

BRB No. 02-0852 BLA

TERRI COX (o/b/o the Estates of)
MARY WILLIAMSON, widow and JOE)
EDWARD WILLIAMSON, deceased miner))
)
Claimant-Petitioner)
)
v.)
)
RIVER HURRICANE COAL COMPANY,) DATE ISSUED: 07/28/2003
INCORPORATED)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS=
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order B Denial of Benefits of Daniel J. Rokenetz, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order B Denial of Benefits (01-BLA-0043 and

¹ Claimant, the executrix of the estate of the miner=s widow, *see* Claimant=s Exhibit

01-BLA-0145) of Administrative Law Judge Daniel J. Roketenetz rendered on a request for modification of the denial of a duplicate miner=s claim and 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).² The administrative law judge found thirteen years and seven months of coal mine employment established and adjudicated the claims pursuant to 20 C.F.R. Part 718, based on the dates of filing.³ Considering the newly submitted evidence, in conjunction with the previously submitted evidence, on the request for modification of the denial of the duplicate miner=s claim, the administrative law judge concluded that the evidence was insufficient to establish disability causation, the element previously adjudicated against the miner, and, therefore, found that modification was not established on the miner=s claim. Accordingly, benefits on the miner=s claim were denied.

2, is pursuing both the miner=s and the survivor=s claims for benefits.

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations refer to the regulations, unless otherwise noted, refer to the amended regulations.

³ The miner filed his first claim for benefits on February 17, 1981, which was deemed abandoned on November 12, 1981. Director=s Exhibits 73-365, 73-279. The miner filed a second claim on December 14, 1982, which was treated as an original claim. On July 1, 1987, Administrative Law Judge Bernard J. Gilday found the existence of pneumoconiosis arising out of coal mine employment and total disability established, but denied the claim because disability causation was not established. Director=s Exhibits 73-66, 74-311. The Board affirmed the denial of benefits on February 26, 1990. Director=s Exhibit 73-1. The miner filed a subsequent claim on November 23, 1994, which was treated as a duplicate claimant and denied by Administrative Law Judge Gerald M. Tierney on June 12, 1996, for failure to establish disability causation. Director=s Exhibit 74-46. The Board affirmed the denial of benefits on July 27, 1997, and denied the miner=s request for reconsideration on June 25, 1997. Director=s Exhibits 74-4, 74-46, 75-10. The miner filed another claim on September 16, 1998, the claim now before the Board, which was denied on January 11, 1999, August 2, 1999, and October 6, 1999, for failure to establish the existence of pneumoconiosis and disability causation. Director=s Exhibits 1, 2, 29, 31, 32. The miner died on November 2, 1999. Director=s Exhibit 8. The district director denied the widow=s request for modification on the miner=s claim on April 6, 2000. Director=s Exhibit 32. The miner=s widow filed her claim for survivor=s benefits on December 21, 1999. The widow=s claim was denied on April 6, 2000 for failure to establish that pneumoconiosis arose out of coal mine employment and that death was due to pneumoconiosis. Director=s Exhibit 30. The claims were referred to the Office of the Administrative Law Judge on October 3, 2000. Director=s Exhibit 38. The widow died on June 24, 2001. Claimant=s Exhibit 3; Hearing Transcript at 11.

Turning to the survivor=s claim, the administrative law judge concluded that the evidence established the existence of pneumoconiosis arising out of coal mine employment, but that it failed to establish that the miner=s death was due to or hastened by pneumoconiosis. Accordingly, benefits were denied on the survivor=s claim.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish disability causation pursuant to Section 718.204(c) in the miner=s claim. Claimant further contends that the administrative law judge erred in finding that the evidence failed to establish death due to pneumoconiosis pursuant to Section 718.205(c) in the survivor=s claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers= Compensation Programs (the Director), is not participating 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 miner=s claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. ' ' 718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

To establish entitlement to survivor=s benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner=s death was due to pneumoconiosis. 20 C.F.R. ' ' 718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor=s claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner=s death, pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. ' 718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner=s death if it hastens the miner=s death. 20 C.F.R. ' 718.205(c)(5); *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-15 (6th Cir. 1993).

Claimant contends that the medical opinion of Dr. Sundaram, the miner=s treating physician, which was supported by the opinion of Dr. Younes, is sufficient to establish

disability causation. Claimant also argues that the administrative law judge erred in according greater weight to the opinions of non-examining, non-treating physicians, than to the opinions of treating and examining physicians.

In weighing the medical opinion evidence on the issue of disability causation,⁴ the administrative law judge accorded little weight to the opinion of Dr. Sundaram because his findings regarding the miner=s smoking history were inconsistent. This was rational. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Perry*, 9 BLR 1-1; *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984). Likewise, the administrative law judge discounted the opinion of Dr. Younes as internally inconsistent and equivocal because, after finding that disability arose from smoking and coal dust exposure, Dr. Younes concluded that the primary cause of the miner=s impairment was cigarette smoking and that coal dust exposure may have been a contributing factor. Director=s Exhibit 14. This was rational. *Griffith*, 49 F.3d at 186, 19 BLR at 2-117; *Handy v. Director, OWCP*, 16 BLR 1-73, 1-76 (1990); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988), *aff=d*, 865 F.2d 916 (7th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-69-70 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Hopton v. United States Steel Corp.*, 7 BLR 1-12, 1-13-14 (1984). The administrative law judge rationally accorded greater weight to the contrary opinions of the reviewing physicians, Drs. Repsher, Rosenberg, Anderson Powell, and Fino, because of their superior qualifications, *i.e.*, their, dual board certifications in internal medicine and pulmonary disease. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). The administrative law judge also rationally accorded greater weight to certain medical opinions, including: the opinions of Drs. Repsher and Rosenberg, because their review of all the medical evidence of record afforded them a more complete picture of the miner=s health; the opinions of Drs. Anderson, Powell, Fino and Branscomb because they reviewed all the evidence when they considered disability causation, and; the opinion of Dr. Vuskovich who examined the miner twice and reviewed additional evidence. *See Stark*, 9 BLR at 1-37. In addition, the administrative law judge accorded greater weight to the opinions of the board-certified pathologists, Drs. Caffrey, Naeye and Hutchins, that the miner=s pneumoconiosis did not contribute to his total disability, as their conclusions were consistent with the opinions of the pulmonary disease experts. *Dillon*, 11 BLR at 1-114. Further, contrary to claimant=s contentions, the administrative law judge was not required to accord greater weight to Dr. Sundaram=s opinion because he was the miner=s treating physician, nor was he required to accord less

⁴ Dr. Sundaram, the miner=s treating physician, found the miner totally disabled due to pneumoconiosis, Director=s Exhibits 11, 17. Dr. Younes found the miner totally disabled due to chronic obstructive pulmonary disease, chronic respiratory failure and emphysema, noting that the primary cause of the miner=s disability was cigarette smoking, but that coal dust exposure may have been a contributing factor. Director=s Exhibit 14. Drs. Caffrey, Naeye, Hutchins, Repsher, Rosenberg, Vuskovich, Anderson, Powell, Fino and Branscomb found total disability due to cigarette smoking, unrelated to pneumoconiosis, Director=s Exhibits 63, 64, Employer=s Exhibits 1-6.

weight to the non-examining physicians of record. See *Jericol Mining, Inc. v. Napier*, 2002 WL 198821; *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tedesco v. Director, OWCP*, 18 BLR 1-103, 1-105 (1994); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1993)(administrative law judge erred by Acompletely@ discrediting opinion of non-examining physician); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); *Worthington v. United States Steel Corp.*, 7 BLR 1-522, 1-524 (1984) (administrative law judge erred in rejecting physician=s opinion solely because he did not examine claimant). Thus, the administrative law judge rationally concluded that the opinions of Drs. Sundaram and Younes, which supported a finding of total disability due to pneumoconiosis, were outweighed by the contrary opinions of record on the issue of disability causation, rationally concluded that the evidence was insufficient to establish disability causation pursuant to Section 718.204(c), and properly denied benefits on the miner=s duplicate claim. See *Napier*, 2002 WL 198821; *Stephens*, 298 F.3d 511; *Groves*, 277 F.3d 834, 22 BLR 2-320; *Clark*, 12 BLR 1-149; *Dillon*, 11 BLR at 1-113; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); see also *Riley v. National Mines Corp.*, 852 F.2d 197, 198, 11 BLR 2-182, 2-184 (6th Cir. 1988)(Ait is the ALJ who makes credibility determinations and resolves inconsistencies in the testimony and evidence@); *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985)(A[d]eterminations of whether a physician=s report is sufficiently documented and reasoned is a credibility matter left to the trier of fact@ as is Athe weight to be accorded to the evidence@); *Hess v. Director, OWCP*, 21 BLR 1-141 (1998).

Regarding the survivor=s claim, claimant contends that the death certificate completed by Dr. Dineen, who attended the miner during his terminal hospitalization, and the autopsy report completed by Dr. Dennis were sufficient to establish that pneumoconiosis was a contributing factor in the miner=s death. We disagree.⁵ The administrative law judge noted that while he placed some weight on Dr. Dineen=s opinion because he had attended the miner at the time of the miner=s death and was a pulmonary expert, the opinion was unreliable because Dr. Dineen had utilized an inaccurate smoking history. This was rational. See *Stark*, 9 BLR at 1-37; *Crosson*, 6 BLR at 1-809. The administrative law judge accorded less weight to Dr. Dennis=s report because while he diagnosed the existence of anthracosilicosis, he did not specifically state the cause of death. This was proper. See *Willis v. Birchfield Mining Co.*, 15 BLR 1-59 (1991); *Clark*, 12 BLR 1-149; *Stark*, 9 BLR 1-36;

⁵ The death certificate, completed by Dr. Dineen, identifies chronic obstructive airways disease as the immediate cause of death and lists other significant conditions: pulmonary embolus, coal workers= pneumoconiosis, anthracosilicosis, arteriosclerotic heart disease, status post myocardial infarction, Director=s Exhibit 8. In the autopsy report, Dr. Dennis concluded that the miner died as a result of pulmonary disease, and had significant emphysema of panlobular distribution and anthracosilicosis in both lungs, Director=s Exhibit 9.

Fields, 10 BLR 1-19; see *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000). Instead, the administrative law judge rationally accorded greater weight to the opinions of Drs. Caffrey, Naeye, Hutchins, who stated that death was not in any way due to or hastened by coal workers= pneumoconiosis, based on their qualifications as board-certified pathologists and their review of all the miner=s medical records. See *Dillon*, 11 BLR at 1-114; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Stark*, 9 BLR 1-36. Likewise, the administrative law judge properly placed greater weight on the opinions of Drs. Repsher and Rosenberg finding that pneumoconiosis did not contribute to death, based on their expertise in pulmonary medicine, their review of all the evidence, and because their opinions were consistent with the opinions of the pathologists. *Clark*, 12 BLR 1-149; *Dillon*, 11 BLR at 1-114; *Fields*, 10 BLR 1-19; *King*, 8 BLR 1-262. Thus, the administrative law judge rationally found the evidence insufficient to establish that the miner=s death was due to or hastened by pneumoconiosis pursuant to Section 718.205(c) and properly denied benefits on the survivor=s claim.

Accordingly, the administrative law judge=s Decision and Order B Denial of Benefits on both the miner=s and the survivor=s claims is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge