

BRB No. 02-0483 BLA

FRANCES POWELL	)	
(Widow of WALTER POWELL)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:_____
	)	
BETHENERGY MINES, INCORPORATED	)	
	)	
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 Survivor's Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Debra Henry (United Mine Workers of America, Compensation Department), Belle Vernon, Pennsylvania, for claimant.

Carl J. Smith, Jr. (Richman & Smith), Washington, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-BLA-742) of Administrative Law Judge Richard A. Morgan awarding benefits 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).<sup>1</sup> The administrative law judge credited the miner with at

<sup>1</sup>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

least forty years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Additionally, the administrative law judge found that claimant<sup>2</sup> established that the miner's death was due to pneumoconiosis. Based upon the medical evidence of record, the administrative law judge found that pneumoconiosis hastened the miner's death and therefore was a substantially contributing cause or factor leading to death, pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, benefits were awarded.

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on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, are to the amended regulations.

<sup>2</sup>Claimant, Frances Powell, is the widow of the miner, Walter Powell, who died on December 6, 1999. The death certificate lists the immediate cause of death as pulmonary edema caused by severe aortic stenosis, while a history of peptic ulcer disease was listed as a condition contributing to death, but not resulting in the underlying cause. Decision and Order at 5; Director's Exhibit 9. The miner filed a claim during his lifetime which was ultimately denied by Administrative Law Judge George P. Morin in a Decision and Order issued on November 12, 1991. Decision and Order at 3; Director's Exhibit 30. Claimant filed a survivor's claim on June 30, 2000. Decision and Order at 3; Director's Exhibit 1. This appeal encompasses only the award of benefits on the survivor's claim.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical evidence pursuant to 20 C.F.R. §718.205(c)(2) and substituted his own judgment for that of the medical experts. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.<sup>3</sup>

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if 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)-(3). Pneumoconiosis is a substantially contributing cause of 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and

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<sup>3</sup>We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of simple pneumoconiosis as well as the finding that claimant was entitled to the rebuttable presumption that the miner's pneumoconiosis arose out of coal mine employment. 20 C.F.R. §§718.202(a); 718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.

Employer contends that the administrative law judge erred in his weighing of the medical evidence pursuant to Section 718.205(c)(2) and substituted his own judgment for that of the medical experts. Employer specifically asserts that the administrative law judge erred in crediting the opinion of Dr. Wecht and in giving less weight to the opinions of Drs. Fino, Naeye and Changco in finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).<sup>4</sup> The administrative law judge noted that Dr. Wecht, who prepared tissue slides and reviewed the miner's medical records, concluded that pneumoconiosis was a substantial contributing factor in the miner's death.<sup>5</sup> Decision and Order at 6-7, 20; Director's Exhibit 10. The administrative law judge also noted that Dr. Fino, who reviewed the pathological reports of Drs. Green and Naeye, but not the autopsy tissue slides, concluded that pneumoconiosis did not play a role in the miner's death.<sup>6</sup> The administrative law judge also noted that Dr. Naeye, who reviewed Dr. Green's report, the death certificate, medical records, the autopsy report and slides, concluded that pneumoconiosis was too limited to have hastened the miner's death.<sup>7</sup> Decision and Order at

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<sup>4</sup> In addition, employer does not challenge the administrative law judge's crediting of Dr. Green's opinion. Dr. Green, who is Board-certified in pathology, reviewed the medical record, autopsy report and slides and concluded that pneumoconiosis contributed to the miner's cardiac failure and hastened the miner's death. Decision and Order at 78; Claimant's Exhibit 1.

<sup>5</sup> The administrative law judge noted that Dr. Wecht is Board-certified in pathology. Decision and Order at 20; Director's Exhibit 10. Employer asserts that the administrative law judge erroneously stated that Dr. Wecht was the autopsy prosector. The autopsy was performed by Cyril H. Wecht and Pathology Associates, Inc., of which Dr. Wecht is President. Director's Exhibit 10. While the autopsy protocol lists Dr. Rozin as the autopsy prosector, Dr. Wecht reviewed the autopsy materials, signed the protocol and prepared the tissue slides. *Id.* In addition, Dr. Rozin and Dr. Wecht both signed the protocol. *Id.* Moreover, in the May 19, 2000, letter from Dr. Wecht to claimant's counsel, Dr. Wecht refers to the enclosed autopsy report as "my autopsy report." *Id.* Thus, if the administrative law judge erred in referring to Dr. Wecht as the autopsy prosector, the error is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

<sup>6</sup> The administrative law judge noted that Dr. Fino is Board-certified in internal medicine with a subspecialty in pulmonary diseases. Decision and Order at 11; Employer's Exhibit 2.

<sup>7</sup> The administrative law judge noted that Dr. Naeye is Board-certified in pathology. Decision and Order at 10; Employer's Exhibit 1.

8-11, 21; Employer's Exhibit 1. The administrative law judge noted that Dr. Changco did not "make an attempt to explain on what basis he believes coal mine dust exposure did not contribute to [the] miner's respiratory problems, other medical tests, or death." Decision and Order at 18; *see* Director's Exhibits 9, 11. After setting forth, discussing and weighing the medical evidence in light of the physicians' credentials and reasoning, the administrative law judge found that the mutually supportive opinions of Drs. Wecht and Green, that pneumoconiosis contributed to the miner's death, outweighed the opinions of Drs. Fino and Naeye. Decision and Order at 18-22.

The administrative law judge assigned diminished weight to Dr. Fino's opinion because, in contrast to the pathologists, he did not review the tissue slides. Decision and Order at 20. The administrative law judge found that Dr. Fino's reliance upon pulmonary function studies in reaching his conclusion that smoking was most likely the cause of the miner's chronic obstructive pulmonary disease was not persuasive since pneumoconiosis can cause an obstructive impairment. Decision and Order at 20. The administrative law judge then discounted the conclusion of Dr. Fino that if the miner had severe pulmonary problems it would have been a longstanding diagnosis. The administrative law judge reasonably found that Dr. Fino, who last examined the miner in 1991, failed to account for the progressive nature of pneumoconiosis, whereas the amended regulations and the United States Court of Appeals for the Third Circuit have acknowledged that pneumoconiosis is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. 20 C.F.R. §718.201(c); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995); *Shendock v. Director, OWCP*, 893 F.2d 1458, 13 BLR 2-242 (3d Cir. 1990)(*en banc*), *cert. denied*, 498 U.S. 826 (1990); *see also Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); Decision and Order at 20-21.

The administrative law judge assigned diminished weight to Dr. Naeye's opinion because he was a non-treating physician and did not participate in the autopsy. Decision and Order at 21. While not dispositive on the issue of death due to pneumoconiosis, the administrative law judge also accorded less weight to Dr. Naeye's findings because, in reaching his conclusion that claimant's impairment was due to smoking, Dr. Naeye relied on objective studies which do not necessarily demonstrate the pulmonary impairments caused by coal mine employment.<sup>8</sup> The administrative law judge, however, permissibly found that the

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<sup>8</sup> Dr. Naeye reviewed the miner's objective studies from 1981 to 1991, approximately eight years prior to the miner's death, and stated that "[t]he near normal results of [the miner's] pulmonary function studies, normal results of arterial blood gas analyses and minimal findings on X-rays showed his dyspnea was the consequence of his myocardial ischemia." Director's Exhibit 24. Dr. Naeye concluded that the miner's simple coal

mutually supportive opinions of Drs. Wecht and Green, that stated the miner's pneumoconiosis contributed to his death, were more persuasive and within his discretion as finder of fact. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We, therefore, reject employer's contention that the administrative law judge provided an invalid reason for according less weight to the opinions of Drs. Fino and Naeye and affirm the administrative law judge's conclusion that pneumoconiosis contributed to the miner's death. *Lukosevicz; supra*. Substantial evidence supports the administrative law judge's findings, and as employer presents no basis to disturb the administrative law judge's decision to credit the opinions of Drs. Wecht and Green, his findings are affirmed.

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workers' pneumoconiosis was "far too limited in extent to have caused any measurable abnormalities in lung function, any disability or to have hastened this man's death." *Id.* Dr. Naeye further stated his conclusion "is strongly supported by the mild abnormalities [the miner] had on pulmonary function studies and arterial blood gas analyses." *Id.*

Employer alleges further that the administrative law judge selectively analyzed the evidence and substituted his own judgment for that of the medical experts when he found that pneumoconiosis hastened the miner's death. The essence of employer's argument is that the administrative law judge did not adequately consider the views of Drs. Naeye and Fino that pneumoconiosis did not hasten the miner's death because there was no objective test evidence of an impairment due to pneumoconiosis during the miner's life. Based on our review of the record and the administrative law judge's Decision and Order as a whole, we conclude that the administrative law judge properly weighed the medical evidence. The administrative law judge applied the correct test, which is whether pneumoconiosis hastened the miner's death. *See* 20 C.F.R. §718.205(c)(4); *Lukosevich, supra*. A review of the record indicates that the miner's lifetime claims for benefits were finally denied because the medical evidence did not establish the existence of pneumoconiosis or that he had a totally disabling respiratory or pulmonary impairment. Director's Exhibit 30. The evidence associated with the miner's claims included predominately negative x-ray evidence and a series of uniformly non-qualifying pulmonary function and blood gas studies administered between May 19, 1981 and October 23, 1991.<sup>9</sup> The last of these tests was administered approximately eight years prior to the miner's death. *Id.* Assessing the evidence from this perspective, and taking into account the progressive nature of pneumoconiosis, the administrative law judge was not persuaded by those physicians who relied heavily on objective tests administered in 1991 or earlier to conclude that pneumoconiosis did not hasten the miner's death in October of 1999. *See Swarrow, supra*. Acting within his discretion as fact-finder, the administrative law judge credited the unequivocal opinions of Drs. Wecht and Green that pneumoconiosis contributed to the miner's cardiac condition, thereby hastening his death.

The administrative law judge is not bound to accept the opinion or theory of any medical expert, but must evaluate the evidence, weigh it, and draw his own conclusions. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). The administrative law judge did so here utilizing the proper legal standards. The medical opinions that he credited explain clearly how pneumoconiosis hastened the miner's death. *See Lukosevitz, supra*. In reaching his decision, the administrative law judge thoroughly discussed the relative qualifications of the competing physicians and assessed the quality of their reasoning. Decision and Order at 19-22. Substantial evidence supports the administrative law judge's findings, which are in accordance with law. Accordingly, we affirm the administrative law judge's finding that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c) and that claimant is therefore entitled to benefits.

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<sup>9</sup> A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

We note, however, that in the conclusion of his Decision and Order, the administrative law judge ordered the Black Lung Disability Trust Fund to pay benefits to claimant, whereas the administrative law judge had earlier found that employer was the responsible operator. Decision and Order at 4, 22. Since this is clearly a misstatement, we modify the administrative law judge's decision and hold that employer is the party responsible for the payment of benefits.

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

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge