

BRB No. 04-0711 BLA

CAROL J. ZAPOTOSKY)	
(Widow of RICHARD R. ZAPOTOSKY))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 03/30/2005
)	
U.S. STEEL MINING COMPANY)	
)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Christopher Pierson (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-05889) of Administrative Law Judge Richard A. Morgan denying 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). The miner died on March 24, 1999 and claimant filed her survivor's claim on March 11, 2002. Director's Exhibits 2, 7. The administrative law judge credited the miner with over twenty-three years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence failed to establish the

existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the autopsy evidence and medical reports were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not presently intend to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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 survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis, if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or if 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).

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 Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Pursuant to Section 718.202(a)(2), the administrative law judge considered whether the autopsy evidence established the existence of pneumoconiosis. In so doing, he reviewed the opinions of Dr. Wecht, the autopsy prosector, and Dr. McMonagle, the miner's treating physician, and those of Drs. Green, Oesterling, and Bush, the reviewing pathologists. Dr. Wecht's final anatomical diagnosis included anthracosilicosis (Coal

Worker's Pneumoconiosis). Decision and Order at 4; Director's Exhibit 9. Drs. McMonagle and Green diagnosed pneumoconiosis, while Drs. Oesterling and Bush identified black pigment, but stated that there were no findings of coal workers' pneumoconiosis. Director's Exhibits 9-10; Claimant's Exhibits 1-2; Employer's Exhibits 1-4. In addition, Drs. Green, Oesterling, and Bush diagnosed emphysema and small airway disease or bronchiolitis. Dr. Green attributed the emphysema and bronchiolitis to a combination of smoking and coal dust exposure, whereas Drs. Oesterling and Bush attributed these conditions solely to smoking. Decision and Order at 12; Director's Exhibit 10; Employer's Exhibits 1-4.

The administrative law judge thoroughly considered the autopsy report and autopsy review reports and permissibly found that they failed to establish that the miner suffered from pneumoconiosis. On this issue, the administrative law judge was within his discretion to find Dr. Oesterling's opinion "better reasoned" and "most persuasive." Decision and Order at 12; see *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). Specifically, the administrative law judge explained that Dr. Oesterling provided a persuasively thorough and specific discussion of the changes present on the lung section slides and described the basis for his conclusion in great detail, noting the sparse quantities of black pigment while further noting the absence of any nodules or scarring of the lung tissue associated with the black pigment. Decision and Order at 12; Employer's Exhibits 1-2.

Claimant's assertion that the administrative law judge erred in giving diminished weight to the diagnosis of the miner's treating physician, Dr. McMonagle, is without merit. The administrative law judge considered Dr. McMonagle's status as the miner's treating physician, but explained that he did not accord Dr. McMonagle's opinion enhanced weight because the doctor did not treat the miner for pulmonary conditions, and based his diagnosis of pneumoconiosis solely on the autopsy findings. Decision and Order at 12; Director's Exhibit 9. Contrary to claimant's contention that Dr. McMonagle's opinion was buttressed by the fact that he also mentioned the duration of the miner's coal mine employment in his report, the administrative law judge reasonably relied on the autopsy evidence as the most reliable indicator of the presence or absence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Although the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has indicated that "treating physicians' opinions are assumed to be more valuable than those of non-treating physicians," *Soubik v. Director, OWCP*, 366 F.3d 226, 235, 23 BLR 2-82, 2-101 (3d Cir. 2004)(Roth, J., dissenting), the administrative law judge reasonably explained why Dr. McMonagle's opinion was not found compelling on this record. See *Mancia v. Director, OWCP*, 130 F.3d 579, 591, 21 BLR 2-215, 2-239 (3d Cir. 1997)(noting that a non-treating physician's opinion may be sufficient to support a conclusion contrary to that of a treating physician). In view of the administrative law judge's broad discretion to assess a medical opinion, he did not err in finding Dr. Oesterling's opinion better reasoned and more persuasive than

Dr. McMonagle's opinion in this case. *See Kertesz*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8. Consequently, we reject claimant's allegation of error in this regard.

Thus, the administrative law judge rationally found that the existence of clinical pneumoconiosis was not established because the mere presence of black pigment diagnosed by Dr. Oesterling was insufficient, by itself, to establish the presence of pneumoconiosis. 20 C.F.R. §718.202(a)(2); *see Hapney v. Peabody Coal Co.*, 22 BLR 1-106 (2001)(*en banc*)(Smith and Dolder, JJ., dissenting in part and concurring in part); *Dagnan v. Blue Diamond Coal Mining Co.*, 994 F.2d 1536, 1541, 18 BLR 2-203, 2-209 (11th Cir. 1993); *see also Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); Decision and Order at 12. Accordingly, we affirm the administrative law judge's finding that the autopsy evidence did not establish the existence of clinical pneumoconiosis.

The administrative law judge next weighed the medical opinions on the issue of the existence of legal pneumoconiosis and concluded that this evidence, which consisted of the opinions of Drs. Green, Oesterling, and Bush, failed to establish the existence of pneumoconiosis. Decision and Order at 12-13. The administrative law judge noted that these physicians diagnosed the miner with emphysema and small airway disease or bronchiolitis, but disagreed on the etiology of the conditions. The administrative law judge evaluated these medical opinions to determine whether there were any reasoned and documented opinions that causally linked the miner's lung diseases to dust exposure in coal mine employment, thereby establishing the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).¹

In finding that claimant failed to establish that the miner's lung diseases arose out of his coal dust exposure, the administrative law judge properly credited the opinion of Dr. Oesterling, as supported by that of Dr. Bush, over the contrary opinion of Dr. Green. Decision and Order at 13. The administrative law judge permissibly determined that the reasoning of Drs. Oesterling and Bush was more persuasive than that of Dr. Green, who the administrative law judge found had relied on the view that "the miner's 30 years of smoking and 24 years of coal mine dust exposure provided approximately equal contribution to the development of emphysema and bronchiolitis." Decision and Order at 12-13; *see Kertesz*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8. Contrary to claimant's assertion that the administrative law judge mischaracterized Dr. Green's opinion, the record reflects that Dr. Green stated that as the miner "smoked for 30 years and worked in mining for 24 years, it is my opinion that the relative contribution of these two agents to his lung disease would be approximately equal." Director's Exhibit 10 at 5. The

¹ The administrative law judge indicated that he weighed these opinions under Section 718.202(a)(2) rather than under Section 718.202(a)(4), because the physicians' diagnoses were primarily based on the autopsy findings. Decision and Order at 11. No party has challenged this aspect of the administrative law judge's analysis.

administrative law judge found that on this record, “the approximate equality [was] not as well established as suggested by Dr. Green,” because “the miner smoked at least 40 years, according to his widow . . . and . . . the miner’s 24 years of coal mine employment involved only 14 years underground” Decision and Order at 13. The administrative law judge rationally found that, by contrast, Dr. Oesterling’s more specific findings based on his examination of the miner’s lung tissue provided a more credible explanation for his opinion that the miner’s emphysema and bronchiolitis were unrelated to coal dust exposure.² See *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); Decision and Order at 13. We affirm the administrative law judge’s credibility determination as it is rational and supported by substantial evidence. Because the administrative law judge rationally found that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence, we affirm the administrative law judge’s finding pursuant to Section 718.202(a). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Although claimant alleges error with respect to the weight the administrative law judge accorded to the medical opinions, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Because we affirm the administrative law judge’s finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement in a survivor’s claim, we also affirm his denial of survivor’s benefits under 20 C.F.R. Part 718. See *Trumbo*, 17 BLR at 1-88; *Trent*, 11 BLR at 1-27.

² As summarized by the administrative law judge, Dr. Oesterling explained that there was no black pigmentation accompanying the lung tissue changes of emphysema and bronchiolitis, indicating that these changes were unrelated to coal mine employment. Decision and Order at 7, 13; Employer’s Exhibit 1 at 3.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge