

BRB No. 03-0498 BLA

BETTY L. ROMINE	)	
(Widow of JAMES ROMINE)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INC.	)	DATE ISSUED: 03/24/2004
	)	
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 on Both Claims of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

Timothy S. Williams (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2001-BLA-1119, 2001-BLA-1120) of Administrative Law Judge Gerald M. Tierney awarding benefits on a miner's claim and 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 forty-one years of qualifying coal mine employment and, based on the dates of filing, adjudicated both claims pursuant to the provisions at 20 C.F.R. Part 718.<sup>2</sup> The administrative law judge determined that the miner's claim was a duplicate claim, and found that claimant, the miner's widow, established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) because new evidence submitted subsequent to the denial of the miner's original claim was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), an element of entitlement previously adjudicated against the miner. Considering the entire record, 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)(1), 718.203(b), total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), (c), and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded on both claims.

On appeal, employer challenges the administrative law judge's findings on the issues of the existence of pneumoconiosis at Section 718.202(a)(1), disability causation at Section 718.204(c), and death due to pneumoconiosis at Section 718.205(c). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's award of benefits in the miner's claim.<sup>3</sup>

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<sup>1</sup>The Department of Labor (DOL) 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 to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup>The miner's initial claim for benefits, filed on May 9, 1989, Director's Exhibit 52-1, was denied by Administrative Law Judge G. Marvin Bober on September 10, 1993, Director's Exhibit 52-38, and the Board affirmed the denial on August 10, 1994. Director's Exhibit 52-56. The miner filed the present duplicate claim on February 7, 2000, Director's Exhibit 1, and died on November 19, 2000. Director's Exhibit 11. Claimant, the miner's widow, filed her survivor's claim on December 28, 2000. Director's Exhibit 2.

<sup>3</sup>The administrative law judge's findings regarding the length of coal mine employment, that the evidence established a material change in conditions at 20 C.F.R. §725.309, that the presumption at 20 C.F.R. §718.203(b) was applicable and was not rebutted, and that total respiratory disability was established at 20 C.F.R. §718.204(b)(2)(i), (iv), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence, consistent with applicable law, and must be affirmed. At Section 718.202(a)(1), employer maintains that because progression of simple pneumoconiosis is unusual after cessation of coal dust exposure, the administrative law judge gave improper weight to the more recent x-ray readings. Employer also asserts that the administrative law judge ignored two negative interpretations by Dr. Russakoff, a B reader, and incorrectly found that claimant established the existence of pneumoconiosis by a preponderance of the evidence when the record reflects a numerical preponderance of negative interpretations, *i.e.*, five out of nine interpretations of four films are negative for pneumoconiosis.<sup>4</sup> Employer's arguments are without merit.

In finding that the preponderance of the x-ray evidence established the existence of pneumoconiosis, the administrative law judge permissibly gave greatest weight to the interpretations by the physicians possessing the dual qualifications of Board-certified radiologist and B reader. Decision and Order at 3; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Co.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). The administrative law judge first found that the new x-ray evidence submitted in support of the miner's duplicate claim established the existence of pneumoconiosis and a material change in conditions, crediting the positive interpretations of the dually-qualified readers, Drs. Nath and Sargent, over the negative interpretation of Dr. Goldstein, a B reader. *Id.*; Director's Exhibits 18, 19, 33; Employer's Exhibit 1. The administrative law judge then properly considered this new x-ray evidence with the earlier x-ray evidence of record and determined that although the earlier, dually-qualified readers, Drs.

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<sup>4</sup>The record reflects that the film dated June 8, 1989 was interpreted as positive for pneumoconiosis by Dr. Ballard, a dually-qualified Board-certified radiologist and B reader, and as negative by dually-qualified Dr. Cole and B readers Drs. Goldstein and Russakoff. Director's Exhibits 52-15, 52-31, 52-32, 52-33, 52-44. The film dated May 10, 1993 was interpreted as positive by Dr. Ballard and as negative by Dr. Russakoff. Director's Exhibits 52-33, 53-25. The film dated March 24, 2000 was interpreted as positive by dually-qualified Drs. Nath and Sargent, Director's Exhibits 18, 19; and the film dated June 12, 2000 was interpreted as negative by Dr. Goldstein, Director's Exhibit 33.

Ballard and Cole, disagreed as to whether pneumoconiosis was present, the dually-qualified readers of the significantly more recent evidence were in agreement. The administrative law judge thus acted within his discretion in concluding that the preponderance of the x-ray evidence overall established the existence of pneumoconiosis. Decision and Order at 3; *see* 20 C.F.R. §718.201(c); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc* Order on Recon.); *Worhach*, 17 BLR 1-105. As the administrative law judge's findings pursuant to Section 718.202(a)(1) are supported by substantial evidence, they are affirmed.

Employer next challenges the administrative law judge's finding of disability causation at Section 718.204(c), noting that because this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, claimant must establish that pneumoconiosis was a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment, *see Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). Employer maintains that the administrative law judge erred in crediting the opinions of Drs. Shad and Milko, which employer asserts do not satisfy the *Lollar* standard, over the reasoned opinion of Dr. Goldstein, a pulmonary expert. Employer's arguments amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 1-112 (1989). The administrative law judge accurately reviewed the conflicting medical opinions of record, acknowledged Dr. Goldstein's qualifications, and determined that the physician did not diagnose either clinical or legal pneumoconiosis. Decision and Order at 6-8. The administrative law judge found, however, that Dr. Goldstein relied on his own negative x-ray interpretation, which was outweighed by the positive interpretations of better-qualified readers. Decision and Order at 8; Director's Exhibit 43; Employer's Exhibit 1. Further, while ultimately attributing the miner's chronic obstructive pulmonary disease to smoking and ruling out coal dust exposure as a cause of any pulmonary problems, Dr. Goldstein indicated in his June 12, 2000 report that more testing should be performed to delineate the etiology of the miner's symptoms, *see* Director's Exhibit 43, yet the record does not reflect that such testing was ever performed, much less reviewed by Dr. Goldstein. Decision and Order at 8. The administrative law judge also determined that Dr. Goldstein failed to document the basis for his statement that the miner's significant obstructive defect was "not typical for coal workers' pneumoconiosis unless there is progressive massive fibrosis," Employer's Exhibit 1, even though chronic obstructive pulmonary disease (COPD) can fall within the regulatory definition of pneumoconiosis at 20 C.F.R. §718.201. The administrative law judge thus permissibly accorded little weight to Dr. Goldstein's opinion. Decision and Order at 7-8; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

In crediting the contrary opinion of Dr. Shad, the administrative law judge noted that under the amended regulations, pneumoconiosis is considered to be a substantially

contributing cause of the miner's totally disabling respiratory or pulmonary impairment if it had a material adverse effect on the miner's respiratory or pulmonary condition. Decision and Order at 6; 20 C.F.R. §718.204(c)(1)(i). The administrative law judge determined that Dr. Shad diagnosed hypertension, heart disease, severe COPD and coal worker's pneumoconiosis, and opined that all of these diagnoses contributed to the miner's totally disabling impairment, although "the extent by percentage cannot be estimated accurately," Director's Exhibit 15. Decision and Order at 5-6. The administrative law judge reasonably concluded that "the fact that Dr. Shad could not separate out the extent each condition contributed supports the inference that he considered each condition, including pneumoconiosis, as having a material adverse effect on the miner's disability." Decision and Order at 6. The administrative law judge additionally found that the reports and records of Dr. Milko, the miner's longtime treating physician, documented the miner's severe obstructive lung disease attributable to both smoking and coal dust exposure, which supported a finding that pneumoconiosis was a substantially contributing cause of the miner's totally disabling respiratory impairment. Decision and Order at 6-7; Director's Exhibit 39; Claimant's Exhibit 1; *see Lollar*, 893 F.2d 1258, 13 BLR 2-277. The administrative law judge's findings and inferences are supported by substantial evidence, and we may not substitute our judgment. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's findings pursuant to Section 718.204(c) and his award of benefits in the miner's claim.

Lastly, employer contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis at Section 718.205(c). Specifically, employer maintains that the administrative law judge provided an inadequate rationale for discrediting Dr. Goldstein's opinion that the miner's death was due to cardiac dysfunction, oat-cell carcinoma and COPD unrelated to pneumoconiosis, Employer's Exhibit 1. Employer further argues that the administrative law judge improperly relied on Dr. Milko's equivocal opinion, that the miner's obstructive lung disease and pneumoconiosis were factors in his ability to withstand the malignancy and likely limited his survival options, Claimant's Exhibit 1, when the only cause listed by Dr. Milko on the death certificate was lung cancer, Director's Exhibit 11. Employer's arguments are without merit. The administrative law judge rationally discounted Dr. Goldstein's opinion, that the miner's death was unrelated to pneumoconiosis, because he found that the physician's underlying premise, that the miner did not have pneumoconiosis, was incorrect. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4<sup>th</sup> Cir. 2002); *see generally Clark*, 12 BLR 1-149; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). The administrative law judge properly discussed the qualified nature of Dr. Milko's opinion, *see generally Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501 (1984), and acted within his discretion as trier-of-fact in finding that the physician's reports "persuasively conveyed his underlying opinion that the miner's respiratory status, which included pneumoconiosis, hastened the miner's respiratory insufficiency and affected the miner's ability to withstand the lung malignancy that ultimately caused his death." Decision and

Order at 9; Director's Exhibits 11, 39; Claimant's Exhibit 1. The administrative law judge thus permissibly concluded that Dr. Milko's opinion satisfied the criteria of Section 718.205(c)(5) and established that pneumoconiosis hastened the miner's death. Decision and Order at 9; *see Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 20-166 (11th Cir. 1997). The administrative law judge's findings pursuant to Section 718.205(c) are supported by substantial evidence and are affirmed. We therefore affirm the administrative law judge's award of benefits in the survivor's claim.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge