

BRB Nos. 07-0559 BLA
and 07-0559 BLA-A

C.S.)	
(Widow of J.S.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 03/27/2008
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals,¹ and employer cross-appeals, the Decision and Order – Denying Benefits (2006-BLA-5391) of Administrative Law Judge Ralph A. Romano rendered 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 administrative law judge credited the miner with ten years of qualifying coal mine employment based on the parties’ stipulation, and adjudicated this survivor’s claim, filed on February 25, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), but insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge’s weighing of the evidence relevant to the cause of the miner’s death pursuant to 20 C.F.R. §718.205(c), arguing that the administrative law judge failed to give proper consideration to the opinions of the miner’s treating physicians under 20 C.F.R. §718.104(d). Employer responds, urging affirmance of the denial of survivor’s benefits, and cross-appeals, arguing in the alternative that the administrative law judge erred in excluding the medical report of Dr. Castle from the record on the ground that it exceeded the evidentiary limitations at 20 C.F.R. §725.414.² The Director, Office of Workers’ Compensation Programs (the Director), has declined to address the merits of claimant’s appeal, but has responded to employer’s cross-appeal, urging the Board to reject employer’s challenge to the administrative law judge’s application of the regulatory limitations on evidence.

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

In order to establish entitlement to survivor’s benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s

¹ Claimant is the widow of the miner, who died on June 14, 2003. Director’s Exhibit 2.

² Employer concedes that its arguments on cross-appeal need not be reached if the Board affirms the administrative law judge’s denial of benefits. Employer’s Brief at 21.

death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see 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). 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); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).³

Claimant maintains that the medical opinions of Drs. Patton and Burgess are well-reasoned and sufficient, in conjunction with the death certificate, to establish that the miner's pneumoconiosis was a substantially contributing cause of and/or hastened the miner's death at Section 718.205(c), and claimant asserts that the administrative law judge selectively analyzed the evidence by failing to credit these opinions. Specifically, claimant argues that the opinion of Dr. Burgess, that the miner's death was directly related to pneumoconiosis, Claimant's Exhibit 2, along with the opinion of Dr. Patton, that the miner's death was caused by multiple spontaneous pneumothoraces resulting from bullous emphysema related to coal dust exposure or pneumoconiosis, Director's Exhibit 19, Claimant's Exhibit 1, Employer's Exhibit 5, are sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant contends that these opinions are supported by the death certificate attributing the immediate cause of death to a "spontaneous pneumothorax with air leak, due to bullous emphysema, due to ventricular tachycardia." Director's Exhibit 11. Claimant also asserts that the administrative law judge failed to take into consideration that Drs. Patton and Burgess were the miner's treating physicians, and that their opinions were thus entitled to substantial weight under the regulatory provisions at 20 C.F.R. §718.104(d). Contrary to claimant's arguments, however, we can discern no error in the administrative law judge's consideration and weighing of the evidence.

The mere fact that a physician is a miner's treating physician does not mandate assigning controlling weight to that medical opinion; rather, the administrative law judge must assess the credibility of a treating physician's opinion on its merits. 20 C.F.R. 718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In evaluating the opinion of Dr. Burgess, the administrative law judge noted his status as one of the miner's treating physicians since 1994, and permissibly determined that the physician's two-paragraph letter was

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

conclusory and insufficient to establish that the miner's death was due to pneumoconiosis, because it did not include findings on examination or any discussion of his treatment of the miner. Decision and Order at 6, 9; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). In evaluating Dr. Patton's opinion, that the miner's recurring pneumothoraces were caused by bullous emphysema due to pneumoconiosis, the administrative law judge acknowledged that the doctor was the miner's treating physician from March 11, 1994 through April 29, 2003, but determined that the opinion was not supported by the physician's own medical records that contained no reference to pneumoconiosis. Decision and Order at 5-6, 8-9; *see Williams*, 338 F.3d 501, 22 BLR 2-625. Thus, the administrative law judge permissibly found that the opinions of Drs. Burgess and Patton were entitled to less weight than the contrary opinions of highly qualified pulmonary specialists, Drs. Jarboe and Ghio, that the miner's bullous emphysema was the result of cigarette smoking and not coal dust exposure, and that the miner's death was unrelated to pneumoconiosis. Decision and Order at 8-9; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). In so finding, the administrative law judge determined that Drs. Jarboe and Ghio discussed the specific findings on examination, findings in the medical record, findings on pathological review, and the medical literature that supported their conclusions. Decision and Order at 9. The administrative law judge then acted within his discretion in according greater weight to the opinions of Drs. Jarboe and Ghio, as he found them to be well-reasoned and better supported by the miner's medical treatment records, as well as the pathological findings and reports of Drs. Caffrey and Roggli, who found minimal pneumoconiotic lesions on biopsy. Decision and Order at 9; Employer's Exhibits 1, 2, 4, 6, 10; *see Williams*, 338 F.3d 501, 22 BLR 2-625; *Clark*, 12 BLR at 1-115. As the administrative law judge discussed all of the medical opinions in full and provided valid reasons and the basis for his credibility determinations, claimant's assertion that the administrative law judge selectively analyzed the evidence is unsupported by the record. Decision and Order at 8-9; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore affirm the administrative law judge's finding that the weight of the evidence was insufficient to meet claimant's burden of establishing death due to pneumoconiosis under Section 718.205(c), as supported by substantial evidence, and affirm his denial of survivor's benefits. *Trumbo*, 17 BLR at 1-87. Consequently, we need not reach employer's arguments on cross-appeal.

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