

BRB No. 01-0904 BLA

ELSIE KOZELE)	
(Widow of JOSEPH KOZELE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
KEYSTONE COAL MINING)	DATE ISSUED:
CORPORATION)	
)	
Employer-Petitioner)	
)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (00-BLA-0127) of Administrative Law Judge Michael P. Lesniak on a survivor's claim¹ 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 initially noted that in 1997,

¹Claimant, the miner's widow, filed the instant claim on March 10, 1999. Director's Exhibit 1. The miner's death certificate indicates that he died on July 31, 1998 due to pneumonia and pulmonary hypertension. Director's Exhibit 3.

²The Department of Labor has amended the regulations implementing the Federal

employer conceded liability in a claim for benefits filed by the miner during his lifetime. Decision and Order at 2; *see* Director's Exhibit 26. Pursuant to the parties' stipulations, the administrative law judge credited the miner with at least thirty-eight years of coal mine employment and found that claimant established that the miner had pneumoconiosis which arose out of his coal mine employment. On the merits of the claim, the administrative law judge found that claimant established that the miner's pneumoconiosis hastened his death under 20 C.F.R. §718.205(c) and pursuant to *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge committed reversible error in failing to make any findings regarding whether the miner's metastatic carcinoma, present in his lungs at the time of his autopsy, was related to the miner's coal mine employment or what role the disease played in causing his death. Employer asserts that the administrative law judge thereby ignored evidence which shows that the miner's metastatic prostate cancer, which invaded his lungs and would not have been related to his coal mine employment, was a factor in the miner's death. Employer also contends that the administrative law judge erred in relying on the opinions of Drs. Rizkalla, Perper and Pisano in finding that claimant established that the miner's pneumoconiosis hastened his death under 20 C.F.R. §718.205(c). Claimant responds, and seeks affirmance of the decision below as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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 survivor's claim filed after January 1, 1982, such as in the instant case, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director,*

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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

OWCP, 11 BLR 1-39 (1988). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Pursuant to the revised regulation at 20 C.F.R. §718.205(c)(5), 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). In the instant case, employer has stipulated to the existence of pneumoconiosis which arose out of the miner's coal mine employment. Decision and Order at 10; *see* Hearing Transcript at 9, 10. Thus, the sole issue is whether claimant has met her burden to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c).

Employer contends that it was error for the administrative law judge not to determine whether or not the miner's cancer, present in his lungs at the time of the autopsy, was related to his coal mine employment or what role the disease played in the miner's demise. Employer argues that the evidence shows that the miner's carcinoma was not related to his coal mine employment and that it contributed to his death, and asserts that this evidence could alter the outcome of this case. Employer also argues that Dr. Rizkalla's opinion regarding the miner's cancer should not have been accorded determinative weight by the administrative law judge. Claimant responds that claimant actually died from a cardiac event and thus, the administrative law judge properly analyzed the medical evidence to determine whether or not the miner's pneumoconiosis was a substantially contributing cause of his death. Claimant asserts that while the presence of cancer in the miner's lungs is a serious medical matter, the administrative law judge was not required to determine what role the miner's cancer played in his death.

Employer's contentions lack merit. The administrative law judge properly analyzed the evidence to determine whether it was sufficient to meet claimant's burden to establish that the miner's death was due to his pneumoconiosis which arose from his coal mine employment. *See* 20 C.F.R. §718.205(c). The administrative law judge correctly noted that under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, and that pursuant to the revised regulation at 20 C.F.R. §718.205(c)(5), pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* Decision and Order at 15-17. Because no physician of record related the miner's cancer, present in his lungs at the time of the autopsy, to his coal mine employment, the administrative law judge was not required to determine its etiology nor what role the cancer played in the miner's death.³ Consequently, employer's assertions of error on the

³Dr. Pisano indicated that the primary site or origin of the miner's metastatic squamous cell carcinoma could not be assessed due to the fact that the autopsy was limited to the miner's chest. Director's Exhibit 4; Claimant's Exhibit 5 at 32, 33, 85. Dr. Pisano generally recognized a link between carcinoma of the lung and exposure to silica dust, but

found “no direct evidence” in this case that the miner’s cancer was due to his coal mine employment. Claimant’s Exhibit 5 at 37, 87-89.

Dr. Oesterling diagnosed metastatic adenocarcinoma consistent with the primary site being the prostate gland, which was unrelated to the miner’s coal mine employment. Employer’s Exhibit 7 at 26-38.

Dr. Schaaf opined, “Although the pathologic examination describes carcinoma in the lungs and implies that it is metastatic, there is no clinical suspicion of carcinoma (except for prostate cancer) noted during life.” Claimant’s Exhibit 3.

Dr. Perper opined that if the miner’s cancer originated in his lungs, it is possible that it was a result of his coal workers’ pneumoconiosis and his exposure to mixed coal and silica

dust. He referred to a number of studies which indicate that exposure to silica dust can cause cancer. Dr. Perper emphasized, however, that in this case, there is “no reliable evidence” that the miner’s metastatic lung tumor originated in his lungs and other primary sites are possible.

Claimant’s Exhibit 1. On deposition, Dr. Perper testified that he could not relate the miner’s squamous cell carcinoma to his coal workers’ pneumoconiosis and exposure to coal and silica dust because the primary site of the cancer could not be identified. He noted that research has shown an association between squamous cell carcinoma of the lung and exposure to coal and silica, adding, “But as I said in this particular case, there is a possibility, but it’s not a possibility which I can say within reasonable satisfactory comment,” because the primary site of the miner’s cancer cannot be identified definitively. Claimant’s Exhibit 7 at 28-29.

Dr. Tuteur found that the miner’s prostate cancer, diagnosed in 1995, was metastatic at the time of his death and was not related to, aggravated by nor caused by coal mine employment or coal workers’ pneumoconiosis. Employer’s Exhibit 3.

Dr. Griffin opined that the miner’s metastatic prostate cancer of the lung was not caused by his exposure to coal dust. Deposition of Dr. Griffin on September 13, 2000 at 80-83.

Dr. Rizkalla ruled out the prostate gland as the source of the miner’s squamous cell carcinoma and indicated that the lung could have been the primary site. He did not relate the miner’s carcinoma to his coal mine employment. Claimant’s Exhibit 8.

administrative law judge's part are without merit.

Employer next contends that the administrative law judge's finding that the miner's pneumoconiosis hastened his death is not supported by substantial evidence. The record contains the following relevant medical evidence supportive of claimant's burden at 20 C.F.R. §718.205(c): Drs. Pisano and Shenouda performed the autopsy. Director's Exhibit 4.⁴ In a January 20, 1999 letter attached to the autopsy, Dr. Pisano indicated that the miner's coal workers' pneumoconiosis was an accelerating factor in his death as it increased the stress on the miner's atherosclerotic coronary artery disease and decreased his pulmonary respiratory reserve. *Id.* On deposition, Dr. Pisano testified that the miner's pneumoconiosis was a significant factor in his death as it was a major, substantially contributing cause of his hypoxemia or ischemia of the heart. Claimant's Exhibit 5 at 52; *see also* Claimant's Exhibit 11. In his opinion dated March 6, 2000, Dr. Pisano indicated, "So, in conclusion, there are plenty of sections of lung parenchyma included among the slides to draw valid conclusions regarding the severity of the black lung disease in the decedent. Claimant's Exhibit 6. Dr. Schaaf reviewed the medical evidence and opined that the miner's coal workers' pneumoconiosis was a major contributory factor in causing the miner's death. Claimant's Exhibits 3, 10. Dr. Perper reviewed the medical evidence, including the autopsy slides, and opined that the miner's coal workers' pneumoconiosis, with associated chronic obstructive lung disease and pulmonary cancer, was a substantially contributing cause of death by inducing hypoxemia. Claimant's Exhibits 1, 7. Dr. Rizkalla reviewed the medical evidence and opined that the miner's coal workers' pneumoconiosis was a substantially contributing factor in his death, which Dr. Rizkalla attributed to arteriosclerotic coronary artery disease. Claimant's Exhibit 8.

The record also contains the following medical evidence which does not support claimant's burden in this case: The miner's death certificate indicates that he died due to pneumonia and pulmonary hypertension. Director's Exhibit 3. Dr. Oesterling reviewed the autopsy slides and other medical evidence and opined that cardio-vascular disease was the primary cause of the miner's death while metastatic carcinoma was a secondary contributory cause. He added that it was difficult to assess the import of the miner's coal workers' pneumoconiosis because the tissue slides did not appear to be representative of the miner's functioning lung tissue. Dr. Oesterling indicated, "I am sorry I cannot specifically answer your questions related to the role of coal workers' pneumoconiosis, but again I would express that I doubt seriously that it was in any way a significant contributory factor in this

⁴Dr. Pisano testified that he was assisted in the autopsy by Dr. Shenouda, a resident. Claimant's Exhibit 5 at 9, 10.

gentleman's demise, nor did it accelerate his death." Employer's Exhibits 1, 7. Dr. Tuteur reviewed the medical evidence and opined that the miner's death was due to acute, superimposed on chronic, congestive heart failure with bilateral pleural effusions and hypoxemia, with metastatic prostate cancer also a contributing factor. Dr. Tuteur added that the miner's death was in no way related to, aggravated by, or caused by either the inhalation of coal mine dust or the development of his coal workers' pneumoconiosis. Employer's Exhibit 3. Dr. Griffin reviewed the medical evidence, including the autopsy slides, and opined that the miner's coal workers' pneumoconiosis occupied less than five percent of his pulmonary tissue and as such could not have contributed to causing his death. He attributed the miner's death to congestive heart failure caused by severe coronary artery disease, with metastatic carcinoma as a significant contributory factor. Employer's Exhibits 5, 8.

Considering the relevant evidence of record, the administrative law judge initially accorded less weight to the death certificate as he found no evidence that the certifying physician, Dr. Ednie, possessed any relevant qualifications or personal knowledge of the miner's condition. Decision and Order at 17. The administrative law judge accorded greater weight to the opinions of Drs. Pisano, Perper and Rizkalla whom he found to be highly qualified. The administrative law judge found the opinions of Dr. Pisano, the autopsy prosector, and Dr. Perper to be well reasoned and supported by the objective studies of record as well as the gross and microscopic findings on autopsy. Decision and Order at 18. He also found that although it was not clear whether Dr. Rizkalla actually reviewed the autopsy slides, he persuasively explained that the miner's pneumoconiosis substantially contributed to the miner's death by adding stress to his heart and by inducing hypoxemia and increasing the workload to his cor pulmonale and dilated right atrium, thereby adding more strain to the severity of the miner's arteriosclerotic coronary artery disease. *Id.* The administrative law judge accorded less weight to the opinions of Drs. Schaaf and Tuteur because he found these doctors less qualified than Drs. Pisano, Perper, Rizkalla, Oesterling and Griffin, and because they did not review the autopsy slides and had relied, at least in part, on the assessments made by other pathologists of record in determining the cause of the miner's death. *Id.* He further found that Dr. Tuteur's opinion was not well reasoned and was contrary to the record evidence. Decision and Order at 18, 19. He also accorded less weight to the opinions of Drs. Oesterling and Griffin as he found that they were inconsistent, inadequately reasoned and equivocal. Decision and Order at 19.

Employer argues that the administrative law judge selectively analyzed the evidence by crediting Dr. Rizkalla's opinion notwithstanding his finding that it was not clear whether Dr. Rizkalla reviewed the autopsy slides, while discrediting the contrary opinions of Drs. Schaaf and Tuteur because, *inter alia*, these physicians did not review the autopsy slides.

Employer also asserts that the opinions rendered by both Drs. Rizkalla and Perper, that the miner's *cancer* was not a factor in his death, is contrary to the weight of the evidence. Employer also argues that the administrative law judge, in crediting Dr. Pisano's opinion, erroneously relied on the physician's status as the autopsy prosector. Employer asserts that the administrative law judge erred by not addressing the differing opinions offered by Drs. Perper and Pisano regarding the role of the miner's *cancer* in his death. Employer reiterates its argument that the administrative law judge erred in not addressing evidence which shows that the miner's cancer originated in the prostate gland and not in the lungs and was unrelated to his coal mine employment and contributed to his death.

Contrary to employer's contention, the administrative law judge's finding that claimant met her burden to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c) is supported by substantial evidence, including the opinions of Drs. Pisano, Perper and Rizkalla. The administrative law judge properly found that these pathologists were highly qualified. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987). Contrary to employer's assertion, the administrative law judge did not summarily rely on Dr. Pisano's status as the autopsy prosector. Rather, he found that Dr. Pisano's opinion was well reasoned and supported by the objective tests of record as well as the gross and microscopic findings presented in the autopsy. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). After observing that Dr. Pisano was the only physician of record to conduct a gross examination of the relevant organs and tissues, the administrative law judge properly found that Dr. Pisano explained, on deposition, the relationship between pulmonary hypertension, cor pulmonale, hypoxemia and pneumoconiosis in rendering his opinion that the miner's death was due to hypoxemia or ischemia of the heart secondary to coronary artery disease and pneumoconiosis. *See U.S. Steel Corp. v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982). Further, the administrative law judge found, within his discretion, that Dr. Perper's medical opinion was well reasoned and well documented and substantially corroborated Dr. Pisano's opinion. *See Clark, supra; Fields, supra.*

We find merit in employer's argument that the administrative law judge selectively analyzed the evidence by crediting Dr. Rizkalla's opinion notwithstanding his finding that it was not clear whether Dr. Rizkalla reviewed the autopsy slides, while discrediting the

contrary opinions of Drs. Schaaf and Tuteur because they did not review the autopsy slides. We note, however, that the administrative law judge provided additional reasons for according less weight to the opinions of Drs. Schaaf and Tuteur. Specifically, the administrative law judge found that Drs. Schaaf and Tuteur, both Board-certified in Internal Medicine and Pulmonary Disease, are less qualified to assess the cause of death than, *inter alia*, Dr. Rizkalla who is a Board-certified pathologist. *Dillon, supra; Martinez, supra*. The administrative law judge also permissibly found that Dr. Tuteur's conclusions are not well reasoned and do not correlate with the medical evidence of record. *Clark, supra*. Accordingly, notwithstanding his error in selectively analyzing the evidence, the administrative law judge provided valid reasons for according greater weight to Dr. Rizkalla's opinion, while according less weight to the opinions of Drs. Schaaf and Tuteur. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988).

We decline to address employer's additional arguments in support of its position that the administrative law judge erred in not determining the cause of the miner's cancer and what role the disease played in his demise. As discussed above, because no physician of record related the miner's cancer to his coal mine employment, the administrative law judge was not required to determine the etiology of the miner's cancer or what role the disease played in his death. *See discussion, supra*.

Based on the foregoing, we affirm the administrative law judge's finding that claimant met her burden to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c) as it is rational, supported by substantial evidence, and in accordance with law. We thus further affirm the administrative law judge's award of benefits in the instant survivor's claim.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge