

BRB No. 03-0372 BLA

ALTA MAE THOMASON)
(Widow of THOMAS THOMASON))

Claimant-Petitioner)

v.)

PEABODY COAL COMPANY)

DATE ISSUED: 01/30/2004

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 – Denial of Benefits of Robert L. Hillyard,
Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for
claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for
employer/carrier.

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

PER CURIAM:

Claimant, the miner's widow,¹ appeals the Decision and Order – Denial of Benefits (02-BLA-0001) of Administrative Law Judge Robert L. Hillyard (the administrative law judge) on a claim for survivor's benefits 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).² The administrative law judge credited the miner with thirty-two years of coal mine employment. Considering the claim on its merits under 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) through (a)(4). The administrative law judge also found, assuming *arguendo* that the evidence established the existence of pneumoconiosis, the evidence failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c) and pursuant to *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Accordingly, benefits were denied. On appeal, claimant alleges error in the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) or death due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, and urges affirmance of the decision below as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

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).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20

¹ Claimant filed this claim for survivor's benefits on October 20, 2000. Director's Exhibit 1. The miner's death certificate indicates that he died on September 10, 2000 due to dementia of Alzheimer's type and atherosclerotic cardiovascular disease. Director's Exhibit 9.

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *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). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Pursuant to the revised regulation at 20 C.F.R. §718.205(c)(5), 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).

Claimant challenges the administrative law judge's finding that the relevant medical evidence fails to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c).³ The administrative law judge found that the June 16, 2001 medical opinion of Dr. Bassi, Director's Exhibit 23, the only opinion supportive of claimant's burden at 20 C.F.R. §718.205(c), was not credible because Dr. Bassi admitted, on subsequent deposition, that he never independently diagnosed pneumoconiosis, although he was the miner's treating physician and had examined the miner several times, Employer's Exhibit 4. Conversely, the administrative law judge found that Drs. Fino, Branscomb, and Caffrey, who opined that the miner's death was unrelated to coal workers' pneumoconiosis or exposure to coal mine dust, Employer's Exhibits 1-3, thoroughly reviewed the medical evidence, provided reasons for their conclusions, and indicated the tests and data upon which they relied in reaching their

³ The record contains the following evidence relevant to the cause of the miner's death: the miner's death certificate, completed by Dr. Bassi, indicating that the miner died on September 10, 2000 due to dementia of Alzheimer's type and atherosclerotic cardiovascular disease, Director's Exhibit 9; Dr. Bassi's July 16, 2001 letter in which he stated that the miner "has a diagnosis of pneumoconiosis" based on his coal mine employment, that the miner's chronic obstructive pulmonary disease was exacerbated by his pneumoconiosis, and that the miner's "vascular disease, which ultimately took his life, would have been hastened by the pneumoconiosis, thereby contributing to a decreased life span[.]" Director's Exhibit 23; Dr. Bassi's December 12, 2001 deposition testimony, Employer's Exhibit 4; and the 2001 consultative opinions of Drs. Fino, Branscomb, and Caffrey. Dr. Fino opined that the miner did not have pneumoconiosis and even were he to assume that the miner had pneumoconiosis, there is no evidence that "lung disease of any etiology caused, contributed to, or hastened the miner's death." Employer's Exhibit 3. Dr. Branscomb opined that the miner's chronic obstructive pulmonary disease was due to cigarette smoking, and that the miner's pulmonary problems were "irrelevant to the final medical events and neither contributed to nor accelerated his death." Employer's Exhibit 2. Dr. Caffrey opined that the miner's chronic obstructive pulmonary disease was due to cigarette smoking, and that the miner's death was not caused by, contributed to, or hastened by the fact that he was a coal miner; that the miner's medical problems were those of the general public and would have existed even if he had not been a coal miner. Employer's Exhibit 1.

conclusions. Decision and Order at 23. The administrative law judge thus determined that the opinions of Drs. Fino, Branscomb, and Caffrey were reasoned and documented, and entitled to substantial weight. *Id.* Claimant argues that the administrative law judge erred in according little weight to the opinion of Dr. Bassi on the basis that Dr. Bassi testified that he never actually diagnosed pneumoconiosis. Claimant argues that the administrative law judge limited his analysis to whether or not Dr. Bassi diagnosed clinical pneumoconiosis and failed to consider Dr. Bassi's finding that the miner's cigarette-smoking induced chronic obstructive pulmonary disease was exacerbated by his pneumoconiosis. *See* Employer's Exhibit 4 at 22-24.

Claimant's contentions lack merit. In the instant case, the administrative law judge properly accorded less weight to Dr. Bassi's June 16, 2001 medical opinion because the physician conceded, on subsequent deposition, that he did not independently render a diagnosis of pneumoconiosis, Employer's Exhibit 4 at 11, 12, 19, and because Dr. Bassi failed to explain his opinion. *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003). The record shows that Dr. Bassi explained on deposition that Drs. Clark and Culbertson treated and managed the miner's pulmonary condition. Employer's Exhibit 4 at 6, 11-13. Dr. Bassi also testified that Dr. Culbertson, a pulmonologist, never related to him that the miner had pneumoconiosis. Employer's Exhibit 4 at 6, 19-20. Dr. Bassi further testified that the miner's chronic obstructive pulmonary disease and emphysema were due to smoking. Employer's Exhibit 4 at 12. When Dr. Bassi was questioned by counsel on deposition regarding his statement in the June 16, 2001 report, that the miner's chronic obstructive pulmonary disease was exacerbated by his pneumoconiosis, Director's Exhibit 23, Dr. Bassi testified that this finding was based on a 1993 diagnosis of pneumoconiosis made by a physician from the "Trover Clinic." Employer's Exhibit 4 at 22-24. Ultimately, Dr. Bassi testified that he would defer to the opinion of an independent pulmonologist the questions of the "aggravation effect" of coal mine dust exposure on chronic obstructive pulmonary disease. Employer's Exhibit 4 at 35-36, 40-43, 49-50. Critically, as to the cause of the miner's death, Dr. Bassi testified that his opinion, that the miner's vascular disease "which ultimately took his life, would have been hastened by the pneumoconiosis, thereby contributing to a decreased life span," Director's Exhibit 23, was also based on records he was provided by claimant from the "Trover Clinic," which records he did not identify, but testified that they included a 1993 diagnosis of pneumoconiosis. Employer's Exhibit 4 at 25. Dr. Bassi, when questioned by counsel as to why he did not list pneumoconiosis as a cause of death on the miner's death certificate, replied:

Well, if the death certificate was two to three pages long, I would be able to list all of the diseases that are contributing to a patient's death. I will tell you that right towards the last of his life the major problem that took his life was his dementia and the atherosclerotic cardiovascular disease.

Employer's Exhibit 4 at 27. Given Dr. Bassi's testimony, we hold that substantial evidence supports the administrative law judge's decision to accord less weight to Dr. Bassi's July 16, 2001 report at 20 C.F.R. §718.205(c), because Dr. Bassi testified that he never independently diagnosed pneumoconiosis, although he had treated the miner on several occasions from before 1993 to August 30, 2000, Employer's Exhibit 4, and because Dr. Bassi failed to explain how the evidence of record supported his opinion. Decision and Order at 20, 22.

Claimant next argues that the administrative law judge's finding, that Dr. Bassi did not explain his opinion that pneumoconiosis contributed to the miner's death, is contrary to the record, where the physician stated that the miner's "vascular disease, which ultimately took his life, would have been hastened by the pneumoconiosis, thereby contributing to a decreased life span." Director's Exhibit 23. Claimant's contention lacks merit. As set forth *supra*, the administrative law judge properly accorded less weight to Dr. Bassi's opinion because the physician did not himself diagnose pneumoconiosis and did not explain how the evidence of record supports a finding that pneumoconiosis contributed to the miner's death. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 22.

Claimant further contends that the administrative law judge selectively analyzed the opinions of Drs. Fino, Branscomb, and Caffrey at 20 C.F.R. §718.205(c). Claimant argues that Dr. Fino's opinion, that there is no evidence that lung disease of any etiology caused, contributed to, or hastened the miner's death, Employer's Exhibit 3, is neither documented nor reasoned because it was based on the absence of objective evidence of impairment in 1985, where the record reflects that the miner's pulmonary condition at the time of his death in 2000 was significantly different than it was in 1985. Claimant's Brief at 15.

Claimant's contentions lack merit. We reject claimant's assertions that Dr. Fino's opinion is not credible inasmuch as they amount to a request that the Board reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).⁴ Further, the record refutes claimant's assertion that the administrative law judge selectively analyzed the evidence by failing to critically consider the opinions of Drs. Fino, Branscomb, and Caffrey. In the instant case, the administrative law judge specifically found that Drs. Fino, Branscomb, and Caffrey, who opined that the miner's death was unrelated to coal workers' pneumoconiosis or exposure to coal mine dust, Employer's Exhibits 1-3, thoroughly reviewed the medical evidence, provided reasons for

⁴For similar reasons, we reject claimant's assertion that Dr. Branscomb's opinion, that the miner's pulmonary problems were "irrelevant to the final medical events and neither contributed to nor accelerated his death," Employer's Exhibit 2, is not well reasoned, though it is "perhaps" better documented than Dr. Fino's opinion. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Claimant's Brief at 16.

their conclusions, and indicated the tests and data upon which they relied in reaching their conclusions. Decision and Order at 23. The administrative law judge thus properly determined that the opinions of Drs. Fino, Branscomb, and Caffrey were reasoned and documented, and entitled to substantial weight. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Claimant contends that Dr. Caffrey's opinion is hostile to the Act, and is unexplained and unreasoned. We need not address claimant's contentions because Dr. Caffrey's opinion does not support claimant's burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). Therefore, any error on the part of the administrative law judge in considering Dr. Caffrey's opinion is harmless as it cannot affect the outcome of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Based on the foregoing, we affirm the administrative law judge's finding that the evidence fails to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c) as it is rational, in accordance with law, and supported by substantial evidence. We, therefore, affirm the administrative law judge's denial of benefits in the instant survivor's claim. Inasmuch as we affirm the denial of benefits based on the administrative law judge's finding that the evidence fails to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c), we need not address claimant's arguments challenging the administrative law judge's finding that the medical opinion evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4): Any error therein cannot affect the outcome of the case. *Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge