

BRB No. 03-0427 BLA

LINDA TOMKIEL	)	
(Widow of JOSEPH TOMKIEL)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/30/2004
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5349) of Administrative Law Judge Edward Terhune Miller 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). Based on the date of filing, the administrative law judge

adjudicated this claim pursuant to 20 C.F.R Part 718.<sup>1</sup> The administrative law judge accepted Administrative Law Judge Robert D. Kaplan's finding that the miner established six and a quarter years of coal mine employment. The administrative law judge further found the evidence of record insufficient to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204, or that the miner's death was due to pneumoconiosis 20 C.F.R. §718.205(c). Accordingly, both claims were denied. On appeal, claimant challenges the administrative law judge's weighing of the evidence in finding that the miner's death was not due to pneumoconiosis at Section 718.205(c).<sup>2</sup> The Director has not participated in this 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, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death

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<sup>1</sup>The record indicates that the miner, Joseph C. Tomkiel, filed an application for benefits on September 13, 1993, which was denied by the district director. Director's Exhibits 1, 10. The miner filed a request for modification which was denied by Administrative Law Judge Robert D. Kaplan although the Director, Office of Workers' Compensation Programs (the Director), stipulated to the existence of coal workers' pneumoconiosis. Director's Exhibits 11, 39. The miner died on June 20, 1999, and, the miner's estate pursued the miner's claim and appealed the denial to the Board. Director's Exhibits 21, 40, 49. The miner's estate requested a formal hearing, and claimant, Linda Tomkiel, the miner's widow, gave notice of her intent to file a survivor's claim. Director's Exhibits 52, 62. The cases were consolidated on May 15, 2001, and claimant filed a formal application for survivor's benefits on July 5, 2001. Director's Exhibits 63, 67. The district director denied the survivor's claim on June 5, 2002, as claimant did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 78. Claimant requested a formal hearing on June 17, 2002, but thereafter filed a motion for decision on the record. Director's Exhibit 80. Administrative Law Judge Edward Terhune Miller (the administrative law judge) considered evidence in both claims.

<sup>2</sup>Claimant is appealing only the denial of the survivor's claim herein.

*See* 20 C.F.R. §§718.202(a), 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). 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)(2); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).<sup>3</sup>

Claimant contends that the administrative law judge erred by finding that Dr. Naeye’s qualifications were superior to those of Dr. Pascucci, and that therefore, Dr. Naeye’s opinion was more probative regarding the cause of the miner’s death. The administrative law judge noted that both Dr. Naeye and Dr. Pascucci were board-certified in clinical and anatomic pathology, Decision and Order at 4-5, but that “Dr. Naeye’s curriculum vitae reflects more extensive experience and extensive publications in the field.” Decision and Order at 7; Director’s Exhibits 47, 50, 73, 74. Thus, the administrative law judge found that Dr. Naeye’s “credentials outweigh those of Dr. Pascucci, despite Dr. Pascucci’s role as prosecutor.” Decision and Order at 10. As it is permissible for the administrative law judge to rely on the superior qualifications and experience of a physician, we hold that substantial evidence supports the administrative law judge’s determination. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant further asserts that the administrative law judge erred by finding that Dr. Naeye’s report was a reasoned medical opinion. We disagree. Dr. Naeye reviewed the miner’s autopsy report and slides, and additional medical records, and opined that although the miner suffered from coal workers’ pneumoconiosis, “these lesions are too small and few in number” to have caused any disability or have “contributed in any way to his death.” Director’s Exhibits 50, 73. Dr. Naeye also stated that his opinion was based on the normal results of the objective tests performed approximately one month prior to the miner’s death. Director’s Exhibits 50, 73. The administrative law judge determined that this opinion was well documented and reasoned because “Dr. Naeye, who possessed superior professional qualifications<sup>4</sup> and experience, cited medical records as well as the particulars of the autopsy results, and persuasively explained how the miner died from pneumoconiosis caused solely

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<sup>3</sup>Since the miner’s last coal mine employment took place in the Commonwealth of Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. Director’s Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup>Although as claimant asserts, both Drs. Naeye and Pascucci are board-certified in anatomic and clinical pathology, the administrative law judge observed that Dr. Naeye, has extensive publications in the field. Decision and Order at 7.

by cancer that had weakened his immune system. Decision and Order at 10. As it is within the administrative law judge's discretion to determine whether a medical report is documented and reasoned, and this finding is supported by the record evidence, we affirm the administrative law judge's crediting of Dr. Naeye's opinion. *Trumbo*, 17 BLR 1-85, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Claimant additionally contends that the administrative law judge erred by finding that Dr. Pascucci's medical opinion was unreasoned, in part, because she failed to discuss the miner's work and smoking histories, yet credited Dr. Naeye's opinion despite his failure to consider these factors. Claimant further argues that the administrative law judge erroneously determined that Dr. Pascucci did not cite any evidence in support of her opinion, as claimant asserts this physician considered the objective tests performed shortly before the miner died. The record indicates that Dr. Pascucci performed the miner's autopsy and diagnosed bronchopneumonia, metastatic adenocarcinoma of the lungs, and coal workers' pneumoconiosis, but did not specifically assign a cause of death in the autopsy report. Director's Exhibits 47, 74. In Dr. Pascucci's May 3, 2001 deposition, she stated that the immediate cause of death was pneumonia precipitated by lung cancer, but that pneumoconiosis hastened the miner's death as his lungs would have been better able to function without this condition. Director's Exhibit 74. Contrary to claimant's contention, the administrative law judge accurately noted that Dr. Pascucci did not address the effects of the miner's smoking history; the administrative law judge rationally found that this opinion was unreasoned as Dr. Pascucci "cited no clinical evidence, medical literature, or other basis to support" her opinion. Decision and Order at 10. Although Dr. Pascucci indicated that she had reviewed the miner's final objective tests, she did not indicate how they supported her diagnosis, and further indicated her lack of familiarity with such tests. Director's Exhibit 74. Thus, it was within the administrative law judge's discretion to find this opinion unreasoned. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Trumbo*, 17 BLR 1-85. Claimant argues that the administrative law judge erred in finding Dr. Pascucci's opinion undermined by her apparent lack of knowledge of the miner's smoking history and his specific coal mine work when Dr. Naeye's opinion is similarly deficient.<sup>5</sup> Claimant fails to recognize that she has the

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<sup>5</sup> The administrative law judge stated: But [Dr. Pascucci's] suggestion that her lack of access to pulmonary function studies or x-rays precluded an opinion regarding complicated pneumoconiosis, and her apparent lack of knowledge of the Miner's smoking history or the actual nature of his coal mine work, as well as her apparent failure or inability to review any medical tests or other medical records, except for the pulmonary function and blood gas tests performed a month before the Miner's death, which were characterized by Dr. Naeye as nearly normal and normal, respectively, indicated significant weakness in her opinion.

burden of proving that the miner's pneumoconiosis actually hastened his death. The only evidence she has offered to prove her case is Dr. Pascucci's opinion. The administrative law judge has reasonably discounted her opinion for failing to address relevant facts. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because the administrative law judge has provided a rational basis for his finding that pneumoconiosis did not hasten the miner's death, this determination is affirmed as supported by substantial evidence. 20 C.F.R. §718.205(c); *Lukosevicz*, 888 F.2d 1001, 13 BLR 2-101.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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PETER A. GABAUER, JR.  
Administrative Appeals Judge

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Decision and Order at 7.