

BRB No. 00-0630 BLA

EVELYN BALSAVAGE)
(Widow of ANTHONY L.)
BALSAVAGE))
)
Claimant-Petitioner) DATE ISSUED:
)
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)
) DECISION AND ORDER

Respondent

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

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Judith E. Kramer, 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the surviving spouse of a deceased miner, appeals the (99-BLA-0900) of Administrative Law Judge Ainsworth H. Brown with respect to 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).¹ The administrative law judge accepted the parties' stipulation to at least ten years of coal mine employment and to the existence of pneumoconiosis arising out of coal mine employment and considered the survivor's claim, dated December 21, 1998, pursuant to the regulations set forth in 20 C.F.R. Part 718 (2000).² The administrative law judge determined that the evidence of record was

¹Claimant is Evelyn Balsavage, the surviving spouse of miner Anthony L. Balsavage who died on November 10, 1998. Director's Exhibit 3. Mr. Balsavage filed a claim for benefits on January 16, 1991. Director's Exhibit 10. The district director awarded benefits on December 9, 1991. *Id.*

²The 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 65 Fed. Reg. 80,045-80,107(2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). By Order dated February 9, 2001, United States District Court Judge Emmet G. Sullivan enjoined the implementation of forty-seven of these regulatory provisions and stayed all claims pending on appeal before the Board, except for those in which the Board, after briefing by the parties, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001). The Director, Office of Workers' Compensation Programs, has filed a brief, asserting that the present case is not affected by the regulations at issue, as the provision relating to the

insufficient to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c)(2000). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the medical evidence of record and did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §554, *et seq.*, as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), in allocating the burden of proof and in setting forth his findings. The Director, Office of Workers' Compensation Programs, has responded and urges affirmance of the denial of benefits.

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. 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).

In determining whether the evidence of record was sufficient to establish that pneumoconiosis hastened the miner's death, the administrative law judge considered the opinions of Drs. Spagnolo, Kraynak, Abdul-Al, and Simelaro. Dr. Spagnolo conducted a record review at the request of the Department of Labor and concluded that the miner's death was entirely attributable to cardiac arrest caused by acute and chronic coronary artery disease. Director's Exhibit 12. Dr. Kraynak became the miner's treating physician in May of 1997 and saw him every one or two months up until the time of the miner's death in November of 1998. Dr. Kraynak identified pneumoconiosis as a substantial and causative factor in the miner's death and indicated at his deposition that coronary artery disease and atrial fibrillation could be precipitated by pneumoconiosis. Claimant's Exhibits 3, 8 at 13. Dr. Abdul-Al was the miner's attending physician when he was hospitalized for acute congestive heart failure in September of 1998 and was apparently in the hospital when the miner died on November 10, 1998. Director's Exhibit 5; Claimant's Exhibit 3. Dr. Abdul-Al stated that the miner's death was caused by heart disease which was, in turn, caused by pneumoconiosis. Claimant's Exhibit 3. Dr. Simelaro reviewed the medical evidence of record at the request of claimant's counsel, diagnosed pneumoconiosis, and determined that "there can be no question that [the

standard of proof in survivor's claims filed after January 1, 1982, merely codifies existing law. 65 Fed. Reg. 80,050 (2000)(to be codified at 20 C.F.R. §718.205(c)(5)). Claimant has not filed a brief with respect to the impact of the amended regulations.

miner's] failing lungs caused his heart to fail and consequently led to his death.” Claimant’s Exhibit 10.

The administrative law judge accorded greatest weight to Dr. Spagnolo’s opinion based upon his status as a physician who is Board-certified in Internal Medicine and Pulmonary Disease and because he “provided a well-reasoned analysis of the evidence presented to him, citing to x-ray evidence of left heart enlargement and congestive heart failure along with EKG results showing ‘atrial fibrillation, left axis deviation, and left bundle branch block’.” Decision and Order at 8; Director’s Exhibit 12. The administrative law judge discredited Dr. Kraynak’s opinion on the ground that during his deposition, the doctor stated his conclusions regarding the link between the miner’s pneumoconiosis and his heart disease in equivocal terms. Decision and Order at 9; Claimant’s Exhibit 8 at 13. The administrative law judge accorded little weight to Dr. Abdul-Al’s opinion, as it was not clear whether he actually examined the miner on the day he died. Decision and Order at 9; Claimant’s Exhibit 3. With respect to Dr. Simelaro’s opinion, the administrative law judge stated that “Dr. Simelaro’s reports do not persuasively focus on the cardiac factors identified in the miner.” Decision and Order at 9; Claimant’s Exhibits 5, 10.

Claimant asserts that the administrative law judge should have given determinative weight to the opinions of Drs. Kraynak and Abdul-Al based upon their status as the miner’s treating physicians and based upon the fact that their conclusions are well-supported by the objective evidence of record and are corroborated by Dr. Simelaro’s opinion. In addition, claimant contends that Dr. Spagnolo’s conclusions are of no probative value, as his opinion is undocumented and unreasoned. Claimant further maintains that in weighing the medical opinions of record, the administrative law judge required her to prove, by more than a preponderance of the evidence, that pneumoconiosis hastened the miner’s death. Claimant also argues that the administrative law judge failed to set forth the rationale for his findings, mischaracterized the evidence, and selectively analyzed the evidence. These contentions are without merit.

After considering the evidence of record in its entirety, the administrative law judge rationally determined that Dr. Spagnolo’s opinion was entitled to greatest weight based upon his expertise and upon his thorough and well-documented analysis of the objective evidence of record. Decision and Order at 8-10; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Contrary to claimant’s assertion, Dr. Spagnolo identified the record evidence that supported his conclusion that the miner’s death was caused solely by left side heart disease, including an EKG and x-ray interpretation obtained during the miner’s hospitalization in September of 1998. Director’s Exhibits 5, 12. The administrative law judge was not required to discredit Dr.

Spagnolo's opinion on the ground he did not review the opinions of Drs. Kraynak, Abdul-Al, and Simelaro regarding the cause of the miner's death, as the administrative law judge rationally found that Dr. Spagnolo's conclusion was adequately supported by the underlying documentation. *See Peskie, supra*.

In addition, the administrative law judge acted within his discretion in finding that the opinions of Drs. Kraynak and Abdul-Al were of little value, inasmuch as Dr. Kraynak was equivocal in describing the causal link between pneumoconiosis and the miner's death and it was unclear whether Dr. Abdul-Al had actually attended the miner at the time of his demise. Decision and Order at 9; *Clark, supra*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Thus, the administrative law judge did not err in declining to give greater weight to the opinions of Drs. Kraynak and Abdul-Al based upon their status as treating physicians.³ *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *see also Mancina v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997).

Finally, the administrative law judge did not abuse his discretion in finding that Dr. Simelaro's explanation of the link between the miner's pneumoconiosis and his heart disease was not persuasive. Decision and Order at 9; Claimant's Exhibits 5, 10; *see Clark, supra*; *Peskie, supra*; *Lucostic, supra*. Because claimant has not identified with specificity any other instances in which the administrative law judge allegedly mischaracterized or selectively analyzed the evidence, the administrative law judge's findings regarding the cause of the miner's death are not otherwise subject to Board review and are, therefore, affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

³The amended regulations provide that the opinion of a treating physician may be accorded special consideration under certain circumstances. 65 Fed. Reg. 80,047 (2000)(to be codified at 20 C.F.R. §718.104(d)). This provision does not apply to evidence, such as that in the present case, developed prior to January 19, 2001. 65 Fed. Reg. 80,046 (2000)(to be codified at 20 C.F.R. §718.101(b)).

Thus, the administrative law judge's conclusion that claimant failed to establish that pneumoconiosis hastened the miner's death was based upon his rational findings concerning the relative weight of the medical opinions of record, rather than the imposition of an improper burden of proof upon claimant. Moreover, the administrative law judge set forth his findings in sufficient detail and with the accompanying rationale such that his Decision and Order is in compliance with the APA. Lastly, inasmuch as this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, which currently applies the "hastening death" standard that has been codified in the amended Part 718 regulations, the outcome of the present case is not affected by the new regulations.⁴ 65 Fed. Reg. 80,050 (2000)(to be codified at 20 C.F.R. §718.205(c)(5)); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Remand of the case to the administrative law judge for reconsideration is not, therefore, required.

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's qualifying coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 10; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge