

BRB Nos. 04-0490 BLA
and 04-0490 BLA-A

DORIS E. TREASE)	
(Widow of DAVID B. TREASE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
VALLEY CAMP OF UTAH,)	
INCORPORATED)	DATE ISSUED: 01/31/2005
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Martin J. Linnet (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Denial of Benefits (2002-BLA-0414) of Administrative Law Judge Thomas F. Phalen, Jr., rendered 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 miner

died on January 20, 2000 and claimant filed her application for survivor's benefits on September 27, 2000.¹ Director's Exhibits 2, 5, 7.

The administrative law judge credited the miner with "at least" thirty years of coal mine employment,² and found that he had a twenty pack-year history of cigarette smoking. Decision and Order at 3, 24. The administrative law judge found that the autopsy evidence established the existence of a minimal degree of coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2). 718.203(b). Decision and Order at 25, 32-33. The administrative law judge further determined that the miner had severe emphysema that played a major role in his death, but found that the better reasoned medical opinions of record did not establish that the miner's emphysema was related to his coal workers' pneumoconiosis or coal dust exposure. Decision and Order at 33-35. The administrative law judge concluded that claimant did not establish by a preponderance of the evidence 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.

On appeal, claimant contends that the administrative law judge failed to resolve the conflicting medical evidence regarding whether the miner's fatal emphysema constituted legal pneumoconiosis. Claimant alleges further that the administrative law judge overlooked relevant evidence when he determined that the extent of the miner's pneumoconiosis was minimal. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal challenging the administrative law judge's finding regarding the extent of the miner's smoking history, and the administrative law judge's determination that Dr. Perper's opinion attributing the miner's death to pneumoconiosis was documented and reasoned. The Director, Office of Workers' Compensation Programs has indicated that he will not file a substantive response to either appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

¹ The miner filed a claim for benefits on October 19, 1989, which was denied on October 26, 1992 and is not at issue herein. Director's Exhibit 1.

² The record indicates that the miner's coal mine employment occurred in Utah. Director's Exhibits 1, 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor’s benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor’s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. 20 C.F.R. §718.205(c)(2), (4). 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); *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 874, 20 BLR 2-334, 2-340 (10th Cir. 1996). Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The record reflects that the miner died of respiratory failure while hospitalized for breathing and abdominal problems. Director’s Exhibit 7. One of the miner’s hospital treating physicians completed a death certificate listing the cause of death as “COPD” due to pneumonia, with “gastric outlet obstruction” as a significant contributing condition. Director’s Exhibit 5. The physicians of record agreed that the miner’s autopsy revealed coal workers’ pneumoconiosis and severe emphysema. Dr. Perper, who is Board-certified in Anatomical, Clinical, and Forensic Pathology, opined that the miner’s coal workers’ pneumoconiosis and coal dust exposure led to the development of emphysema, which played a major role in the miner’s death. Director’s Exhibit 8; Employer’s Exhibit 3. By contrast, Drs. Naeye, Oesterling, and Tomashefski, who are Board-certified in Anatomical and Clinical Pathology, concluded that the miner’s coal workers’ pneumoconiosis was minimal and thus too mild to hasten his death. Director’s Exhibits 19, 20, 22; Employer’s Exhibits 6, 7, 9, 10, 12. These pathologists also opined that the miner’s emphysema was unrelated to coal dust exposure but was due solely to smoking. Dr. Castle, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the miner’s medical records and reached the same conclusions. Director’s Exhibit 23; Employer’s Exhibits 8, 13. The administrative law judge chose to rely on the opinions of Drs. Naeye, Oesterling, and Tomashefski and found that claimant did not establish that the miner’s death was due to pneumoconiosis under Section 718.205(c).

Pursuant to Section 718.205(c), claimant contends that the administrative law judge failed to determine whether the miner’s emphysema constituted legal pneumoconiosis. Consequently, claimant asserts, the administrative law judge erred in

determining that claimant did not establish that the miner's death was due to pneumoconiosis. Claimant's contention lacks merit.

Contrary to claimant's assertion, the administrative law judge quoted the definition of legal pneumoconiosis set forth at Section 718.201 and considered whether the miner's severe emphysema was related to his coal mine dust exposure. Decision and Order at 25, 27-35. The administrative law judge reviewed Dr. Perper's opinion that the miner's emphysema was related to coal dust exposure, and compared Dr. Perper's opinion with those of Drs. Castle, Naeye, Oesterling, and Tomashefski stating that the miner's emphysema was related solely to smoking. Focusing primarily on the opinions rendered by pathologists who reviewed the miner's lung tissue, the administrative law judge concluded that the opinions of Drs. Naeye, Oesterling, and Tomashefski were "better supported by the objective pathological evidence" than was Dr. Perper's opinion. Decision and Order at 34.

Specifically, the administrative law judge noted that Drs. Naeye, Oesterling, and Tomashefski explained that there was an insignificant amount of coal dust present in the miner's lungs, and that the areas of emphysema in his lungs did not contain the crystals of silica that would have been deposited with coal dust exposure. Director's Exhibits 19 at 2, 20 at 2-3, 22 at 3-5; Employer's Exhibits 6 at 1, 7 at 1-2, 9 at 3, 10 at 23, 30, and 32, 12 at 14-15, 31. The administrative law judge also noted these pathologists' explanation that the coal macules they detected with associated focal emphysema were too few and insignificant to contribute to the miner's centrilobular emphysema. *Id.* Additionally, the administrative law judge considered Dr. Oesterling's observation that there should have been compression of the miner's airways if his coal workers' pneumoconiosis had contributed to his severe emphysema, but no such compression was present. Employer's Exhibit 10 at 21-22.

By contrast, the administrative law judge found that Dr. Perper's reasoning was essentially "that [the] Miner had coal dust exposure and CWP, and the medical literature establishes that coal dust exposure and CWP can cause emphysema." Decision and Order at 34; Director's Exhibit 8 at 7-10; Employer's Exhibit 3 at 19, 27. Assuming that Dr. Perper's view of the medical literature was correct, the administrative law judge found that Drs. Naeye, Oesterling, and Tomashefski explained that the miner's emphysema in this particular case was unrelated to coal workers' pneumoconiosis or coal mine dust exposure. Because the administrative law judge found that the opinions of Drs. Naeye, Oesterling, and Tomashefski "were based on more specific and concentrated pathological findings regarding the absence of significant changes related to the presence of any particles associated with coal mining," he also found their opinions to be "better reasoned." Decision and Order at 34, 35. This was a permissible credibility determination within the administrative law judge's discretion. *See Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen v. Director, OWCP*, 984 F.2d 364, 368, 17 BLR 2-48,

2-54 (10th Cir. 1993). Consequently, we reject claimant's contention that the administrative law judge did not resolve the issue of the etiology of the miner's emphysema.

Claimant next asserts that the administrative law judge erred by failing to discuss the autopsy prosector's notation of "many dust macules," Director's Exhibit 6, when he credited medical opinions that the miner's coal workers' pneumoconiosis was minimal and too mild to hasten his death. We reject claimant's allegation of error. Review of the record reflects that the autopsy prosector, Dr. Gurunadham, did not categorize the degree of coal workers' pneumoconiosis present.³ Director's Exhibit 6. Thus, Dr. Gurunadham's report does not address whether the miner's coal workers' pneumoconiosis was mild to moderate, as stated by Dr. Perper, or minimal, as stated by Drs. Naeye, Oesterling, and Tomashefski. Additionally, Dr. Gurunadham's notation of "many" macules does not address the ultimate issue of whether coal workers' pneumoconiosis hastened the miner's death. Moreover, the administrative law judge declined to credit Dr. Perper's view that the miners coal workers' pneumoconiosis was moderate because he found that Drs. Oesterling and Tomashefski better documented their assessment of minimal coal workers' pneumoconiosis using photomicrographs.⁴ See *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Review of the record reflects that Dr. Gurunadham's report references no photomicrographs, a form of documentation found critical by the administrative law judge. Director's Exhibit 6. Consequently, we reject claimant's contention.

Claimant raises no further challenge to the administrative law judge's findings. The administrative law judge considered the physicians' conflicting opinions in light of the physicians' reasoning and credentials. Decision and Order at 27-35. Substantial evidence supports the administrative law judge's findings, which are based on permissible credibility determinations. See *Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39. We therefore affirm the administrative law judge's finding that claimant did not establish by a preponderance of the evidence that the miner's death was due to pneumoconiosis

³ The reviewing pathologists and the administrative law judge noted that Dr. Gurunadham did not make a final diagnosis of coal workers' pneumoconiosis, but listed findings that she stated were in favor of the diagnosis. Director's Exhibit 6 at 1-2. The administrative law judge reviewed and "attached probative weight to the findings noted by Dr. Gurunadham." Decision and Order at 27.

⁴ A photomicrograph is "the photograph of a minute object as seen under the light microscope, produced by ordinary photographic methods." *Dorland's Illustrated Medical Dictionary* 1190 (25th ed. 1974).

pursuant to Section 718.205(c). In view of our disposition of this case, we need not address employer's cross-appeal.

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

JUDITH S. BOGGS
Administrative Appeals Judge