

BRB No. 06-0580 BLA

BETTY SUE BACK	)	
(Widow of STANLEY BACK)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED: 03/15/2007
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (04-BLA-5363) of Administrative Law Judge Rudolph L. Jansen denying benefits on a survivor's claim filed pursuant to the

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<sup>1</sup>Claimant is the widow of the deceased miner, who died on March 28, 2002.

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 administrative law judge credited the miner with twenty-five years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.<sup>2</sup> The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) and therefore did not consider death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (4). Employer responds, urging affirmance of the administrative law judge's denial 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. 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 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 survivor's claims filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, death will be considered due to pneumoconiosis if the evidence

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Director's Exhibit 10. Claimant filed her survivor's claim on May 7, 2002. Director's Exhibit 4.

<sup>2</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the miner's coal mine employment occurred in Kentucky. Director's Exhibit 1; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup>The administrative law judge's length of coal mine employment finding and his finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3) are affirmed as unchallenged on appeal. *Skrack v. Island Coal Co.* 6 BLR 1-710 (1983).

establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Claimant initially contends that the administrative law judge erred in finding the autopsy evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). The administrative law judge considered the reports of Dr. Abalos, the prosector, and Dr. Caffrey, the reviewing pathologist. In an autopsy report dated April 29, 2002, Dr. Abalos opined that the miner had simple coal workers' pneumoconiosis. Director's Exhibit 11. In contrast, Dr. Caffrey, in a report dated April 28, 2003, opined that the miner did not have coal workers' pneumoconiosis. Employer's Exhibit 1. Further, during a deposition dated December 30, 2004, Dr. Caffrey reiterated his opinion that the miner did not have coal workers' pneumoconiosis.<sup>4</sup> Employer's Exhibit 6.

Claimant asserts that the administrative law judge erred in relying on Dr. Caffrey's opinion regarding the issue of pneumoconiosis. Contrary to claimant's assertion, the administrative law judge reasonably found "Dr. Caffrey's opinion to be detailed, well documented and reasoned, and entitled to full probative weight." Decision and Order at 13. The administrative law judge noted that Dr. Caffrey based his opinion that the miner did not have coal workers' pneumoconiosis on his review of pathology slides. *Id.* Specifically, the administrative law judge stated that Dr. Caffrey did not see any lesions of simple coal workers' pneumoconiosis on the slides of the lung tissue, which contained minimum to moderate amounts of anthracotic pigment.<sup>5</sup> *Id.* The administrative law judge further stated that "[d]uring his deposition, [Dr. Caffrey] explained that according to the July 1979 issue of *Archives of Pathology and Laboratory Medicine*, coal dust must stimulate the production of reticulin in the lung tissue to support a diagnosis of pneumoconiosis." *Id.* The administrative law judge additionally stated that "[Dr. Caffrey] opined that since he found no evidence that the coal dust ever stimulated the production of reticulin and/or collagen, the evidence does not support a diagnosis of

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<sup>4</sup>The administrative law judge reasonably found that "the autopsy evidence does not support a finding of legal pneumoconiosis, since neither [Dr.] Abalos nor [Dr.] Caffrey opined that the etiology of the [m]iner's emphysema was coal dust related." Decision and Order at 14.

<sup>5</sup>Contrary to claimant's assertion, the administrative law judge considered that Dr. Abalo referred to "macuoles [sic] consisting of black colored dust particles, minimal fibrosis" in his microscopic examination of the miner's lung tissue. Decision and Order at 13; Director's Exhibit 11.

pneumoconiosis.” *Id.* Because the administrative law judge reasonably found that Dr. Caffrey’s opinion is well reasoned and documented, *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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), and permissibly accorded greater weight to the doctor’s opinion based on his superior qualifications,<sup>6</sup> *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), we reject claimant’s assertion that the administrative law judge erred in relying on Dr. Caffrey’s opinion. We therefore affirm the administrative law judge’s finding that the autopsy evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) because it is supported by substantial evidence.

Claimant next contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Baker, Dahhan, and Fino.<sup>7</sup> Dr. Baker opined that the miner had coal workers’ pneumoconiosis and chronic obstructive airway disease related to a history of coal dust exposure. Claimant’s Exhibit 1. In contrast, Dr. Dahhan opined that the miner did not have coal workers’ pneumoconiosis but that he had emphysema related to smoking. Employer’s Exhibits 3, 4, 10. Dr. Dahhan also opined that the miner had chronic obstructive pulmonary disease related to smoking, not coal dust exposure. Employer’s Exhibit 4. Similarly, Dr. Fino opined that the miner had emphysema related to smoking but did not have coal workers’ pneumoconiosis. Employer’s Exhibits 2, 5, 9. The administrative law judge found that the opinions of Drs. Dahhan and Fino outweighed Dr. Baker’s contrary opinion because he found that they are better reasoned and documented. Decision and Order at 16.

Initially, we reject claimant’s assertion that the administrative law judge ignored the first page of Dr. Baker’s report, which provides the bases for Dr. Baker’s diagnosis of pneumoconiosis. On the first page of his April 1, 2005 report, Dr. Baker stated:

So based on the information in his chart concerning this hospitalization and the pathological findings and history of 25 years of coal dust exposure, I would state that he has [coal workers’ pneumoconiosis], chronic obstructive

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<sup>6</sup>Dr. Caffrey is Board-certified in clinical pathology. Employer’s Exhibit 6. The credentials of Dr. Abalos are not found in the record.

<sup>7</sup>The administrative law judge stated, “I find that the [m]iner’s hospital and treatment records do not support a finding of clinical or legal pneumoconiosis.” Decision and Order at 16.

airway disease and died of bronchial pneumonia and his death was in fact hastened by the presence of obstructive airway disease and [coal workers' pneumoconiosis]. He also had an approximate 20-year history of smoking one to two pack [sic] per day.

Claimant's Exhibit 1. Further, Dr. Baker noted that he also reviewed the reports of Drs. Dahhan and Fino. *Id.* Contrary to claimant's contentions, the administrative law judge acknowledged that Dr. Baker reviewed hospital records, the miner's coal mine employment history, cigarette smoking history, and pathology findings. Decision and Order at 8, 15. Regarding Dr. Baker, the administrative law judge stated:

I find that Dr. Baker's opinion regarding the etiology of the [m]iner's obstructive airway disease is based on generalities. Although Dr. Baker noted that the medical literature suggests that coal dust exposure can cause obstructive airway disease, he never explained how [the miner's] 25 years of coal mine employment resulted in his lung impairment.

Decision and Order at 15. Contrary to claimant's argument, the administrative law judge acted within his discretion in discounting Dr. Baker's opinion. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. We therefore affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) as he properly discounted the only medical opinion of record that could support a finding of pneumoconiosis.<sup>8</sup>

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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<sup>8</sup>In view of our disposition of the case at 20 C.F.R. §718.202(a)(4), that claimant did not carry her burden of proof with Dr. Baker's opinion, we need not reach claimant's contentions regarding the opinions of Drs. Dahhan and Fino.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge