

BRB No. 04-0306 BLA

DORIS J. WAGNER)	
(Widow of JOHN E. WAGNER, JR.))	
)	
Claimant-Respondent)	
v.)	DATE ISSUED: 01/31/2005
)	
DUQUESNE LIGHT COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

David A. Colecchia, Greensburg, Pennsylvania, for claimant.

James M. Poeria (Tucker Arensberg, P.C.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (02-BLA -0257) of Administrative Law Judge Michael P. Lesniak 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 found that the parties did not contest the issues of whether the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. The administrative law judge found that the evidence of record establishes that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence of record establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant¹ responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer generally challenges the administrative law judge's determination that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Employer asserts that the opinion of Dr. Michael E. Wald, which the administrative law judge ultimately credited, is legally insufficient to establish that the miner's death was due to pneumoconiosis. Moreover, employer challenges the administrative law judge's determination to discount the opinion of Dr. Gregory Fino, who stated that the miner died due to complications from pneumonia of the lung, and not due to pneumoconiosis.

The record contains two relevant medical opinions.² Dr. Wald reviewed the miner's medical records, including the death certificate, Director's Exhibit 9, which listed

¹Claimant is Doris J. Wagner, surviving spouse of the miner, John E. Wagner, Jr. The miner died on November 23, 2000. Director's Exhibit 9. Claimant filed her survivor's claim on January 17, 2001. Director's Exhibit 1.

²The record also contains an opinion by Dr. Steven Maxwell, claimant's treating physician. Director's Exhibits 10, 11. Dr. Maxwell concluded that pneumoconiosis did not cause the miner's death. However, the administrative law judge gave this opinion "less weight" because he found it unreasoned and undocumented. Decision and Order at 9. No party challenges the administrative law judge's characterization of Dr. Maxwell's opinion, or his decision to assign it less weight. Thus, we affirm the administrative law judge's consideration of Dr. Maxwell's opinion, as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the miner's cause of death as respiratory failure due to acute exacerbation of chronic obstructive lung disease and pneumonia. Dr. Wald stated in his report that the miner's death was "directly due to the pneumoconiosis that was diagnosed during his lifetime." Claimant's Exhibit 1 at 2. At deposition, Dr. Wald testified that the miner's final hospitalization was due to chronic obstructive lung disease, and that the chronic obstructive lung disease resulted in the miner's death. Claimant's Exhibit 2 at 9. Dr. Wald further testified that the miner's exposure to coal mine dust hastened his death. *Id.* at 11. The administrative law judge noted that Dr. Wald is Board-certified in internal medicine and pulmonary diseases. Decision and Order at 8; Claimant's Exhibit 1. Dr. Fino submitted an initial report dated December 26, 2002, based upon a review of the miner's medical records, excluding the miner's final hospitalization records. Employer's Exhibit 1. Dr. Fino stated that it was not reasonable to opine that coal mine dust caused, contributed to, or hastened the miner's death, as there was no objective evidence that directly indicated the miner's cause of death. *Id.* At deposition, Dr. Fino testified that he reviewed the miner's final hospitalization records, and concluded that the miner suffered from an acute infectious process, and a pneumonia in his lungs due to a pseudomonas. Employer's Exhibit 2 at 9. Dr. Fino testified further that this condition is more likely to become a problem in an individual with a compromised lung function, such as the miner. *Id.* at 12-13. Dr. Fino also opined that pseudomonas pneumonia caused the miner's death and that chronic obstructive pulmonary disease contributed to the miner's death. *Id.* at 14. Dr. Fino testified further that both smoking and coal mine dust inhalation played a role in causing the miner's chronic obstructive pulmonary disease, but that while coal mine dust inhalation could not be excluded as a factor, the role that the coal mine dust inhalation played was clinically insignificant, such that it did not contribute to, or hasten, the miner's death. *Id.* at 14-21, 24-26. Dr. Fino submitted a report dated April 22, 2003 with his deposition, wherein he opined that "it was not medically sound to opine that coal mine dust caused, contributed to, or hastened the miner's death." Employer's Exhibit 2. The administrative law judge stated that Dr. Fino is Board-certified in internal medicine and pulmonary diseases. Decision and Order at 8.

In order to establish that a miner died due to pneumoconiosis pursuant to Section 718.205(c), the evidence must establish that the miner's death was due to pneumoconiosis. In instances where it is due to multiple causes including pneumoconiosis, the inquiry is whether the evidence shows that it is not medically feasible to distinguish which disease caused the miner's death or the extent to which pneumoconiosis contributed to the cause of death, or where pneumoconiosis is a substantially contributing cause of the miner's death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause of the miner's death where the evidence shows that it hastened the miner's death. Decision and Order at 4; 20 C.F.R. §718.205(c)(5); *Lango v. Director, OWCP*, 104 F. 3d 573, 21 BLR 2-12 (3d Cir. 1997);

Lukosevicz v. Director, OWCP, 888 F. 2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Employer initially challenges the administrative law judge's determination to credit the opinion of Dr. Wald to find that the miner's death was due to pneumoconiosis. Employer raises six specific challenges. First, employer contends that Dr. Wald's opinion is legally insufficient to establish death due to pneumoconiosis because he was not aware of the immediate cause of the miner's death and he did not review the records regarding the miner's final hospitalization, which resulted in the miner's death. Employer's Brief at 3. We disagree. Dr. Wald testified that he did not have these records at the time he completed his report dated October 29, 2002, but he testified that he did have access to the final hospitalization records prior to the deposition in March of 2003. Claimant's Exhibit 2 at 8-9. Moreover, at deposition, Dr. Wald testified that he was aware that the miner entered the hospital with pneumonia cause by pseudomonas, but disagreed that the pneumonia caused by pseudomonas caused the miner's death. Claimant's Exhibit 2 at 8-9, 23-24, 26. We reject, therefore, employer's contention that Dr. Wald's opinion is legally insufficient to establish death due to pneumoconiosis on this basis.

Second, employer asserts that Dr. Wald's opinion is deficient because he did not have the miner's complete smoking history. Employer also contends that Dr. Wald's consideration of the miner's smoking history was one of the bases upon which the administrative law judge chose to credit Dr. Wald's opinion. Employer's Brief at 3; Decision and Order at 10. Dr. Wald stated at deposition that he considered the miner's smoking history as it was described in the various hospital records he reviewed, but that he could not recall exactly what the miner's smoking history was. Claimant's Exhibit 2 at 18.³ Further, the administrative law judge did not use the miner's smoking history to credit or discount any relevant opinion. We reject, therefore, employer's contention that the administrative law judge erred in failing to discount Dr. Wald's opinion based upon his inability to recall all of the various smoking histories contained in the medical reports of record.

Third, employer challenges the administrative law judge's consideration of Dr. Wald's opinion on the basis that Dr. Wald could not state whether there were pulmonary function studies administered during the lifetime of the miner that conformed to the applicable quality standards. This contention is misplaced, and therefore rejected, as pulmonary function studies are not relevant to the miner's cause of death, the sole issue to

³Dr. Fino testified that he considered the miner's smoking history to between 13-90 pack years, as it was reported differently in the various records that were reviewed by each physician. Employer's Exhibit 2 at 14.

be adjudicated in this case . *See generally, Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Piniansky v. Director, OWCP*, 7 BLR 1-71 (1984).

Fourth, employer asserts that Dr. Wald's opinion is suspect because he was unaware that a CT scan was read as indicative of a necrotizing pneumonia one week prior to the miner's death. Employer's Brief at 4. Dr. Wald stated initially that he could not recall such a CT scan, but upon review of the CT scan report at deposition, stated that he disagreed with the interpretation that the CT scan indicated a necrotizing pneumonia. Rather, Dr. Wald concluded that it showed a cavity which was not necessarily a necrotizing pneumonia. He testified that it was not clear whether the miner's clinical findings were consistent with a necrotizing pneumonia. Claimant's Exhibit 2 at 20-21. Dr. Wald stated further that that, no matter what kind, the miner did have pneumonia. Moreover, he testified that the miner also had a chronic obstructive pulmonary impairment due to coal mine dust inhalation and, as a result, had less of a pulmonary reserve with which to fight the pneumonia. Dr. Wald stated that in such an individual, such a condition might become life threatening. *Id.* at 21. On redirect examination, Dr. Wald explicitly stated that nothing in employer's counsel's cross-examination changed his mind as to the miner's cause of death. *Id.* at 29. Thus, Dr. Wald was clearly aware of the complete medical history of the miner, including the existence of the CT scan, but disagreed with the conclusion reached by the physician who initially read the CT scan contained in the records from Monongalia General Hospital. We reject, therefore, employer's challenge to Dr. Wald's opinion on the ground that it was based upon an inaccurate medical history of the miner.

Employer next asserts that Dr. Wald's opinion was not credible as to the miner's cause of death because Dr. Wald was not sure whether pseudomonas pneumonia was responsive to antibiotics, and Dr. Wald "had no personal knowledge or explanation as to what condition caused the deterioration [Dr. Wald] noted." Employer's Brief at 5. Employer also asserts that Dr. Wald's opinion regarding the miner's cause of death is "unsupported and unsustainable." *Id.* Thus employer argues that the administrative law judge erred by crediting Dr. Wald's opinion. To the extent these contentions concern what weight Dr. Wald's opinion should have been accorded, they constitute a request to reweigh the evidence, which the Board is not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). To the extent these contentions are merely restatements of employer's contentions that Dr. Wald was unaware of the miner's immediate cause of death, and that Dr. Wald did not consider all of the relevant information in the miner's medical records, we reject them. Having rejected each of employer's specific contentions regarding Dr. Wald's opinion, we affirm the administrative law judge's treatment of Dr. Wald's opinion as supported by substantial

evidence.

Employer also challenges the administrative law judge's overall weighing of the medical opinion evidence at Section 718.205(c). The administrative law judge initially found that Dr. Wald and Dr. Fino have the same credentials, and noted that both opinions were based upon a review of the same medical records. The administrative law judge then permissibly found that Dr. Wald's opinion was entitled to more weight than Dr. Fino's opinion because he rationally concluded that Dr. Wald's opinion was better supported by the objective evidence of record. Specifically, the administrative law judge found that Dr. Wald consistently opined that the miner suffered from a pulmonary disease, that the medical records reviewed by both physicians revealed treatment for a severe chronic obstructive pulmonary disease, and that the final hospitalization records indicated that the cause of the miner's death was pulmonary in nature. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1989); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1985); Decision and Order at 10. Moreover, the administrative law judge rationally found that Dr. Fino's opinion was not persuasive because his explanation for concluding that pneumoconiosis played no role in the miner's death was that the miner's chest x-rays did not show changes consistent with a coal dust related condition, which he would expect. The administrative law judge noted that x-ray changes are not the only means of establishing pneumoconiosis under the Act, and therefore rationally found that Dr. Fino, who found that coal mine dust played a role in causing the miner's chronic obstructive pulmonary disease, did not satisfactorily exclude pneumoconiosis as a cause of the miner's death. See *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); Employer's Exhibits 1, 2; Decision and Order at 9-10.

In light of the foregoing, we affirm the administrative law judge's finding that the evidence establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge