

BRB No. 98-0880 BLA

CHRISTINE McPHERSON (Widow of)	
DALLAS McPHERSON))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>8/12/99</u>
)	
PEABODY COAL COMPANY)	
)	
and)	
)	
OLD REPUBLIC INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley, Madisonville, Kentucky, for claimant.

Richard A. Dean (Arter & Hadden LLP), Washington D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0678) of Administrative Law Judge Donald W. Mosser awarding benefits in 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). Based on the filing date, the administrative law judge applied the regulations at 20 C.F.R. Part 718. At the hearing, employer stipulated to at least ten years of coal mine employment and withdrew its challenge to the issue of the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b). At 20 C.F.R. §718.205(c)(2), the administrative law judge found the evidence of record sufficient to establish that pneumoconiosis hastened the miner's death. Accordingly, benefits were awarded. On appeal, employer challenges the findings of the administrative law judge at Section 718.205(c)(2) and the award of benefits. Claimant, the miner's surviving spouse,¹ responds, urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. Employer filed a reply brief, in which it reiterates its previous contentions. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.²

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹The miner, Dallas McPherson, died on April 13, 1994. Director's Exhibits 1, 7. Claimant filed her application for survivor's benefits on February 13, 1996. Director's Exhibit 1.

²The administrative law judge's findings that claimant failed to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c)(1) and (c)(2) are affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits 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 or factor leading to the miner's death or that death was caused by complications of pneumoconiosis. See 20 C.F.R. §§718.205(c), 718.202(a), 718.203; *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 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). The United States Court of Appeals for the Sixth Circuit has held that any condition that hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205(c)(2).³ See *Griffith, supra*; *Brown, supra*.

In challenging the administrative law judge's finding under Section 718.205(c)(2), employer contends that the administrative law judge erred when he found the medical opinion of Dr. Simpao sufficient to establish that pneumoconiosis hastened the miner's death.⁴ Specifically, employer asserts that Dr. Simpao's opinion presumed that there was a pulmonary disability, which the physician based only on a history that the miner received coal mine benefits. Employer also notes that Dr. Simpao admitted that his opinions were based solely on the records of treatment at the time of the miner's final hospitalization, contending that there was nothing in the records which indicated that the miner had any lung impairment due to coal mine employment. Thus, employer contends that there is no objective basis for Dr. Simpao's finding of chronic obstructive pulmonary disease due to coal mine employment or a finding that pneumoconiosis hastened the miner's death. Employer further argues that by crediting Dr. Simpao's medical opinion, the administrative law judge created an irrebuttable presumption that if a miner suffered

³Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴The death certificate, signed by Dr. Simpao, listed the immediate cause of death as cardiopulmonary arrest. Bilateral multilobar pneumonia due to, or as a consequence of, possible acute coronary emboli due to, or as a consequence of, coronary artery occlusion with possible myocardial infarction and chronic obstructive pulmonary disease were listed as conditions leading to the immediate cause of death. Director's Exhibit 7. In their medical reports, Drs. Simpao, Branscomb and Fino agreed that bilateral multilobar pneumonia was the primary cause of the miner's death. Employer's Exhibits 1, 2, 4.

from pneumoconiosis, pneumoconiosis automatically contributed to, or hastened, the miner's death.

In his August 18, 1997 letter, Dr. Simpao stated that the x-ray taken in connection with the miner's final hospital admission showed that the miner had a chronic lung disease superimposed "with acute infection." Dr. Simpao suggested that the miner's ten or more years of coal dust exposure contributed to the condition. Claimant's Exhibit 1. Dr. Simpao also opined that with the preexisting chronic lung disease, the miner could not withstand the effects of the acute infection. *Id.*; Employer's Exhibit 4 at 12-13. In his deposition, Dr. Simpao testified that an individual's chances of surviving pneumonia are lessened if the individual has other chronic pulmonary conditions, including chronic obstructive pulmonary disease (COPD) and coal workers' pneumoconiosis. Employer's Exhibit 4 at 20. Dr. Simpao also testified that because the miner was seriously ill at the time of his final hospitalization, almost any other coexistent pulmonary condition would have had a very detrimental effect on his ability to survive the pneumonia. *Id.* at 24. Dr. Simpao indicated that, for this reason, he listed COPD as an "other contributing cause" on the death certificate. *Id.*; Director's Exhibit 7.

In according determinative weight to Dr. Simpao's opinion, the administrative law judge stated that:

I find Dr. Simpao's explanation reasoned and credible. He noted that Mr. McPherson was so ill that almost any pre-existing pulmonary condition would have weakened his ability to fight off the pneumonia, and it is undisputed that Mr. McPherson suffered from pneumoconiosis, which is a pulmonary condition. Thus, I find that the pneumoconiosis made it more difficult for the miner to survive the pneumonia, thereby hastening his death. Drs. Branscomb, Burki, and Fino offer no reasoned dispute of this point. Drs. Branscomb and Burki do not address this point, other than [to]make bald statements that pneumoconiosis did not contribute to or influence Mr. McPherson's death. They offer no explanation of how they arrived at this conclusion and do not address Dr. Simpao's hypothesis at all.

Decision and Order at 4. Contrary to employer's contention, the administrative law judge permissibly found the medical opinion in which Dr. Simpao described the miner as seriously ill with bilateral multilobar pneumonia reasoned and credible. See

generally Director, OWCP v. Rowe, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). The administrative law judge also found that because Dr. Simpao explained that almost any coexisting pulmonary condition would have weakened the miner's ability to fight his pneumonia, Employer's Exhibit 4 at 24, and because it was undisputed that the miner suffered from pneumoconiosis, a pulmonary condition,⁵ Dr. Simpao's opinion was sufficient to meet claimant's burden under Section 718.205(c)(2). *Griffith, supra*; *Carson v. Westmoreland Coal Company*, 19 BLR 1-18 (1994); *Fields v. Island Creek Coal Company*, 10 BLR 1-19 (1987). Employer's contention that the mere crediting of Dr. Simpao's report by the administrative law judge created an irrebuttable presumption is without merit as the administrative law judge considered, weighed and evaluated all the medical reports of record and provided a rationale for his treatment of this evidence. See 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). We therefore affirm the administrative law judge's findings concerning the medical report of Dr. Simpao.

Employer also challenges the administrative law judge's decision not to accord any determinative weight to Dr. Branscomb's medical opinion.⁶ Employer specifically argues that the administrative law judge erred in finding that Dr. Branscomb did not offer an explanation for his opinion that claimant's pneumoconiosis did not contribute to death. Employer argues that Branscomb did offer an explanation inasmuch as Dr. Branscomb found that because the miner had no pulmonary impairment, pneumoconiosis did not contribute to his death. Employer also argues that the administrative law judge erred in discounting Dr. Branscomb's opinion on the ground that it did not address the issues raised in Dr. Simpao's report as Dr. Branscomb's report predated Dr. Simpao's report. The administrative law judge permissibly found that Dr. Branscomb's opinion did not address whether the miner's pneumoconiosis affected his ability to fight off his pneumonia, the basis for Dr. Simpao's conclusion that pneumoconiosis hastened the miner's death, and lacked any explanation for his conclusion on the relationship between the miner's

⁵The hospital records for the miner's last illness reflect that the miner was admitted for treatment of bilateral multilobar pneumonia and that medical staff performed an arterial blood gas study on the day of admission. Director's Exhibit 9.

⁶Employer does not challenge the administrative law judge's treatment of the medical opinion of Dr. Burki. We, therefore, affirm the finding of the administrative law judge with respect to this report as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis and death.⁷ See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd* 865 F.2d 916 (7th Cir. 1989); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Krizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985).

Employer also argues that the administrative law judge erred in discrediting Dr. Fino's opinion because it was based on the fact that pneumonia is no more common in coal workers than in the general population. Employer further argues that the administrative law judge erred in discrediting Dr. Fino's opinion that the miner was not disabled because it was based on testing that was over a decade old at the time of the miner's death.

With regard to Dr. Fino's opinion the administrative law judge stated that:

Dr. Fino facially offers more support to his opinion that Mr. McPherson's death was unrelated to pneumoconiosis. However, Dr. Fino's reasoning is based on two factors: that Mr. McPherson was not totally disabled and that pneumonia is no more common in coal workers than in the general population. Regarding the latter issue, it is academic whether pneumonia is more or less present in the coal worker population. This case is not about coal workers in general, but about a specific coal worker, Dallas McPherson. In his specific case, Dr. Simpao concluded that pneumoconiosis made it more difficult for

⁷Contrary to employer's assertion, the administrative law judge did not reject Dr. Branscomb's report because the physician did not review Dr. Simpao's report; rather the administrative law judge declined to credit Dr. Branscomb's opinion on the issue of whether the miner's pneumoconiosis hastened his death because the physician did not address a hypothesis similar to the hypothesis of Dr. Simpao that pneumoconiosis made it more difficult for the miner to survive his pneumonia. See Decision and Order at 4.

the miner to fight off the pneumonia already contracted. There is no allegation that the pneumonia itself was caused by coal dust work. Secondly, Dr. Fino's findings about a lack of a disability are based on testing that was over a decade old at the time of Mr. McPherson's death. Pneumoconiosis is a progressive disease, and could easily have grown worse in the intervening years. Furthermore, in a survivor's claim, the issue is not total disability, but whether pneumoconiosis hastened death. In any event, Dr. Fino's opinion also does not address the issue of pneumoconiosis making pneumonia less survivable.

Decision and Order at 4-5. The administrative law judge permissibly concluded that Dr. Fino's statement that pneumonia was a disease of the general population which was not more prevalent in coal workers was irrelevant to the issue in the instant case. See *generally Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400 (1984). In addition, the administrative law judge acted within his discretion in finding that Dr. Fino's diagnosis of no pulmonary disability, based on records more than ten years old at the time of the miner's death, was irrelevant to the issue of whether the miner's pneumoconiosis lessened his chances of surviving pneumonia. See *generally Fagg, supra; Clark, supra; McGinnis, supra.*

As the administrative law judge is not required to accord determinative weight to the better qualified physicians, the administrative law judge did not err when he credited the medical opinion of Dr. Simpao, who is the Director of the Miners' Respiratory Clinic at Muhlenberg Community Hospital, over the medical opinions of Drs. Branscomb and Fino, who are Board-certified in internal medicine and pulmonary disease. See *Clark, supra; McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Employer's Exhibits 1, 2, and 4 at 4. Finally, employer's contention that in order to establish entitlement to benefits, claimant must show that the miner would have survived the pneumonia if he had not had simple pneumoconiosis is rejected. At Section 718.205(c)(2), claimant must establish only that pneumoconiosis actually hastened, even briefly, the miner's death. See *Brown, supra; Shuff v. Cedar Coal Co.* 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d 1989). We therefore affirm the administrative law judge's finding that claimant established that the miner's death was hastened by pneumoconiosis under Section 718.205(c)(2) and the award of benefits. See *Brown, supra.*

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge