

BRB No. 04-0950 BLA

MAUDIA ROWE)	
(Widow of PERRY ROWE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
SEA "B" MINING COMPANY)	DATE ISSUED: 08/12/2005
)	
Employer-Petitioner)	
)	
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Maudia Rowe, Pounding Mill, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-5910 and 03-BLA-5911)¹ of Administrative Law Judge Jeffrey Tureck on a miner's subsequent claim and 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). Adjudicating

¹ Although the miner's and survivor's claims were consolidated, the record files of each claim are distinctly separate. Thus, any reference to evidence associated with the miner's claim will be cited as "Miner-" and any reference to evidence associated with the survivor's claim will be cited as "Survivor-" immediately preceding the exhibit number.

both claims pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that the miner worked in qualifying coal mine employment for twenty-nine years. With respect to the miner's subsequent claim, the administrative law judge found that, because the newly submitted medical opinion evidence was sufficient to establish total respiratory disability, the miner demonstrated that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final under 20 C.F.R. §725.309(d). He, therefore, considered all the evidence of record to determine whether claimant established entitlement.

After addressing the requisite elements of entitlement for both the miner's and survivor's claims,² the administrative law judge determined that the miner suffered from simple coal workers' pneumoconiosis because both pathologists who reviewed the autopsy evidence diagnosed the existence of simple pneumoconiosis. Next, the administrative law judge found that the evidence of record contained conflicting physicians' opinions concerning whether the miner suffered from complicated coal workers' pneumoconiosis; therefore, the administrative law judge analyzed all the relevant evidence to determine whether claimant had established invocation of the irrebuttable presumption of total disability/death due to pneumoconiosis based on a finding that the miner suffered from complicated pneumoconiosis, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Based on his determination to accord determinative weight to the pathology opinion of Dr. Joyce diagnosing progressive massive fibrosis and the x-ray interpretation of Dr. Forehand finding category A large opacities, the administrative law judge found that the miner suffered from complicated pneumoconiosis. Accordingly, the administrative law judge found that claimant established invocation of the irrebuttable presumption that the miner was totally

² Claimant, Maudia Rowe, is the widow of the miner, Perry Rowe, who died on February 26, 2002. Survivor-Director's Exhibit 7. The miner filed his first application for benefits on July 10, 1987. That claim was finally denied by Administrative Law Judge Ben L. O'Brien in a Decision and Order issued on December 26, 1989 because the miner failed to establish total disability due to pneumoconiosis. Miner-Director's Exhibit 1. Although the miner filed a subsequent claim for benefits on March 15, 2001, he died shortly before the district director awarded benefits on his claim. Miner-Director's Exhibits 7, 57. Consequently, claimant filed a survivor's claim for benefits on March 29, 2002 and the district director awarded benefits on her claim. Survivor-Director's Exhibits 2, 24. Pursuant to employer's request for a formal hearing on both claims, the claims were forwarded to the Office of Administrative Law Judges where they were consolidated and adjudicated by Administrative Law Judge Jeffrey Tureck after a formal hearing held on September 5, 2003. Judge Tureck issued the instant Decision and Order awarding benefits on both claims and both awards are now on appeal before the Board.

disabled due to pneumoconiosis on the miner's claim and invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis on the survivor's claim. *See* 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304(a)-(c). Benefits were, therefore, awarded on the miner's claim as of July 2001, the month in which complicated pneumoconiosis was first diagnosed, to end in January 2002, the month prior to the miner's death. Benefits were awarded in the survivor's claim to begin in February 2002, the month in which the miner died.

Employer appeals both awards of benefits and argues that the administrative law judge erred in finding that the miner suffered from complicated pneumoconiosis and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of total disability and death due to pneumoconiosis pursuant to Section 718.304. Employer contends that the administrative law judge erroneously failed to consider all the relevant medical evidence, which was not supportive of a finding of complicated pneumoconiosis, that he improperly substituted his opinion for the opinions of Drs. Caffrey and Hippensteel, and that he impermissibly discounted the opinions of Drs. Caffrey and Hippensteel. Claimant, who is without the assistance of counsel, has not responded to employer's appeal. 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).

In challenging the administrative law judge's determination under Section 718.304, *i.e.*, that claimant established invocation of the irrebuttable presumption of total disability and death due to pneumoconiosis based on a finding of complicated pneumoconiosis, employer argues that the administrative law judge erred in failing to consider all the relevant medical evidence because the vast majority of chest x-rays, CT scans, and autopsy reports indicate that the interstitial fibrosis on the miner's lungs was attributable to a condition known as adult respiratory distress syndrome (ARDS), rather than complicated pneumoconiosis. Relying primarily on the opinions of Drs. Caffrey and Hippensteel, that the miner developed

³ We affirm the administrative law judge's findings with respect to length of coal mine employment, the existence of simple coal worker's pneumoconiosis, total respiratory disability, onset of disability, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 inasmuch as these determinations, which are not adverse to claimant, are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2, 4.

ARDS while he was hospitalized for treatment of a spinal infection, employer argues that the administrative law judge erred by finding that the objective evidence failed to support these physicians' opinions because the pulmonary function and blood gas studies administered prior to the miner's hospitalization yielded non-qualifying values while those tests completed after the hospitalization demonstrated significant decreases and abnormalities. In addition, employer argues that the administrative law judge substituted his opinion for those of the "highly qualified medical experts" since, in rendering their diagnoses of ARDS, Dr. Caffrey relied upon his review of the autopsy slides to opine that the slides illustrated distinct and separate evidence of fibrosis due to ARDS and, Dr. Hippensteel relied upon his review of a CT scan to opine that the abnormalities found were consistent with interstitial pneumonitis due to ARDS.

Contrary to employer's contention, the administrative law judge properly assessed the objective evidence of record and, after critically evaluating the medical reports, diagnostic tests, and the underlying documentation of each physician's opinion, he permissibly determined that the opinions of Drs. Caffrey and Hippensteel possessed little, if any, probative value, and therefore, were entitled to less weight. The administrative law judge found that, although Dr. Caffrey, a Board-certified anatomical and clinical pathologist, listed all the records including the autopsy evidence he had reviewed, the only evidence he cited as supporting his conclusion that the miner did not suffer from complicated pneumoconiosis but instead, suffered from severe ARDS (as a result of an infection that occurred in connection with 1999 back surgery) was a hospital discharge summary dated October 30, 1999 wherein Dr. Kennedy, the miner's treating cardiologist, listed "[p]revious evidence of adult respiratory distress syndrome" among nine other diagnosed conditions. Miner-Director's Exhibit 12. Similarly, the administrative law judge found that Dr. Hippensteel, a Board-certified pulmonary specialist, who had examined the miner and reviewed his medical records including post-mortem evidence, relied on the same information contained in Dr. Kennedy's October 1999 hospital discharge report regarding the miner's ARDS, *i.e.*, that the miner's "interstitial fibrosis appear[ed] to have been associated with a severe bout of adult respiratory distress syndrome associated with sepsis." Miner-Director's Exhibit 21.

The administrative law judge determined that the diagnosis of ARDS rendered by Dr. Caffrey and by Dr. Hippensteel was particularly problematic because the sole basis for their conclusions, *i.e.*, Dr. Kennedy's notation of "previous evidence" of ARDS, was the only mention of ARDS in all of the hospital and medical treatment reports of record and they lacked any definitive indication that Dr. Kennedy had, in fact, personally diagnosed this condition or any indication of what this "previous evidence" of ARDS was. Decision and Order at 6. Hence, the administrative law judge reasonably found that the opinions of Drs. Caffrey and Hippensteel were further undermined because, except for the October 1999 hospital discharge report, Dr. Kennedy did not diagnose or mention ARDS in any of his other reports and none of the miner's other treating physicians, particularly, Dr. Miller, the miner's

primary care physician who treated the miner until his death, and Dr. Forehand, who conducted the most recent complete pulmonary evaluation of the miner, diagnosed ARDS. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on at 6. The administrative law judge, therefore, rationally found that the opinions of Drs. Caffrey and Hippensteel diagnosing ARDS, lacked credibility and probative value because their conclusions were undocumented, unsupported by evidence on which the doctors relied, and inconsistent with the other physicians' opinions of record. Consequently, we reject employer's contention that the administrative law judge substituted his opinion for those of the medical experts and affirm his discrediting of the opinions of Drs. Caffrey and Hippensteel. *See Kennellis Energies v. Director, OWCP [Ray]*, 333 F.3d 822, 826, 22 BLR 2-591, 2-598 (7th Cir. 2003) (making credibility determinations and resolving inconsistencies in evidence is within sole province of administrative law judge); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 1190, 7 BLR 2-202, 2-208 (4th Cir. 1985). Similarly, employer's argument that the miner's pulmonary function studies and blood gas studies did not show a significant respiratory impairment until after the onset of ARDS in 1999 is not dispositive since the administrative law judge considered all the evidence of record and found that it did not support the opinions of Drs. Caffrey and Hippensteel. *See Clark*, 12 BLR at 1-155.

Employer also argues that the administrative law judge erred in relying on the opinions of Drs. Forehand and Joyce because, unlike Drs. Caffrey and Hippensteel: Drs. Forehand and Joyce were unfamiliar with the miner's ARDS; they relied on a limited number of medical records when rendering their conclusions; and they possessed limited qualifications and expertise in pulmonary medicine. We disagree.

Considering the opinion of Dr. Joyce, the autopsy prosector who was also a Board-certified pathologist, the administrative law judge found it to be well reasoned and credible because it was lengthy and detailed, and its diagnosis of progressive massive fibrosis with black pigment deposition foci of one centimeter or more was substantiated by the evidence of record. The administrative law judge further concluded that Dr. Joyce's opinion standing alone was insufficient to establish the existence of complicated pneumoconiosis because it did not constitute a diagnosis of an underlying condition that was equivalent to an opacity found on x-ray measuring greater than one centimeter. The administrative law judge went on to find, however, that the opinion, when considered in conjunction with Dr. Forehand's x-ray reading of a category A large opacity, showing the existence of complicated pneumoconiosis, was sufficient to establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(c). Decision and Order at 7; *see Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v.*

Blankenship, 177 F.3d 240, 243-244, 22 BLR 2-554, 2-561-562 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).

Specifically, the administrative law judge found that the reading by Dr. Forehand, a B-reader, of the July 2, 2001 x-ray film as showing category 2/3 simple pneumoconiosis and category A large opacities was not only consistent with Dr. Joyce's diagnosis of complicated pneumoconiosis but also satisfied the statutory and regulatory definition of the congressionally defined medical condition commonly referred to as complicated pneumoconiosis. See *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR 2-561; *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-310-311 (2003); *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring). The administrative law judge permissibly discounted the readings of Dr. Wheeler, a Board-certified radiologist and B-reader, of the July 2, 2001 and February 20, 2002 x-ray films as negative for coal workers' pneumoconiosis because the administrative law judge found that simple coal workers' pneumoconiosis was established based on autopsy. Decision and Order at 8. Accordingly, because the administrative law judge's review of the record revealed no credible evidence sufficient to compel a conclusion contrary to the opinions of Drs. Joyce and Forehand, the administrative law judge, within a permissible exercise of his discretion, concluded that the probative evidence of record affirmatively established that the miner suffered from complicated pneumoconiosis, and was, therefore, entitled to invocation of the irrebuttable presumption of disability and death due to pneumoconiosis pursuant to Section 718.304. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, citing *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); Decision and Order at 8-9.

Likewise, employer's contention that the opinions of Drs. Joyce and Forehand were worth less weight because their opinions were not based on a review of a multitude of medical records lacks merit. While a physician's reasoning, consideration of the evidence, and credentials are relevant to an assessment of the credibility of that physician's opinion, an administrative law judge must reject as unreasoned any medical opinion which lacks an explanation and is contrary to the objective evidence of record. *Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-395 (3d Cir. 2002); Decision and Order at 9. After reviewing the miner's voluminous medical history and hospital records, the administrative law judge thoroughly discussed the numerous medical ailments from which the miner suffered and, relying on the evidence which clearly described how the miner's

overall health had gradually deteriorated,⁴ was persuaded by the evidence demonstrating that the fibrosis in the miner's lungs was attributable to complicated pneumoconiosis, *i.e.*, the opinions of Drs. Joyce and Forehand, rather than the unsupported and undocumented, contrary opinions of Drs. Caffrey and Hippensteel that the miner did not suffer from complicated pneumoconiosis but instead suffered from ARDS which had developed into a severe, life-threatening condition. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Based on the foregoing, we hold that the administrative law judge conducted a full and comparative weighing of all relevant evidence, reasonably determined that the evidence was sufficient to invoke the irrebuttable presumption at Section 718.304, and fully explained how the opinions of Dr. Joyce and Forehand and the evidence of record supported his ultimate conclusion that the miner suffered from complicated pneumoconiosis and not from alternate conditions diagnosed by employer's experts, including the opinions of Drs. Caffrey and Hippensteel. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 (1984). We, therefore, affirm the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of disability and death due to pneumoconiosis pursuant to Section 718.304. *See* 20 C.F.R. §718.304.

⁴ The administrative law judge found that the miner suffered from the following ailments including, but not limited to: an injury to his neck, back, left knee, and right forearm during a mining accident in 1982; brain surgery for an aneurysm in 1992; gallbladder disease in 2002; two occasions of acute gastroenteritis; two hernia surgeries; left carotid surgery in 1998; cardiac catheterization, stent placement, and angioplasty in 1999; and back surgery complicated by a staph infection and a myocardial infarction requiring the miner to be placed on a ventilator in 1999. Decision and Order at 3.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge