

BRB No. 98-0890 BLA

ELLEN MCGREGOR)
(Widow of EARL MCGREGOR))
)
 Claimant-Petitioner))
)
 v.)
)
 U. S. STEEL MINING COMPANY,) DATE ISSUED:
 INCORPORATED)
)
 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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Debra Henry (United Mine Workers' of America), Belle Vernon, Pennsylvania, for claimant.

D. Scott Newman (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order (97-BLA-0835) of Administrative

¹Claimant is the widow of the miner, Earl McGregor, who died on March 18, 1996. Director's Exhibit 50. Claimant filed her survivor's claim on April 1, 1996. Director's Exhibit 46.

Law Judge Michael P. Lesniak denying benefits on a miner's duplicate claim² 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). The administrative law judge credited the miner with twenty years of coal mine employment, and adjudicated the miner's claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that because employer conceded that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d). In addition, the administrative law judge found that claimant established that the miner suffered from total disability pursuant to 20 C.F.R. §718.204(c). However, the administrative law judge found that claimant did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim.

On appeal, claimant challenges the administrative law judge's findings under Sections 718.204(b) and 718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.³

²The miner's first claim, filed in 1980, was finally denied in 1990 because the miner failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 31. The record does not show that the miner continued to pursue this claim. The miner filed a duplicate claim on September 29, 1994. Director's Exhibit 1.

³Inasmuch as the parties do not challenge the administrative law judge's finding of twenty years of coal mine employment, as well as his findings under 20 C.F.R.

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

§§718.202(a), 718.203(b), 718.204(c) and 725.309(d), these findings are affirmed. See *Skrack v. Island Creek Coal Co.* 6 BLR 1-710 (1983); Decision and Order at 2-4.

In the miner's claim, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis under Section 718.204(b). Specifically, claimant asserts that the administrative law judge erred in failing to accord determinative weight to Dr. Bobak's opinion based upon his status as the miner's treating physician. The administrative law judge stated that while "[t]he reports of Drs. Cho, Bobak, and Levine linked the miner's respiratory impairment to his coal dust exposure[,]...[t]he reports of...Drs. Morgan, Bennett, and Fino did not."⁴ Decision and Order at 5. After considering the reports of Dr. Bobak,⁵ the administrative law judge, within his discretion as trier of fact, discounted Dr. Bobak's opinion because he found that "[i]n none of the above entries did Dr. Bobak provide additional documentation or [a] rationale for his conclusion of pneumoconiosis." Decision and Order at 7; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also found that although Dr. Bobak treated the miner since the 1980's, "it was not until October 1994 that Dr. Bobak included the diagnosis of possible pneumoconiosis." Decision and Order at 6. However, as claimant contends, the record indicates that Dr. Bobak diagnosed coal workers' pneumoconiosis in a 1986 hospital discharge

⁴The alj observed that because "Dr. Wecht characterized the degree of pneumoconiosis as moderate[,]...[h]is report supported the earlier findings of Drs. Cho, Bobak, and Levine linking the miner's respiratory impairment to coal dust exposure." Decision and Order at 5. Further, the administrative law judge observed that because "Drs. Naeye and Oesterling described the degree of pneumoconiosis found on autopsy as very mild - too mild to have altered the miner's lifetime pulmonary function[,]...[t]heir reports supported the conclusions reached by pulmonary specialists Drs. Morgan, Bennett, and Fino." *Id.*

⁵Dr. Bobak's opinions are contained in hospital treatment records, reports, letters, and the records of a claims examiner. In 1987, Dr. Bobak prepared a discharge summary which listed acute exacerbation of chronic obstructive pulmonary disease, chronic bronchitis type, among the final diagnoses. *Id.* Further, as noted by the administrative law judge, Dr. Bobak diagnosed chronic obstructive pulmonary disease through the years, in 1992, 1993, 1994 and 1995, prompting several hospital admissions. Decision and Order at 6; Director's Exhibit 27; Claimant's Exhibit 2. The administrative law judge also stated that "[i]n a follow-up phone call from the claims examiner, Dr. Bobak was supposed to have stated that he felt [that] the miner's chronic obstructive pulmonary disease met the definition of pneumoconiosis." Decision and Order at 6; Director's Exhibit 20.

summary. See *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); Director's Exhibit 31. Nonetheless, we hold that the administrative law judge's mischaracterization of the evidence with respect to Dr. Bobak is harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), since the administrative law judge properly discounted Dr. Bobak's opinion because he did not provide any documentation or rationale for his conclusion, and in the 1986 discharge summary Dr. Bobak did not provide any explanation or basis for his diagnosis of possible pneumoconiosis, see *Clark, supra*; *Fields, supra*; *Fuller, supra*. Further, while an administrative law judge may accord greater weight to the medical opinion of a treating physician, see *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, see *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in failing to accord determinative weight to Dr. Bobak's opinion based upon his status as the miner's treating physician.

Claimant also asserts that the administrative law judge erred in relying on the opinions of Drs. Bennett, Fino and Morgan to find that the miner was not totally disabled due to pneumoconiosis since he did not discuss the discrepancies in their opinions with regard to the cause of the miner's respiratory impairment. The administrative law judge stated, "I rely on the opinions of Drs. Morgan, Bennett, and Fino over the earlier physician opinion evidence at Director's Exhibit 31, and the later opinions of Drs. Cho, Levine, and the miner's treating physician Dr. Bobak."⁶ Decision and Order at 7. Whereas Drs. Bennett and Fino⁷ opined that the miner's lung impairment was due to asthma, Director's Exhibits 39, 42, Dr. Morgan opined that the miner's airway obstruction was due to asthma and smoking, Director's Exhibit 37. The administrative law judge stated that "[w]hile these pulmonary experts did not agree as to the cause of the impairment, smoking verses asthma or both, they each were clear that the impairment was not the result of coal mine dust

⁶The administrative law judge discounted the opinions of Drs. Cho, Levine and Bobak because of the discrepancies in their opinions with regard to the miner's smoking history. Decision and Order at 7.

⁷Dr. Fino stated that the miner "had anywhere from a two-pack-year to a 60-pack-year smoking history." Director's Exhibit 42. Dr. Fino also stated that "although cigarette smoking may have certainly...contributed to his underlying respiratory condition, I believe that his respiratory condition can be explained by causes other than cigarette smoking." *Id.* Further, Dr. Fino stated, "I do not believe that he has a cigarette smoking induced lung condition." *Id.* Hence, Dr. Fino found that "although cigarette smoking may play a role, I do not believe that cigarette smoking is the most significant cause of his shortness of breath." *Id.*

exposure.” Decision and Order at 7. The administrative law judge observed that the “[r]easons cited included that the type of pulmonary function abnormalities seen were not consistent with pneumoconiosis such as the partial reversibility seen on pulmonary function testing and that the miner improved during his many hospitalizations.” *Id.* Further, the administrative law judge observed that “[t]he opinions of pulmonary specialists Dr. Morgan, Bennett, and Fino supported the conclusions of pathologists Drs. Naeye and Oesterling that the extent of pneumoconiosis found on autopsy was too mild or minor to have altered the miner’s lifetime pulmonary function.”⁸ *Id.* at 8. Thus, inasmuch as the administrative law judge did discuss the discrepancies in the opinions of Drs. Bennett, Fino and Morgan with regard to the cause of the miner’s respiratory impairment and rationally found that the discrepancies did not affect the credibility of their opinions, see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), we reject claimant’s assertion that the administrative law judge erred by relying on the opinions of Drs. Bennett, Fino and Morgan. Moreover, we hold that substantial evidence supports the administrative law judge’s finding that the evidence is insufficient to establish total disability due to pneumoconiosis at Section 718.204(b). See *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).⁹

⁸The administrative law judge stated that “Drs. Naeye and Oesterling were aware of the miner’s pulmonary disability.” Decision and Order at 8. However, the administrative law judge stated, “consistent with pulmonary specialists Drs. Morgan, Bennett, and Fino, Drs. Naeye and Oesterling explained why they also concluded that the pattern of the miner’s abnormalities pointed to smoking and/or asthma as the origin of the miner’s difficulties and not coal mine dust exposure.” *Id.*

⁹Inasmuch as the miner’s coal mine employment took place within the Commonwealth of Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. Director’s Exhibit 5; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In the survivor's claim, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis under Section 718.205(c).¹⁰ Specifically, claimant asserts that the administrative law judge erred in discounting the opinion of Dr. Bobak since Dr. Bobak's determination in the miner's death certificate, that pneumoconiosis is among the conditions leading to the immediate cause of the miner's death, is supported by the medical evidence of record, including Dr. Bobak's treatment notes, which extend over a decade, and Dr. Wecht's pathological report and opinion. Whereas Drs. Bobak and Wecht opined that the miner's death was due to pneumoconiosis, Director's Exhibits 50, 53, 55, Drs. Naeye and Oesterling opined that the miner's death was not due to pneumoconiosis, Employer's Exhibits 1, 2. The administrative law judge, within his discretion as trier of fact, discounted Dr. Bobak's opinion in the death certificate because he found that Dr. Bobak did "not provide any rationale for his conclusion." Decision and Order at 9; see *Clark, supra*; *Fields, supra*; *Fuller, supra*. The administrative law judge stated that Dr. Bobak "simply listed pneumoconiosis as a cause of death on the death certificate." Decision and Order at 9.

The administrative law judge also found that while "[t]he miner's lifetime records document Dr. Bobak's care of the miner for chronic obstructive pulmonary disease...[,] it was only in the last few entries that Dr. Bobak identified pneumoconiosis and then it was without further explanation." *Id.* Contrary to the administrative law judge's finding, as previously noted, the record indicates that Dr.

¹⁰Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
- (2) Where pneumoconiosis was a **substantially contributing** cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at Section 718.304 is applicable.

Section 718.205(c)(emphasis added). The United States Court of Appeals for the Third Circuit has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2) if it hastened the miner's death. See *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Bobak diagnosed possible pneumoconiosis in a 1986 hospital discharge summary. Director's Exhibit 31; see *Tackett, supra*. Nonetheless, we hold that the administrative law judge's error in this regard is harmless, see *Larioni, supra*, inasmuch as Dr. Bobak did not provide any explanation or basis for his diagnosis of possible pneumoconiosis in the 1986 hospital discharge summary, see *Clark, supra*; *Fields, supra*; *Fuller, supra*. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Bobak's opinion.

Claimant further asserts that the administrative law judge erred by not according determinative weight to Dr. Wecht's opinion based on his status as the autopsy prosector. During a deposition dated July 17, 1997, Dr. Wecht explained that the following gross observations were significant in the overall diagnosis of pneumoconiosis and not preserved in slides or otherwise in the record for a reviewing physician to assess: increased diameter of the chest, clubbing of the fingers, disproportionately increased thickening of the right ventricular wall which he determined to be cor pulmonale caused by pneumoconiosis, right ventricular hypertrophy secondary to primary lung disease, and black anthracitic streaking in the lungs. Claimant's Exhibit 1 at 9, 12, 14-17, 49, 50. The Board has held that an administrative law judge may not mechanically, without a valid explanation, accord greater weight to the opinion of the autopsy prosector over the contrary opinions of the reviewing pathologists simply on the grounds that the prosector had the benefit of performing a gross examination on the miner's lungs. See *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Here, the administrative law judge stated that Dr. Wecht "did not say that his gross examination played a determinative role in his conclusion that pneumoconiosis contributed to the miner's death." Decision and Order at 9. Further, the administrative law judge stated that "the other pathologists [Drs. Naeye and Oesterling] relied on [Dr. Wecht's] observations and addressed why specific findings noted by Dr. Wecht did or did not support their respective conclusions." *Id.* Thus, we reject claimant's assertion that the administrative law judge erred by not according determinative weight to Dr. Wecht's opinion based on his status as the autopsy prosector. See *Urgolites, supra*. Moreover, inasmuch as the administrative law judge rationally found that "the opinions of Drs. Naeye and Oesterling are supported by the preponderance of the evidence, *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), see *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In view of our affirmance of the administrative law judge's findings that the

evidence is insufficient to establish that the miner's total disability was due to pneumoconiosis at Section 718.204(b), and that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), essential elements of entitlement under 20 C.F.R. Part 718 in both a miner's claim and a survivor's claim, see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge