Order at 15; Claimant's Exhibits 10, 11, 13.

Claimant has set forth the evidence supportive of her burden, specifically the medical opinion of Dr. Nichols, and argues that the administrative law judge erred in not crediting this evidence over the contrary medical evidence of record. In particular, claimant argues that the administrative law judge erred in failing to accord enhanced weight to the medical opinion of Dr. Nichols based solely on his status as the miner's treating physician. Claimant's Brief at 6. Contrary to claimant's assertion, the administrative law judge was under no obligation to accord "enhanced weight" to the opinion of the miner's treating physician, Dr. Nichols. 20 C.F.R. §718.104(d)(5); *see generally Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Rather, the administrative law judge reasonably found that the opinion of Dr. Nichols, that coal workers' pneumoconiosis hastened the miner's death, was contrary to the bulk of the medical evidence which established that the miner's end stage pulmonary disease was not attributable to his coal dust exposure. Decision and Order at 15.

As it is in the sole province of the administrative law judge, as trier-of-fact, to weigh conflicting medical evidence, and claimant has not set forth any meritorious allegations of error in the administrative law judge's weighing of Dr. Nichols's opinion, we affirm the administrative law judge's finding that this opinion is insufficient to establish that pneumoconiosis hastened the miner's death. *See Pickup*, 100 F.3d 871, 20 BLR 2-334; *Hansen v. Director, OWCP*, 984 F.2d 364, 17 BLR 2-48 (10th Cir. 1993). In addition, contrary to claimant's contention, the administrative law judge within a

reasonable exercise of her discretion found the opinions of Drs. Castle, Rosenberg and Repsher disputed Dr. Nichol's opinion that pneumoconiosis hastened the miner's death and reasonably accorded these opinions greater weight. *Id.* Consequently, because claimant's arguments are seeking a reweighing of the evidence, which the Board is not empowered to do, we reject claimant's contentions and affirm the administrative law judge's finding that the weight of the medical evidence is insufficient to establish that the miner's death was caused, in whole or in part, by pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c). See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Because we have affirmed the administrative law judge's finding that claimant has not established that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c), an essential element of entitlement in this survivor's claim, error, if any, in the administrative law judge's weighing of the evidence relevant to the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4) is harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We will not, therefore, address claimant's arguments pertaining to these findings.

Furthermore, since we have affirmed the administrative law judge's denial of benefits, we need not address the general arguments regarding Section 718.202(a), raised in employer's combined cross-appeal and response brief.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge