

BRB No. 04-0434 BLA

AGNES FRANKO	)	
(Widow of JOSEPH FRANKO)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GORETY TUNNELING COMPANY	)	DATE ISSUED: 12/20/2004
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Modification and Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman and Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (2003-BLA-00121) of Administrative Law Judge Paul H. Teitler denying modification and denying benefits 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). The administrative law judge adjudicated this survivor's claim, filed on May 26, 2000, pursuant to the provisions at 20 C.F.R. Part 718, and noted employer's agreement that the miner had pneumoconiosis which arose out of coal mine employment and was totally disabling, consistent with the final award of benefits on the miner's lifetime claim. The administrative law judge reviewed the

earlier evidence in conjunction with the evidence submitted in support of modification, and determined that there was no basis for modification of Administrative Law Judge Robert D. Kaplan's prior denial of benefits, as he found that the weight of the evidence of record did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the evidence at Section 718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Officer of Workers' Compensation Programs, has declined to participate in this appeal.<sup>1</sup>

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).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see 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). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant contends that the administrative law judge erred in finding that pneumoconiosis was not a substantially contributing cause of the miner's death pursuant to Section 718.205(c). Specifically, claimant maintains that the administrative law judge failed to give proper consideration to the reports of Drs. Mathur and Zawisza as the miner's treating physicians, and erred in accepting the contrary conclusions of non-examining physicians Drs.

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<sup>1</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 4, 5.

Levinson and Dittman that the miner's death was unrelated to pneumoconiosis. Further, claimant asserts that the administrative law judge provided an inadequate explanation for rejecting the opinion of the most qualified pulmonologist of record, Dr. Similaro, that the miner's death was due to pneumoconiosis. Claimant also contends that the administrative law judge failed to provide a rationale for his findings sufficient to satisfy the provisions of 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). Claimant's arguments are without merit and essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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). The question of whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has indicated, however, that automatic preferences are disfavored. *See Mancina v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Thus, the opinions of treating and examining physicians should not automatically be presumed to be correct, entitled to the greatest weight or considered to have the most probative value. Additionally, an administrative law judge cannot discredit the report of a physician solely because the physician did not examine the miner. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). The administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to the examining physicians' opinions, when warranted. *See* 20 C.F.R. §718.104(d); *Mancina*, 130 F.3d 579, 21 BLR 2-114; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Clark*, 12 BLR 1-149; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

In the present case, the administrative law judge accurately reviewed the medical evidence of record, which showed that the immediate cause of the miner's death was metastatic colon carcinoma and its complications. Decision and Order at 4-7. The administrative law judge acknowledged that Dr. Zawisza was the miner's treating physician for six years prior to the miner's death, but permissibly found that the physician's opinion was conclusory and did not establish claimant's burden under Section 718.205(c) because it was not sufficiently well-supported or reasoned. In so finding, the administrative law judge determined that Dr. Zawisza did not explain how pneumoconiosis could have hastened the

miner's death,<sup>2</sup> nor did he provide any basis for concluding that pneumoconiosis played a major role in the miner's death in light of the fact that although the colon cancer had metastasized to the miner's lungs, the medical records "failed to document any treatment of pneumoconiosis or any other pulmonary condition prior to the miner's death." Decision and Order at 8; Director's Exhibits 2, 10, 39; *see Lango*, 104 F.3d 573, 21 BLR 2-12. The administrative law judge further found that Dr. Zawisza's opinion was outweighed by the more persuasive reviews provided by Drs. Levinson and Dittman, who concluded that the objective findings on pulmonary function studies and blood gas studies, while disabling, showed that the pneumoconiosis present was not severe enough to hasten the miner's death. Decision and Order at 8; Director's Exhibits 26, 40; Employer's Exhibits 1-5; *see Clark*, 12 BLR 1-149; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46. The administrative law judge determined that Drs. Levinson and Dittman supported their conclusions with references to the miner's extensive treatment records "which clearly documented a progression of the colon cancer but which included no treatment for or indication of a deterioration in the miner's pulmonary condition in the years prior to his death." *Id.*

Similarly, the administrative law judge acted within his discretion in according little weight to the opinion of Dr. Mathur, who treated the miner over a period of twelve years, as the physician "provides no basis or explanation for his statement that the presence of disabling pulmonary anthracosilicosis during the miner's life establishes that pneumoconiosis was a substantial contributing factor leading to the miner's death." Decision and Order at 8; Director's Exhibit 37; *see Lango*, 104 F.3d 573, 21 BLR 2-12. We reject claimant's argument that the administrative law judge mischaracterized Dr. Mathur's opinion by stating that it was based primarily on the physician's 1987 examination of the miner. Claimant's Brief at 5-6. Although claimant asserts that the report dated August 20, 2002 indicated that the miner had a progressive disabling anthracosilicosis condition and listed the dates of the miner's office examinations from June 13, 1987 through March 24, 1999, Dr. Mathur noted that he was enclosing a copy of his "detailed" 1987 report which recorded the miner's pulmonary complaints, physical findings, medical, occupational and social histories. Director's Exhibit 37. The physician further stated that the diagnostic studies which he interpreted as evidence of disabling pneumoconiosis consisted of a May 16, 1987 x-ray and pulmonary function studies dated May 30, 1987 and December 26, 1988. *Id.* The administrative law judge thus reasonably concluded that Dr. Mathur's 2002 report was based primarily on his 1987 examination findings, and that the physician's opinion not only was conclusory but was outweighed by the opinions of physicians who considered more recent

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<sup>2</sup>The administrative law judge noted that while Dr. Zawisza concluded generally that the miner's "quality of life would have been better and his life possibly longer" if he had not had pneumoconiosis, Director's Exhibit 39, the physician did not discuss how pneumoconiosis could have hastened the miner's death. Decision and Order at 8.

medical evidence in determining the cause of the miner's death on April 18, 2000. Decision and Order at 8; *see generally Clark*, 12 BLR 1-149.

In evaluating Dr. Similaro's reports and deposition testimony, the administrative law judge found reasonable and persuasive the physician's opinion that the scarring of the miner's lungs from pneumoconiosis added to the effects of the pulmonary metastases from colon cancer. Decision and Order at 8-9; Claimant's Exhibits 1, 2, 4. The administrative law judge permissibly found, however, that Dr. Simelaro's conclusion, that the combined effects of pneumoconiosis and pulmonary metastases hastened the miner's death, was outweighed by the contrary opinions of Drs. Levinson and Dittman, which the administrative law judge found to be well-reasoned, more persuasive and better supported by the treatment records and objective evidence of record.<sup>3</sup> Decision and Order at 9; *see generally Clark*, 12 BLR 1-149; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46. The administrative law judge, therefore, acted within his discretion as trier-of-fact in finding that the weight of the record evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Decision and Order at 8-9; *see Lukosevich*, 888 F.2d 1001, 13 BLR 2-100.

We hold that the administrative law judge has provided a rationale for his findings that is consistent with the provisions of the APA. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As the administrative law judge's findings pursuant to Section 718.205(c) are supported by substantial evidence, they are affirmed. Consequently, we affirm the administrative law judge's denial of modification and denial of benefits.

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

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<sup>3</sup> The administrative law judge specifically determined that the findings of Drs. Levinson and Dittman, that the miner's death was not hastened by his pulmonary condition of any etiology, were supported by the fact that "none of the medical reports included treatment for or discussion of a progressive failing of the miner's pulmonary system," whereas the medical records indicated that treatment was necessary for the miner's colon cancer and complications resulting from chemotherapy, including anemia, diarrhea, neutropenia, and thrombocytopenia. Decision and Order at 9.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge