

BRB No. 05-0828 BLA

EDITH M. GIBBONS	)	
(Widow of LEO O. GIBBONS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLORENCE MINING COMPANY	)	
	)	DATE ISSUED: 07/12/2006
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Blair Pawlowski (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

George H. Thompson (Thompson, Calkins and Sutter), Pittsburgh, Pennsylvania, for employer.

Rita A. Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, the surviving spouse of the deceased miner, appeals the Decision and Order-Denying Benefits (03-BLA-6662) of Administrative Law Judge Michael P. Lesniak 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 administrative law judge accepted the parties' stipulations of twenty-six years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment, and considered the claim, filed on September 25, 2002, pursuant to the regulations contained at 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish 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 erred in his analysis of the medical evidence. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director) has filed a limited response letter stating that the administrative law judge erred in his analysis of whether an opinion that emphysema played a small role in the miner's death established that pneumoconiosis was a substantially contributing cause of the miner's death.

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 (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 the cause of the miner's death, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Failure to establish any one of these elements precludes 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 indicates that the miner died on May 21, 2001. Director's Exhibit 13. Drs. Goldblatt and Labeeb conducted an autopsy and diagnosed lung cancer, macular and micronodular simple coal workers' pneumoconiosis, severe emphysema, severe coronary artery disease, cor pulmonale, and old healed myocardial infarct scar. Director's Exhibit 14. Drs. Goldblatt and Labeeb did not specify a cause of death in the autopsy report. Dr. Klain completed the miner's death certificate, listing lung carcinoma as the immediate cause of death, due to pulmonary silicosis, due in turn to chronic obstructive pulmonary

disease. Director's Exhibit 13. The administrative law judge found the death certificate insufficient, standing alone, to establish that pneumoconiosis was a substantially contributing cause of death. Decision and Order at 12.

The administrative law judge also had before him the opinions of Drs. Goldblatt, Perper, Naeye, and Oesterling regarding the cause or causes of the miner's death. Drs. Perper and Goldblatt opined that the miner's coal workers' pneumoconiosis with associated emphysema triggered a fatal cardiac arrhythmia.<sup>1</sup> Drs. Perper and Goldblatt additionally opined that the miner's fatal lung cancer was due partly to coal mine dust exposure. By contrast, Drs. Naeye and Oesterling opined that the miner died due to cancer unrelated to coal mine dust exposure, and further opined that heart disease also played a role in his death.<sup>2</sup>

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<sup>1</sup> Dr. Goldblatt stated that the miner died from cardiac arrhythmia secondary to severe chronic obstructive pulmonary disease, which occurred primarily due to coal dust exposure and coal workers' pneumoconiosis. Claimant's Exhibit 13 at 30. Dr. Goldblatt opined that the miner's panlobular and centrilobular emphysema were due to both cigarette smoking and coal dust exposure. Claimant's Exhibit 13 at 20–24. Dr. Perper opined that coal workers' pneumoconiosis was a substantial contributory cause of death, both directly and indirectly through associated centrilobular emphysema that caused hypoxemia, which either triggered or aggravated a fatal cardiac arrhythmia, and through complications from pulmonary cancer. Claimant's Exhibit 12 at 34.

<sup>2</sup> Dr. Naeye opined that the miner died due to cancer which probably originated in his lungs and was probably due to cigarette smoking, and of heart failure attributable to cigarette smoking. Employer's Exhibit 6 at 24, 33. Dr. Naeye stated that the miner's coal workers' pneumoconiosis was too mild to have played a role in the miner's death, and that the miner's centrilobular emphysema, due primarily to cigarette smoking with a five to ten percent contribution from coal dust exposure, may have played a very small role in the miner's death, but that the major cause of death was cancer. Employer's Exhibit 6 at 44-45, 57. Dr. Oesterling opined that the miner's death was due to a combination of severe metastatic lung carcinoma complicated by progressive ischemic heart disease and passive pulmonary congestion, none of which could be attributed to coal mine dust exposure. Director's Exhibit 34. Dr. Oesterling opined that coal workers' pneumoconiosis did not have any effect on the miner's death. Employer's Exhibit 7 at 29. Dr. Oesterling stated that the miner's death was primarily a cardiorespiratory death. Employer's Exhibit 7 at 14. Regarding the respiratory portion of death, Dr. Oesterling testified that hemosiderin in the miner's lungs, which was caused by congestive heart failure, led to early hemosiderosis, a form of interstitial fibrosis. Employer's Exhibit 7 at 18-19. Regarding the cardiac portion of death, Dr. Oesterling opined that the

The administrative law judge credited the opinions of Drs. Perper and Goldblatt that, in addition to coal workers' pneumoconiosis, the miner had severe emphysema due to both coal mine employment and cigarette smoking. Decision and Order at 13. However, the administrative law judge declined to credit their opinions that the miner's lung cancer was due partly to silica in coal mine dust. The administrative law judge explained that all of the pathologists agreed that there was a minimal or small amount of silica crystals in the miner's lungs. The administrative law judge concluded that although Dr. Perper discussed studies linking silica exposure to lung cancer, those studies did not establish that the small amount of silica present in the miner's lungs in this case was sufficient to cause the miner's lung cancer. Decision and Order at 15-16.

The administrative law judge also explained that he did not credit the opinions of Drs. Perper and Goldblatt that coal workers' pneumoconiosis and emphysema played a role in the miner's death by triggering or aggravating a cardiac arrhythmia. Specifically, the administrative law judge found that although Dr. Perper testified that the pathologic findings, pulmonary function studies, and pulmonary diffusion test indicated that the miner had hypoxemia, the pulmonary function studies and diffusing capacity test were normal. Decision and Order at 14. The administrative law judge also noted that Dr. Goldblatt testified that cancer and arteriosclerosis can produce cardiac arrhythmias. The administrative law judge found that the record established that the miner's cancer was significant, present in the lungs and liver and metastatic to the lymph nodes. Decision and Order at 14; Claimant's Exhibit 13 at 30-31, 54. The administrative law judge additionally noted that the autopsy revealed severe arteriosclerosis. Decision and Order at 14. Since there was medical testimony that these two diseases present could produce cardiac arrhythmia, the administrative law judge found that neither Dr. Perper nor Dr. Goldblatt adequately ruled out these causes before concluding that the miner's fatal cardiac arrhythmia--assuming that he had one--was due to coal mine employment-related emphysema. Therefore, the administrative law judge found their opinions poorly reasoned on this point. Decision and Order at 14-15.

Turning to the opinions by Drs. Oesterling and Naeye, the administrative law judge accorded great weight to Dr. Naeye's opinion that coal workers' pneumoconiosis did not play a role in the miner's death because of Dr. Naeye's well-reasoned explanation that there was a minimal amount of coal workers' pneumoconiosis lesions in the lungs, in

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hemosiderin and the miner's emphysema depleted the oxygen supply in the blood and accelerated the miner's cardiac disease. Employer's Exhibit 7 at 20. Dr. Oesterling opined that the emphysema was unrelated to coal dust exposure, but was due to cigarette smoking. Employer's Exhibit 7 at 22-25, 44-45. He opined that emphysema "may have been a very small factor" in the miner's death. Employer's Exhibit 7 at 21.

contrast to extensive damage from lung cancer. Decision and Order at 15.

On the issue of the role of emphysema in the miner's death, the administrative law judge accorded little weight to Dr. Naeye's opinion that smoking and coal dust-related emphysema played a small role in the miner's death because the administrative law judge found that Dr. Naeye could not have sufficiently considered the role of emphysema, since Dr. Naeye admitted that the autopsy slides were inadequate for him to evaluate the severity of the miner's emphysema. Decision and Order at 15. The administrative law judge interpreted Dr. Oesterling's opinion as being that emphysema played a small role in the miner's death,<sup>3</sup> and found the opinion reasoned and entitled to great weight. *Id.* However, the administrative law judge found the opinion legally insufficient to establish that legal pneumoconiosis hastened the miner's death. The administrative law judge reasoned that because the miner's emphysema was due to both smoking and coal dust, only a portion of the small role that emphysema played in the death was due to coal mine dust. The administrative law judge found this partial, small role insufficient to establish that pneumoconiosis was a substantially contributing cause of death. Decision and Order at 15. Accordingly, the administrative law judge denied benefits.

Claimant contends that the administrative law judge improperly accepted, without adequate explanation, the opinions of employer's pathologists that the miner's fatal lung cancer was unrelated to coal mine employment. Claimant's contention lacks merit. As discussed above, the administrative law judge gave his reasons for declining to credit the opinions of Drs. Perper and Goldblatt linking the miner's cancer to silica exposure in coal mine employment. Specifically, the administrative law judge explained that the amount of silica detected in the miner's lungs was small, and the medical literature that Dr. Perper cited did not convince the administrative law judge that the small amount of silica present in this particular case could have caused the miner's lung cancer. Decision and Order at 15-16. This was a credibility determination within the administrative law judge's discretion, and it is supported by substantial evidence. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1985)(*en banc*).

Claimant asserts that the administrative law judge erred by failing to determine which type of emphysema--centrilobular or panlobular--the miner suffered. This assertion lacks merit. The administrative law judge found that although the conflicting evidence did not allow him to determine which type of emphysema the miner had, it was

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<sup>3</sup> When asked if emphysema was a contributor to the miner's death, Dr. Oesterling replied that, "It may have been a very small factor in his death." Employer's Exhibit 7 at 21.

clear that the miner had severe emphysema due to both smoking and coal mine dust exposure. Decision and Order at 13. Claimant does not explain how the administrative law judge erred in failing to determine the specific type of emphysema present, considering that the administrative law judge found that the miner's emphysema was pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

Claimant argues further that the administrative law judge erred in discounting the opinions of Drs. Perper and Goldblatt that coal workers' pneumoconiosis and emphysema caused or hastened the miner's death by triggering or aggravating a cardiac arrhythmia. Claimant states that the administrative law judge's finding that these two doctors did not adequately rule out other possible causes of an arrhythmia was unclear because the doctors' opinions were found well-reasoned on other points. We disagree. First, claimant cites no authority for her apparent proposition that an administrative law judge may only credit or discredit the entirety of an opinion. Second, as discussed, the administrative law judge explained why he did not credit Dr. Perper's and Goldblatt's cardiac arrhythmia theory of death causation: The administrative law judge found that even assuming the miner suffered a cardiac arrhythmia, Drs. Perper and Goldblatt did not adequately explain why coal mine employment-related emphysema caused or aggravated the arrhythmia, when Dr. Goldblatt testified that two other diseases that were present--cancer and severe heart disease--could cause an arrhythmia. Decision and Order at 14-15. Also, he explained that the objective evidence did not support Dr. Perper's opinion that hypoxia was present that led to an arrhythmia. *Id.* Contrary to claimant's contention, the administrative law judge provided valid rationales for questioning the reasoning of these two opinions as to the cause of death. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 397, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20 (3d Cir. 1997); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

The Director contends that the administrative law judge did not properly weigh Dr. Oesterling's opinion that emphysema played a small role in the miner's death. The record reflects that Dr. Oesterling opined that the miner's emphysema was unrelated to coal mine dust exposure, and that the miner's death was unrelated to pneumoconiosis. Director's Exhibit 34; Employer's Exhibit 7. Considering that claimant's evidence linking the miner's death to pneumoconiosis was properly discounted, the Director does not explain how Dr. Oesterling's opinion that emphysema unrelated to coal mine dust may have played a small role in the miner's death could support claimant's burden of proof at 20 C.F.R. §718.205(c). Consequently, we decline to remand this case for the administrative law judge to reconsider Dr. Oesterling's opinion. For the same reasons, we need not address claimant's argument that the administrative law judge misinterpreted Dr. Oesterling's testimony on cross-examination as to the degree of contribution by emphysema.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge