

BRB No. 95-1769 BLA

RUTH E. ZURAT)
(Widow of JOSEPH ZURAT))
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown,
Administrative Law Judge, United States Department of Labor.

Debra A. Smith (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for
claimant.

Eileen McCarthy (J. Davitt McAteer, Acting Solicitor of Labor; Donald S.
Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate
Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for
Administrative Litigation and Legal Advice), Washington, D.C., for the
Director, Office of Workers' Compensation Programs, United States
Department of Labor.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (95-BLA-0048) of Administrative

¹Claimant is Ruth E. Zurat, the miner's widow, who filed a survivor's claim for
benefits on October 21, 1993. Director's Exhibit 1. The miner, Joseph Zurat, filed a
claim for benefits on April 25, 1989 and was awarded benefits by Administrative Law

Law Judge Ainsworth H. Brown denying benefits on a 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

Judge Paul H. Teitler on July 18, 1991 pursuant to 20 C.F.R. Part 718. Director's Exhibit 18. The miner died on October 7, 1993. Director's Exhibit 2.

claimant failed to establish that pneumoconiosis contributed to or hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence of record pursuant to Section 718.205(c). The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the denial of benefits and remand the case for reconsideration of the opinions of Drs. Spagnolo, Naeye, and Malik.

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).

Claimant contends, and the Director agrees, that the administrative law judge erred in assigning greater weight to Dr. Naeye's opinion because he stated that the miner had no significant lung dysfunction when the administrative law judge in the miner's claim found the miner to be totally disabled due to pneumoconiosis. Claimant's Brief at 4; Director's Motion to Remand at 3.

The administrative law judge considered the miner's death certificate, Director's Exhibit 2, the records of the Pottsville Hospital, which include discharge summaries signed by Dr. Malik, Director's Exhibit 3, letters from Dr. Malik dated in April and May 1993, the autopsy report of Dr. Bindie, Director's Exhibit 12, and medical reports and/or depositions of Drs. Mathur, Spagnolo, Malik, Karlavage, and Naeye. Director's Exhibits 7, 11-13; Claimant's Exhibits 1-3. The administrative law judge also noted that the miner was awarded benefits on his claim. Decision and Order at 2.

The administrative law judge then determined that Dr. Naeye's opinion that the miner's pneumoconiosis did not hasten the miner's death was entitled to "primary weight" because of Dr. Naeye's superior qualifications. Decision and Order at 6; Director's Exhibit 13. The administrative law judge further found that Dr. Naeye's opinion was supported by Dr. Spagnolo's opinion that "there is no objective information . . . that a pneumoconiosis contributed in any substantial way" to the miner's death and noted that his qualifications were greater than those of Drs. Malik and Karlavage. Decision and Order at 6; Director's Exhibit 7.

Dr. Naeye reviewed the autopsy report and nine slides with tissue removed at autopsy and opined:

Overall the coal workers' pneumoconiosis is far too mild to have produced impairments in lung function that would have prevented this man from doing hard physical work in the coal mining industry. It is also too mild to have reduced the level of oxygen in this man's blood, too mild to have increased the work of his heart and too mild to have hastened his death. Death was caused by complications of a prostatic carcinoma that had metastacized widely. The immediate cause of death was a massive cryptococcal pneumonia.

Director's Exhibit 13.

Contrary to claimant's contention, the prior administrative law judge's finding and the Director's concession that the miner was totally disabled due to pneumoconiosis do not diminish claimant's burden of proof in a survivor's claim. Pursuant to Section 718.205(c), claimant must show that pneumoconiosis was a substantially contributing cause of death, which the United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, has defined as any condition which actually hastens the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); see *Tackett v. Armco, Inc.*, 17 BLR 1-103 (1993).

Thus, the administrative law judge is not required to award benefits in a survivor's claim because the miner was found to be totally disabled and was awarded benefits in his claim. 20 C.F.R. §718.1(a); *The Earl Patton Coal Co. v. Patton*, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988), *aff'g*, 9 BLR 1-164 (1986); *Johnson v. Eastern Associated Coal Corp.*, 8 BLR 1-248 (1985). Further, the administrative law judge is not required to reject the opinion of a physician who opines, based on evidence developed subsequent to a miner's death, that the miner did not have a disabling respiratory impairment. *Cf. Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); see generally *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

The Director also argues that Dr. Naeye's opinion is flawed because he did not address whether "legal" pneumoconiosis was a cause of the miner's death. Director's Motion to Remand at 3-4. We reject this argument because, although Dr. Naeye did not rule out legal pneumoconiosis, he did opine that the miner's coal workers' pneumoconiosis was too mild to hasten the miner's death and specifically stated that the miner's death was caused by complications of a prostatic cancer that

had metastasized widely and that the "immediate cause of death was a massive cryptococcal pneumonia." Director's Exhibit 13; Decision and Order at 4.

Inasmuch as the administrative law judge need not accept the opinion of any physician but must weigh all the evidence and draw his own conclusions and inferences, see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), and may assign more weight to a physician's opinion based on that physician's superior qualifications, *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), we affirm the administrative law judge's weighing of Dr. Naeye's opinion and the denial of benefits.²

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

²The administrative law judge's weighing of Dr. Karlavage's opinion is affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Also, we need not address claimant's contentions regarding the administrative law judge's weighing of the opinions of Drs. Spagnolo and Malik because the administrative law judge permissibly accorded determinative weight to Dr. Naeye's opinion.

NANCY S. DOLDER
Administrative Appeals Judge