

BRB No. 99-0363 BLA

BEATRICE ROBERTSON)
(Widow of AUBURN ROBERTSON))

Claimant-Respondent)

v.)

E & H MINING & TRUCKING,)
INCORPORATED)

and)

WEST VIRGINIA COAL-WORKERS')
PNEUMOCONIOSIS FUND)

Employer/Carrier -)

Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)

Party-in-Interest)

DATE ISSUED:

DECISION AND ORDER

Appeal of the Decision and Order-Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Stephen E. Crist (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (97-BLA-1906) of Administrative Law Judge Richard T. Stansell-Gamm on a 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).¹ Based on the date of filing of this claim, October 9, 1996, the administrative law judge considered the claim under the regulations set forth in 20 C.F.R. Part 718. Director's Exhibit 1. The administrative law judge found that claimant is an eligible survivor under the Act and that the parties agreed that the miner had suffered from pneumoconiosis arising out of coal mine employment. After consideration of the record, the administrative law judge found the evidence insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1) and (c)(3). However, the administrative law judge found that the evidentiary weight of the evidence, as supported by the opinions of Drs. Yousaf and Rana, establishes that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(2) in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 969 F.2d 977, 16 BLR 2 - 90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).² Accordingly, benefits were awarded and the administrative law judge ordered carrier to pay survivor's benefits to claimant commencing September 1, 1996. On appeal, employer contends that the administrative law judge erred in crediting Dr. Rana's opinion and in according the least probative weight to Dr. Zaldivar's opinion.³ Claimant has not responded. The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in this appeal.

¹Claimant is the surviving spouse of the miner, Auburn Robertson, who died on September 10, 1996. Director's Exhibit 9. On November 4, 1994, the miner had been awarded benefits with augmentation for one dependent. The district director determined the onset date to be July 1, 1984. Director's Exhibit 26.

²This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment occurred in West Virginia. Director's Exhibit 28; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³The administrative law judge's findings pursuant to 20 C.F.R. §718.205(c)(1) and (c)(3) are unchallenged on appeal and are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed 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 had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 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). The United States Court of Appeals for the Fourth Circuit has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). See *Shuff, supra*.

In determining whether pneumoconiosis hastened the miner's death, the administrative law judge considered medical opinions by Drs. Zaldivar, Renn, Naeye, Plata, Yousaf and Rana. The administrative law judge found that Dr. Renn's opinion that pneumoconiosis did not contribute to the miner's death was entitled to diminished probative value because Dr. Renn's finding that the miner had not suffered from a ventilatory impairment during his life was contrary to the objective medical data in the record, and because Dr. Renn did not sufficiently explain his conclusion. Decision and Order at 16; Employer's Exhibit 2. The administrative law judge then found that Dr. Naeye provided a reasoned opinion that the miner's pneumoconiosis was too mild to have contributed to death, but found the opinion entitled to little comparative weight because it was not based on a review of the entire record. The administrative law judge also found that the opinion was entitled to little weight because Dr. Naeye only interpreted the autopsy slides, but did not have the benefit of a gross examination of the lung tissue, which revealed coal dust macules up to three millimeters, as observed by Dr. Plata, the autopsy prosector. Decision and Order at 17; Director's Exhibit 14. With regard to Dr. Plata's findings, the administrative law judge found that the physician did not provide a definitive statement on the cause of death, and thus, was a neutral factor on the issue. Decision and Order at 17; Director's Exhibit 10. The administrative law judge then gave the death summary and death certificate, prepared by Dr. Yousaf, "greater relative probative weight" as Dr. Yousaf was the attending physician during the last week of the miner's life and was therefore the most familiar with the circumstances of death. Decision and Order at 17; Director's Exhibit 9. These findings by the administrative law judge are unchallenged on appeal and are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-719 (1983).

The administrative law judge accorded Dr. Zaldivar's opinion that the miner died from aortic stenosis and pneumonia the least probative value because the physician did not find pneumoconiosis established, because the autopsy prosector found more than Dr. Zaldivar's stated "black pigment", and because the physician's conclusions were based on the "expected outcome" in cases such as the miner's, and not on specific medical data like the death summary, death certificate or autopsy results.⁴ Decision and Order at 16; Employer's Exhibit 1. The administrative law judge then found Dr. Rana's opinion well documented and the best reasoned opinion in the record. He noted that Dr. Rana had been the miner's treating physician during the two hospitalizations prior to death and that the opinion was based on Dr. Rana's doctor-patient relationship with the miner, the medical record, work history and autopsy results. The administrative law judge lastly found that Dr. Rana's explanation of the miner's death, "including the relationship between his pneumoconiosis-impaired lungs and the pneumonia which took his life, is the medical opinion most consistent with all the medical evidence in the record." Decision and Order at 17; Claimant's Exhibit 1.

Carrier argues that the administrative law judge erred in crediting Dr. Rana's opinion because the administrative law judge did not consider that the physician was unfamiliar with the miner's smoking history. Carrier's Brief at 2. Carrier also contends that the administrative law judge improperly accorded the least probative weight to Dr. Zaldivar's opinion because the physician's opinion is supported by the record. Carrier's Brief at 3. Moreover, carrier argues that because Dr. Zaldivar hypothetically assumed that the miner had pneumoconiosis, he did not fail to consider pneumoconiosis as a possible cause of respiratory impairment, and the administrative law judge erred in discrediting the opinion pursuant to *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order awarding benefits is supported by substantial evidence and contains no reversible error therein. In a rational exercise of his discretion, the administrative law judge found that Dr. Rana's opinion was entitled to determinative weight. Dr. Rana was deposed on June 19, 1998 during which time he discussed his treatment of the miner from July 2, 1996 to July 25, 1996, and again from August 19, 1996 to September 3, 1996. Claimant's Exhibit 1. Dr. Rana stated that the miner suffered from advanced chronic obstructive pulmonary disease. Claimant's Exhibit 1 at 6. He also stated that this condition predisposed the miner to

⁴Dr. Zaldivar completed a review of the medical record and issued his opinion on December 2, 1997. Employer's Exhibit 1. Dr. Zaldivar stated that coal workers' pneumoconiosis was not present in this case and that there was no physiological impairment in spite of emphysematous changes found at autopsy. Dr. Zaldivar further stated that since pneumoconiosis was not present, it could not cause or contribute to death, but that even if pneumoconiosis were present, the cause of death was a combination of poorly functioning heart due to aortic stenosis and aspiration pneumonia resulting from gastroesophageal reflux and neurological impairment and dementia. *Id.*

complications of pneumonia and cor pulmonale. *Id.* Dr. Rana stated that he was not sure whether the miner had any history of cigarette smoking or tobacco abuse, but that even assuming a significant history, it would not detract from his diagnosis of coal workers' pneumoconiosis or its significant contribution in the miner's death. Claimant's Exhibit 1 at 7. Dr. Rana was also asked whether he considered any social habits the miner may have had. The physician replied "I said that the patient was demented. Dementia patients cannot tell much...My feeling is that the patient was unable to give us a good social background." Claimant's Exhibit 1 at 14 - 15. Contrary to carrier's contention, the administrative law judge noted that "consideration of Mr. Robertson's cigarette smoking history did not alter [Dr. Rana's] opinion." Decision and Order at 14. Moreover, while the administrative law judge may accord diminished weight to an opinion based on an inaccurate smoking history, see *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988), he is not required to do so. In the instant case, the administrative law judge rationally found Dr. Rana's opinion the best reasoned and documented opinion in the record, and the physician's discussion of the relationship between pneumonia and pneumoconiosis to be the most consistent with the record. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). The administrative law judge also permissibly relied on Dr. Rana's opinion because of his status as the miner's treating physician in the two hospitalizations prior to miner's death. See *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). As the administrative law judge rationally found Dr. Rana's opinion to be the most reasoned in light of the medical evidence in the record, and this opinion is also supported by the unchallenged opinion of Dr. Yousaf, we affirm the finding that pneumoconiosis hastened the miner's death. See *Shuff, supra*. As the administrative law judge's weighing of Dr. Rana's opinion is affirmed, we need not address employer's contentions regarding Dr. Zaldivar's opinion. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Inasmuch as the administrative law judge's findings are supported by substantial evidence, we affirm his determination pursuant to Section 718.205(c)(2).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge