

BRB No. 09-0155 BLA

JEAN E. NELSON)
(Widow of THOMAS R. NELSON))
)
 Claimant-Respondent)
)
 v.)
)
 CHAFIN COAL COMPANY) DATE ISSUED: 01/06/2010
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Petitioners)
)
 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 Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Bradley J. Pyles (Pyles, Turner & Mick, LLP), Logan, West Virginia, for
claimant.

Ashley M. Harman and Wendy G. Adkins (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-05981)
of Administrative Law Judge Robert D. Kaplan 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 accepted employer's concessions that it is the responsible operator, that claimant is an eligible survivor under the Act, and that, by application of the doctrine of collateral estoppel, claimant established that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203(b).¹ The administrative law judge then weighed the medical evidence and found that claimant established 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 argues that the administrative law judge did not properly weigh the conflicting opinions of Drs. Kowatli, Rasmussen, Dahhan and Spagnolo, as to the nature of the miner's respiratory condition and whether coal dust exposure caused, substantially contributed to, or hastened the miner's death. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this 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 supported by substantial evidence, is rational, and is in accordance with applicable law.² 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).

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

¹ The miner was awarded lifetime benefits in a Decision and Order issued by Administrative Law Judge Lawrence E. Gray on May 18, 1988. Following the miner's death on September 11, 2006, claimant, the miner's widow, filed her survivor's claim on October 27, 2006. Director's Exhibit 2. In a Proposed Decision and Order dated June 11, 2007, the district director awarded benefits upon finding that the miner's death was due to pneumoconiosis. Director's Exhibit 16. Employer requested a hearing, which was held on June 14, 2007. Thereafter, the administrative law judge issued his Decision and Order Awarding Benefits on October 15, 2008, which is the subject of this appeal.

² The record indicates that the miner's coal mine employment was in North Carolina. Director's Exhibit 3. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1- 200 (1989)(*en banc*).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

A. The Medical Evidence

As noted by the administrative law judge, the record in this case contains medical records relating to the miner's hospitalizations and treatments beginning on May 23, 2004. A hand-written emergency room report indicates that the miner was taken to the hospital on May 23, 2004, with complaints of shortness of breath (SOB) and chest discomfort. Director's Exhibit 9. A medical history of chronic obstructive pulmonary disease (COPD) and coronary artery disease (CAD) was reported, and Dr. Kowatli was listed as the miner's treating physician. *Id.* One month later, on June 23, 2004, Dr. Kowatli authored a report of the miner's hospitalization, indicating that he was admitted due to chest pain and SOB. *Id.* Dr. Kowatli noted the miner smoked many years before quitting on an unspecified date and that he had a history of pneumoconiosis, CAD, and end-stage lung disease. Dr. Kowatli indicated that the chest x-ray showed interstitial lung disease and that the EKG was negative. Dr. Kowatli determined that the miner suffered from exacerbation of pneumoconiosis/interstitial lung disease with sputum production, SOB and chest pain secondary to CAD or chronic inflammation of the lung. *Id.* In the discharge summary dated June 28, 2004, Dr. Kowatli noted the presence of exacerbation of end-stage lung disease, COPD, asthma, end-stage interstitial lung disease, SOB, diabetes mellitus, heart rhythm abnormality, a stress test that was negative for ischemia and depression known to exacerbate SOB. *Id.*

In a letter dated April 12, 2006, addressed to Dr. Agas, the miner's primary care physician, Dr. Kowatli opined that the miner suffered from chronic hypoxic respiratory failure caused by end-stage interstitial lung disease due to pneumoconiosis and that his prognosis was very poor because of the high mortality rate associated with hypoxia.³

³ Dr. Kowatli's April 12, 2006 letter to Dr. Agas included a past medical history, list of medications, social history, review of systems, physical examination, impression and plan. Claimant's Exhibit 3. Dr. Kowatli indicated that the miner developed traction bronchiectasis secondary to fibrosis, which caused recurrent sputum production. *Id.* He prescribed oxygen, but also informed the miner and his family that, although the

Director's Exhibit 9. The miner subsequently was admitted to the hospital on April 13, 2006, at which time Dr. Kowatli performed a transtracheal oxygen catheterization to alleviate the miner's severe hypoxia, secondary to pulmonary fibrosis, due to advanced pneumoconiosis. Director's Exhibit 10. The miner was also admitted to the hospital on May 3, 2006, for treatment of SOB. Dr. Kowatli indicated that the miner had SOB caused by pulmonary fibrosis, due to advanced pneumoconiosis, and that the miner's medical history included diagnoses of hypertension, CAD, myocardial infarction, diabetes and congestive heart failure (CHF). *Id.* Dr. Kowatli noted in the May 5, 2006 discharge summary that the miner had chronic hypoxic respiratory failure, secondary to end-stage black lung and interstitial disease, for over two years. *Id.* He opined that the miner's prognosis was "very poor." *Id.*

On August 5, 2006, the miner was admitted to the hospital with reported SOB but no chest pain. He was described as unresponsive with diminished consciousness and was seen by Dr. Perez, who diagnosed "end-stage COPD with pneumoconiosis" and acute hypercarbic respiratory failure, aspiration pneumonia, chronic renal insufficiency stage IV, CHF, diabetes, hypertension, CAD, hyperlipidemia, and benign prostatic hyperplasia. Director's Exhibit 9. A report was issued by Dr. Marzouk on August 6, 2006, in which he indicated that a chest x-ray showed bilateral interstitial changes consistent with lung fibrosis. *Id.* Dr. Marzouk noted that the miner's medical history included diagnoses of COPD and pneumoconiosis with lung fibrosis. *Id.* The miner was also seen by Dr. Quddus on August 7, 2006, and his diagnoses included end-stage COPD, a history of coal workers' pneumoconiosis, left lower lobe pneumonia, renal insufficiency, and possible aspiration pneumonia. *Id.* The discharge summary, which was completed by Dr. Perez on August 22, 2006, listed a final diagnosis of end-stage COPD/pneumoconiosis with hypercarbic hypoxic respiratory failure.⁴ *Id.* The miner subsequently died on September 11, 2006, and the death certificate, signed by Dr. Agas, identified the causes of death as respiratory failure and COPD. Director's Exhibit 8.

In a report dated December 3, 2007, Dr. Dahhan reviewed a portion of the medical evidence of record, and opined that the miner had simple coal workers' pneumoconiosis,

treatment could improve oxygenation, it would not stop the progression of the miner's interstitial disease. *Id.*

⁴ Two additional reports of hospitalization were prepared by Dr. Marzouk on August 23, 2006, at which time the miner was seen for syncope and was noted as having a history of pneumoconiosis, chronic obstructive pulmonary disease (COPD) and pulmonary fibrosis. Director's Exhibit 9. In a report prepared by Dr. Flanagan, the miner was also diagnosed with end-stage COPD with pneumoconiosis. *Id.*

COPD and a severe and disabling respiratory impairment. Employer's Exhibit 1. Dr. Dahhan noted that the miner was a "heavy smoker," that his respiratory impairment was "purely obstructive," and opined that that the impairment was not attributable to pneumoconiosis "but rather to his lengthy smoking habit." *Id.* Dr. Dahhan further stated that the miner died as a result of end-stage obstructive lung disease complicated by renal and heart failure, and that there was no evidence that pneumoconiosis or coal dust exposure caused, contributed to, or hastened the miner's death. *Id.*

Dr. Spagnolo also reviewed the medical evidence of record and prepared a report dated December 16, 2007. Employer's Exhibit 2. Dr. Spagnolo indicated that he assumed, at the request of employer, that the miner had pneumoconiosis, for the purpose of rendering his opinion. *Id.* Dr. Spagnolo opined that the miner suffered from severe CAD, which caused his death. *Id.* Dr. Spagnolo noted that the miner had smoked for many years, and that his history placed him at risk for the development of COPD. *Id.* According to Dr. Spagnolo, there was no clinical or objective evidence to suggest that pneumoconiosis or any respiratory condition hastened the miner's death. *Id.*

Dr. Rasmussen prepared a report on May 15, 2008, based on his review of a portion of the medical evidence of record, and opined that the miner's "disabling and ultimately fatal chronic lung disease was the consequence of both his cigarette smoking and coal mine dust exposure." Claimant's Exhibit 1. Dr. Rasmussen further opined that the miner's severe chronic lung disease "was the major cause [of,] and clearly hastened his death[,] whether due to respiratory or cardiac failure." *Id.* Dr. Rasmussen also reviewed Dr. Dahhan's December 3, 2007 report. *Id.* Dr. Rasmussen criticized Dr. Dahhan's opinion, that coal dust exposure was not a contributing factor in the miner's death, "simply because of the presence of obstructive lung disease." *Id.* Dr. Rasmussen cited epidemiological studies indicating that both cigarette smoking and coal dust exposure may cause forms of obstructive lung impairment identical to those seen in the miner. *Id.* Dr. Rasmussen also further noted that "coal mine dust[,] in contrast to cigarette smoke[,] also causes interstitial fibrosis" and that "[t]his pattern was encountered in the miner in 1986." *Id.*

By letter dated June 5, 2008, Dr. Dahhan replied to Dr. Rasmussen's critique of his opinion, stating only that Dr. Rasmussen's conclusions "cannot be supported by the state of the art medical knowledge." Employer's Exhibit 3.

B. The Administrative Law Judge's Findings

The administrative law judge found that Dr. Kowatli treated the miner "from at least May 2004 through his [terminal] hospitalization in 2006" and that he offered a reasoned opinion regarding the nature of the miner's illnesses prior to death. Decision and Order at 8; *see* 20 C.F.R. §718.104(d). The administrative law judge gave

controlling weight to Dr. Kowatli's numerous statements in the treatment records that the miner suffered from end-stage or terminal interstitial lung disease/pneumoconiosis, noting that his opinion was also supported by "the similar conclusions of [Drs. Marzouk, Quddus and Perez,] who treated the miner in the hospital during the month of August 2006." Decision and Order at 9. The administrative law judge found that Dr. Rasmussen's opinion, that the miner's death was due to chronic lung disease caused by both smoking and coal dust exposure, was reasoned and documented. The administrative law judge rejected Dr. Dahhan's contrary opinion, that the miner's death was unrelated to coal dust exposure, as unreasoned. *Id.* The administrative law judge explained:

Dr. Dahhan opined that the miner's death was unrelated to his pneumoconiosis simply because the impairment was "obstructive" in nature. Dr. Dahhan's thesis contravenes the definition of legal pneumoconiosis in [20 C.F.R. §]718.201(a)(2). Consequently, I find that the opinion of Dr. Dahhan[,] that coal workers' pneumoconiosis was not a substantial contributor to the miner's death[,] is entitled to no weight.

Id. The administrative law judge noted, however, that Dr. Dahhan's opinion "substantially buttresses the opinion of Dr. Rasmussen," insofar as Dr. Dahhan acknowledged that the miner's death was largely due to end-stage COPD, complicated by renal and cardiac failure. *Id.* at 9-10. Thus, the administrative law judge found that Dr. Dahhan was in "agreement with Dr. Rasmussen that obstructive lung disease was a substantial contributor to the miner's death." *Id.* at 10.

The administrative law judge further explained that he gave no weight to Dr. Spagnolo's opinion, that the miner's death was due solely to his cardiac condition, since Dr. Spagnolo did not discuss the miner's COPD and his opinion was "in opposition" to the opinions of Dr. Rasmussen and Dr. Dahhan, that the miner's disabling COPD caused his death. The administrative law judge concluded that Dr. Rasmussen's opinion was sufficient to establish that the miner's COPD was due, in part, to coal dust exposure (legal pneumoconiosis)⁵ and that the miner's death was hastened by both clinical and legal pneumoconiosis. Thus, the administrative law judge found that claimant satisfied her burden of proving that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

⁵ Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

C. Employer's Arguments on Appeal

Employer argues that the administrative law judge erred in failing to resolve the conflict in the evidence as to the existence of legal pneumoconiosis. Employer asserts that there is insufficient evidence to justify the administrative law judge's conclusion that the miner's death was due to legal pneumoconiosis, in the form of COPD caused by coal dust exposure. Employer contends that the administrative law judge failed to explain how Dr. Kowatli's treatment of the miner afforded him "superior information" or a "superior understanding" of the miner's condition prior to his death. Employer's Brief at 6. Employer also contends that the administrative law judge erred in finding that Dr. Kowatli's diagnosis of end-stage or terminal pneumoconiosis was supported by the opinions of Drs. Marzouk, Quddus and Perez. Lastly, employer asserts that the administrative law judge selectively analyzed the medical opinions and erred in finding that Dr. Rasmussen's opinion was reasoned and documented. We reject employer's assertions of error as they are without merit.

Contrary to employer's contention, the administrative law judge specifically considered the factors set forth at 20 C.F.R. §718.104(d),⁶ in assessing the weight to accord to Dr. Kowatli's opinion. Decision and Order at 8. The administrative law judge reasonably found that "although all of Dr. Kowatli's reports in the evidentiary record in this case pre-date the miner's death, [his] opinion regarding the nature of the miner's illnesses are entitled to controlling weight" pursuant to 20 C.F.R. §718.104(d).⁷ Decision and Order at 8-9; *Consolidation Coal Co. v. Held*, 314 F.3d 184, 188, 22 BLR 2-564, 2-571 (4th Cir. 2002). The administrative law judge also reasonably found that Dr. Kowatli treated the miner for end-stage, or terminal, pneumoconiosis and that the opinions of Drs. Kowatli, Marzouk, Quddus and Perez support a conclusion "that during the last two years

⁶ Pursuant to 20 C.F.R. §718.104(d), the administrative law judge must take into account the nature and duration of the treating physician's relationship, as well as the frequency and extent of his treatment, in weighing the treating physician's opinion. 20 C.F.R. §718.104(d)(1)-(4). The applicable regulation additionally provides that "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

⁷ The administrative law judge also correctly noted that Dr. Kowatli did not offer an opinion regarding the cause of the miner's death, so he limited his consideration of Dr. Kowatli's opinion to the nature of the miner's respiratory condition during the period leading up to his death. Decision and Order at 8-9.

of the miner's life he suffered from end-stage lung disease caused by [clinical] pneumoconiosis.”⁸ *Id.* at 9; *see Held*, 314 F.3d at 188, 22 BLR at 2-571.

With respect to the issues of the existence of legal pneumoconiosis and the cause of the miner's death, we reject employer's contention that the administrative law judge selectively analyzed the evidence and erred in relying on Dr. Rasmussen's opinion to award benefits. The administrative law judge acted within his discretion in finding that Dr. Rasmussen's opinion was reasoned and documented and sufficient to establish that the miner suffered from COPD due to both smoking and coal dust exposure (legal pneumoconiosis) and that the miner's COPD caused the miner's death. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002) *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). As noted by the administrative law judge, Dr. Rasmussen “considered most of the medical evidence of record and rationally found, in contrast to Dr. Dahhan, that the fact that the miner had obstructive lung disease did not exclude dust exposure in his coal mine employment as a substantial contributor to his death.” Decision and Order at 9. Furthermore, there is no merit to employer's contention that Dr. Rasmussen did not discuss the specifics of the miner's respiratory condition in attributing his obstruction to coal dust exposure, as Dr. Rasmussen explained that both smoking and coal dust exposure cause types of obstruction identical to those seen in this case, and further opined that the miner's pulmonary fibrosis was associated with coal dust exposure rather than smoking. Claimant's Exhibit 1. Because determining the credibility of the medical experts' opinions is within the sound discretion of the trier of fact, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion was entitled to substantial weight pursuant to 20 C.F.R. §718.205(c).

We further reject employer's assertion that the administrative law judge erred in finding that Dr. Dahhan offered an opinion that was in contravention of the definition of legal pneumoconiosis at 20 C.F.R. §718.201. Based on our review of Dr. Dahhan's report, the administrative law judge reasonably questioned whether Dr. Dahhan's rationale for excluding coal dust exposure as a causative factor in the miner's COPD was based on an erroneous belief that coal dust exposure does not result in an obstructive respiratory impairment. *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir.

⁸ In discussing Dr. Kowatli's opinion, the administrative law judge noted that employer conceded that the miner had coal workers' pneumoconiosis and that no physician in the record opined that the miner's pneumoconiosis was due to anything other than coal dust exposure. Decision and Order at 9.

1995); *see also* 65 Fed Reg. 79,920, 79,939 (Dec. 20, 2000); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). We therefore affirm the administrative law judge's finding that Dr. Dahhan's opinion was not sufficiently reasoned as to the existence of legal pneumoconiosis pursuant to 20 C.F.R. §§718.201, 718.202(a)(4), or the cause of the miner's death pursuant to 20 C.F.R. §718.205(c).

We also affirm the administrative law judge's decision to accord no weight to Dr. Spagnolo's opinion, that the miner's death was caused by his heart condition, without any contribution by pneumoconiosis or COPD. *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155. The administrative law judge determined that while Dr. Spagnolo acknowledged that the miner had COPD due to smoking, "the physician did not provide any clear statement that he believed that any lung impairment whatsoever substantially contributed to the miner's death." Decision and Order at 10. The administrative law judge permissibly found that Dr. Spagnolo's opinion as to the cause of the miner's death was not persuasive since it was "in opposition" to the opinions of both Dr. Rasmussen and Dr. Dahhan, that the miner's lung impairment was the primary cause of his death. Decision and Order at 10; *Clark*, 12 BLR at 1-155. Additionally, the administrative law judge noted that Dr. Spagnolo "failed to discuss the possible contribution of the miner's [clinical] pneumoconiosis to his death." Decision and Order at 10 n.5; *see Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155. Thus, we affirm the administrative law judge's finding that Dr. Spagnolo's opinion was entitled to no weight on the issue of the cause of the miner's death pursuant to 20 C.F.R. §718.205(c).

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*, 12 BLR 1-151; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge permissibly found, based on Dr. Rasmussen's opinion, and the totality of the medical record in this case, that the miner suffered from legal pneumoconiosis, in the form of COPD due, in part, to coal dust exposure, which caused or substantially contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant is entitled to benefits on her survivor's claim. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

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

REGINA C. McGRANERY
Administrative Appeals Judge