

BRB No. 04-0278 BLA

JULIA A. KOVAL)
(Widow of JOSEPH KOVAL))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 12/06/2004
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order Denying Benefits (03-BLA-5046) of Administrative Law Judge Janice K. Bullard rendered on a survivor's claim¹ filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and

¹ The claims filed by the miner were administratively closed. Director's Exhibits 1, 2. The miner's death certificate indicates that he died on June 9, 2001 due to cardiac arrest, atherosclerotic heart disease, metastatic colon cancer with small bowel

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found that the evidence was sufficient to support the concessions of the Director, Office of Workers' Compensation Programs (the Director) that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202, 718.203, respectively. The administrative law judge further found, however, that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge committed reversible error by crediting the opinion of Dr. Sherman, that pneumoconiosis did not contribute to the miner's death, over the contrary opinion of Dr. Delehanty, the miner's treating physician, to find that the evidence is insufficient to establish death due to pneumoconiosis. Claimant also contends that it was improper for the administrative law judge to determine that the medical evidence of record, showing that the miner suffered from heart disease and took nitroglycerin prior to his death, contradicted claimant's testimony at the hearing that she could not remember whether the miner had a heart condition. Employer and the Director respond, urging affirmance of the administrative law judge's denial of benefits based on her finding at 20 C.F.R. §718.205(c).

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

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the 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; *see 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). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the

obstruction. Director's Exhibit 7. Acute renal failure, chronic obstructive pulmonary disease, and active tuberculosis are listed in the death certificate as other significant conditions contributing to death, but unrelated to the underlying causes of death as identified. *Id.* Claimant filed her claim for survivor's benefits on July 27, 2001, which was denied by the district director on September 11, 2002. Director's Exhibits 4, 16. Claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 17, 18. A formal hearing was held before the administrative law judge on April 8, 2003.

miner's death, death was caused by complications of pneumoconiosis, or the irrebuttable presumption set forth at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz*, 888 F.2d at 1006, 13 BLR at 2-107-108.

Claimant contends that the administrative law judge erred in according more weight to the opinion of Dr. Sherman over the contrary opinion of Dr. Delehanty who examined the miner during his life.² The administrative law judge found that Dr. Sherman's opinion was better reasoned and documented than that of Dr. Delehanty, and was more consistent with the relevant medical evidence of record. Claimant argues that it was error for the administrative law judge to credit the opinion of a consulting physician, Dr. Sherman, over the opinion of a treating physician, Dr. Delehanty.

Claimant's contentions lack merit. The administrative law judge found, within her discretion, that Dr. Sherman, in determining that pneumoconiosis did not cause, substantially contribute, or hasten the miner's death, reviewed and analyzed the relevant medical evidence, citing "the hospital records immediately prior to the miner's death, which focused on nonpulmonary problems and reported no respiratory distress or abnormalities on physical examination of the lungs."³ *Clark v. Karst-Robbins Coal Co.*,

² Dr. Sherman opined that the "most likely cause of Mr. Koval's death was an acute cardiac event – either a cardiac arrhythmia or a myocardial infarction." Director's Exhibit 12. Dr. Sherman further found that the miner "had significant coronary artery disease as evidenced by his history of coronary angioplasty and his requirement for cardiac medications including nitroglycerin, aspirin and Plavix." *Id.* Dr. Sherman also noted that despite "the concomitant presence of active tuberculosis, Mr. Koval was in no respiratory distress the day prior to his death. Indeed, notes on admission and on 6/8 both indicate that no significant shortness of breath was present. It therefore is unlikely that his lung disease contributed to his death." *Id.* Based on his review of the miner's medical records and the death certificate, Dr. Sherman determined that pneumoconiosis did not cause, substantially contribute to or hasten the miner's death. *Id.*

By letter dated August 12, 2002, Dr. Delehanty indicated that coal workers' pneumoconiosis shortened the miner's life expectancy. Claimant's Exhibit 1. Dr. Delehanty testified, at his February 12, 2003 deposition, that although coal workers' pneumoconiosis did not "directly cause" the miner's death, it contributed to it. *Id.* at 11. Dr. Delehanty agreed that the miner would have lived longer had he had normal lungs. *Id.* at 12. Dr. Delehanty further testified that he saw the miner three times; in his office on November 1, 2000 and February 1, 2001, and in the hospital on May 1, 2001. *Id.* at 14.

³ We reject, as refuted by the record, claimant's assertion that the administrative

12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 11; *see* Director’s Exhibit 11. The administrative law judge thereby properly found Dr. Sherman’s opinion to be reasoned and documented.⁴ *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997). Moreover, contrary to claimant’s contention, the administrative law judge was not required to accord less weight to Dr. Sherman, as a non-examining physician. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1993).

Further, the administrative law judge provided valid reasons for finding Dr. Delehanty’s opinion to be less reasoned than Dr. Sherman’s. The administrative law judge initially found that although Dr. Delehanty treated the miner for pulmonary problems, he saw claimant only “on three occasions covering a very limited period from November 2000 to May 1, 2001.” Decision and Order at 11. The administrative law judge also noted that Dr. Delehanty did not treat the miner during the last month of his death. *Id.* The administrative law judge thus rationally determined that Dr. Delehanty “did not have superior understanding and/or relevant information concerning the miner’s condition than did Dr. Sherman.” 20 C.F.R. §718.104; *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); Decision and Order at 11. Further, the administrative law judge permissibly accorded less weight to Dr. Delehanty’s opinion because it was unsupported by the medical evidence of record. Claimant’s Exhibit 1 at 12; Decision and Order at 12. Dr. Delehanty opined that the miner’s pneumoconiosis contributed to his death by making him more susceptible to infection and increased debility. Claimant’s Exhibit 1 at 12. The administrative law judge found, however, that contrary to Dr. Delehanty’s conclusion, the evidence of record fails to establish that either infection or increased debility actually contributed to the miner’s death. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); Claimant’s Exhibit 1 at 12; Decision and Order at 12.

law judge used, as a reason to credit Dr. Sherman’s opinion over Dr. Delehanty’s opinion, claimant’s testimony at the hearing that she could not remember whether the miner had heart disease. Decision and Order at 3 and at n.4, 11-12.

⁴ Claimant argues that the administrative law judge did not consider that Dr. Brady, in his report rendered May 9, 2001, one month before the miner’s death, found dyspnea on exertion, shortness of breath, diminished breath sounds, and scattered wheezing, which findings, claimant asserts, counter Dr. Sherman’s statement that the miner was in no respiratory distress on June 8, 2001, the day before he died. Claimant seeks a weighing of the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Further, the record shows that the administrative law judge fully considered Dr. Brady’s opinions. Decision and Order at 4-7, 11.

Based on the foregoing, we affirm the administrative law judge's finding that the evidence of record failed to meet claimant's burden to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) as it is supported by substantial evidence and is in accordance with law. We thus affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge