

BRB Nos. 03-0608 BLA
and 03-0608 BLA-A

ANNA KOVALCK)	
(Widow of FRANK KOVALCK))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED: 05/13/2004
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 Robert J. Lesnick,
Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick (Carrick Law, PLLC), Morgantown, West Virginia, for
claimant.

Dorothea Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer.

Jennifer U. Toth (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: DOLDER, Chief Administrative Appeals Judge, McGRANERY
and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, and employer cross-appeals, the Decision and Order-Denying Benefits (02-BLA-0298 and 02-BLA-0299) of Administrative Law Judge Robert J. Lesnick on a miner's 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).² The procedural history of this case is as follows. The miner filed applications for benefits on May 18, 1970 and on January 16, 1976. His claims were denied by the Social Security Administration. On March 31, 1978, the miner signed an election card requesting review by the Social Security Administration. His claim was again denied, but was then forwarded to the Department of Labor. On March 30, 1982, Administrative Law Judge James W. Kerr, Jr., issued a Decision and Order denying benefits, which the miner appealed. In an Order issued on February 27, 1986, the Board dismissed the miner's appeal on the ground that it had been abandoned. Director's Exhibit 18.

The miner filed a new application for benefits on November 8, 1988, which was denied by the district director. The miner appealed this denial to the Board, as instructed by the district director under then existing case law. Director's Exhibit 19. In an Order issued December 29, 1989, the Board dismissed the miner's appeal because the miner did not submit a Petition for Review and a brief, nor did he respond to the Board's Order to Show Cause. Director's Exhibit 23.

The miner filed a new application for benefits on March 20, 1992. Director's Exhibit 1. The district director made an initial determination of entitlement, Director's Exhibit 11, and employer requested a formal hearing, Director's Exhibit 13. On March 19, 1998, Administrative Law Judge James Guill issued a Decision and Order – Denial of Benefits. The miner appealed to the Board. On November 3, 1998, the Board issued an Order vacating Judge Guill's Decision and Order because the record indicated that employer had not been given notice of the hearing it requested and because no responsible operator finding had been made. Director's Exhibit 51.

¹ Claimant is Anna Kovalck, the widow of Frank Kovalck, the miner, who died on March 2, 1999. Director's Exhibit 109. Claimant is pursuing the miner's claim as well as her survivor's claim.

² 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 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.

A hearing was scheduled on remand, but before it was held, the miner died. Director's Exhibit 79. On January 31, 2000, claimant filed her application for survivor's benefits. Director's Exhibit 71. After the district director denied her claim, she requested a formal hearing on her claim, as well as on the miner's claim. A hearing was held before Judge Robert J. Lesnick (the administrative law judge) on October 9, 2002.

The administrative law judge credited the miner with forty-two years of coal mine employment and noted that the miner's case involved a duplicate claim. The administrative law judge also noted that the existence of pneumoconiosis and its causal relationship to the miner's coal mine employment has been conceded by employer. In considering the miner's claim, the administrative law judge found the evidence sufficient to establish a material change in conditions. Turning to the merits of the miner's claim, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found the evidence insufficient to establish that the miner's disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, benefits were denied on the miner's claim. In considering the survivor's claim, the administrative law judge found the evidence 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 the survivor's claim.

On appeal, claimant asserts that the administrative law judge erred in denying benefits on both the miner's and the survivor's claims. Employer responds, urging affirmance of the administrative law judge's denial of benefits. In employer's cross-appeal, it asserts that if the Board vacates the administrative law judge's disability causation finding on the miner's claim, it should also vacate the administrative law judge's total disability finding. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's cross-appeal, urging the Board to reject employer's argument. Employer has filed a reply brief, urging the Board to find merit in its arguments in its cross-appeal.³

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

³ We affirm the administrative law judge's length of coal mine employment finding and his finding that a material change in conditions has been established on the miner's claim. We also affirm the administrative law judge's finding that the miner had pneumoconiosis arising out of his coal mine employment. These findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Miner’s Claim

In challenging the administrative law judge’s finding that the miner’s total disability is not due to pneumoconiosis pursuant to Section 718.204(c), claimant states:

It is simply erroneous for the Administrative Law Judge to properly weigh the evidence in the fashion he weighed it, and in a narrative form that he weighed it and discussed it, concluding that the miner’s total pulmonary disability had been established by the record and also noting that the coal workers’ pneumoconiosis had been progressive over the years and yet then hold that the claimant’s coal workers’ pneumoconiosis played no role in the miner’s total pulmonary disability. This is a conclusion that is simply contrary to the evidence in this case and it is the claimant’s position herein that the estate of Frank Kovalck should be entitled to benefits up to the date of his death.

Claimant's Brief at 3 (unpaginated).

The administrative law judge considered all of the medical opinion evidence relevant to the issue of disability causation⁴ and stated:

⁴ Drs. Rasmussen and Walker opined that the miner’s total disability was due to pneumoconiosis. Director's Exhibits 18, 19. Dr. Abrahams opined that the major contributing factor in the miner’s impairment was his borderline cardiomegaly, but the physician stated that the miner’s coal workers' pneumoconiosis and his chronic obstructive pulmonary disease contributed in a minor portion to his impairment. Director's Exhibit 19. Dr. Sachs opined that the miner’s impairment was probably the result of his smoking history, but stated “I can’t completely exclude some degree of industrial dust exposure contributing to this. The latter is less likely.” Director's Exhibit 18. The record does not contain the credentials of any of these physicians. Drs. Bellotte, Fino and Renn, who are Board-certified in internal medicine and pulmonary disease, and Drs. Naeye, Oesterling and Tomashefski, who are Board-certified in anatomic and clinical pathology, each opined that the miner was not impaired due to pneumoconiosis. Director's Exhibit 26, 90, 93; Employer's Exhibit 1-3.

Among the more recent medical opinions, virtually all of the physicians who addressed the causation issue found that the miner's respiratory or pulmonary impairment is not due to pneumoconiosis and/or occupational dust exposure. This includes the opinions of Board-certified pathologists, such as Drs. Naeye, Tomashefski, and Oesterling, and Board-certified pulmonary specialists, such as Drs. Bellotte, Fino, and Renn. I find that the recent opinions of the foregoing physicians are well-reasoned and well-documented, and based upon a more extensive analysis and review of the newer, more probative medical evidence. Moreover, I find Dr. Bellotte's opinion to be particularly persuasive. In so finding, I note that Dr. Bellotte not only reviewed the medical evidence, but also he had treated the miner in the early 1990's for the miner's respiratory problems.

Decision and Order at 25-26. The administrative law judge therefore found the evidence insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c).

We hold that the administrative law judge properly considered all of the evidence of record, and permissibly relied upon the preponderance of the medical opinions provided by highly qualified physicians, which the administrative law judge, within a proper exercise of his discretion as the finder-of-fact, found to be well-documented and well-reasoned. See *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Consequently, we affirm the administrative law judge's finding that claimant has not established that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c), as supported by substantial evidence.

Because we affirm the administrative law judge's finding that claimant has not established that the miner's disability was due to pneumoconiosis, one of the essential elements of entitlement under Part 718, see *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits on the miner's claim.

Survivor's Claim

In challenging the administrative law judge's denial of benefits on the survivor's claim, claimant recites the medical evidence supportive of her position, and asserts that the evidence, if "fairly weighed," is sufficient to establish that the miner's death was due to pneumoconiosis. Claimant's Brief at 4 (unpaginated). Claimant also asserts that the medical evidence supportive of her position is more objective than the medical evidence

developed by employer “for the sole forensic purpose of defeating the claim.” Claimant's Brief at 4 (unpaginated).

In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.201, 718.202, 718.203, 718.205(a)(1)-(3); *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 the evidence establishes that 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 a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

The administrative law judge considered the medical evidence relevant to the cause of the miner's death⁵ and found Dr. Perper's conclusions to be equivocal and ambiguous, and he therefore accorded little weight to Dr. Perper's opinion. Decision and Order at 26. The administrative law judge also noted the autopsy findings and Dr. Kahn's opinion and noted that neither addressed the issue of whether the miner's death was due to pneumoconiosis. The administrative law judge stated:

⁵ Drs. Fino, Renn and Bellotte, who are Board-certified in internal medicine and pulmonary disease, and Drs. Naeye, Oesterling and Tomashefski, who are Board-certified in anatomic and clinical pathology, opined that the miner's death was not due to pneumoconiosis. Director's Exhibits 82, 83, 90; Employer's Exhibits 1-3. The miner's death certificate lists the cause of death as respiratory failure due to aspiration pneumonia, due to metastatic gastric cancer. Director's Exhibit 109. The autopsy report states that the immediate and contributing causes of the miner's death could not be determined due to the limited nature of the autopsy. Director's Exhibit 109. Dr. Kahn reviewed the autopsy and slides and diagnosed coal workers' pneumoconiosis and other conditions. Claimant's Exhibit 1. Dr. Perper opined that the miner's pneumoconiosis “had the potential of being a substantial contributory cause” of the miner's death, but the physician stated “[h]owever, a reliable evaluation of the role of the pneumoconiosis in the death of [the miner], requires a thorough and full evaluation of his medical records and medical history.” Director's Exhibit 110.

On the other hand, the record contains the well-reasoned and documented medical opinions of Drs. Naeye, Tomashefski, Oesterling, Bellotte, Fino, and Renn, who found that the miner's pneumoconiosis did not cause, contribute to, or hasten the miner's death. Not only are the foregoing physicians well-credentialed pathologists or pulmonary specialists, but also, they had the benefit of reviewing the miner's records and medical history. Furthermore, as previously stated, Dr. Bellotte had been the miner's treating physician. In view of the foregoing, I find that the Claimant has clearly failed to meet her burden of establishing death due to pneumoconiosis under §718.205(c), or by any other means.

Decision and Order at 27.

We reject claimant's suggestion that the evidence supportive of her position is more objective than the medical evidence developed by employer "for the sole forensic purpose of defeating the claim." Claimant's Brief at 4 (unpaginated). The administrative law judge must consider all of the relevant evidence, *see Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989), and the Board has held that a physician's payment for his opinion is irrelevant, *see Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Moreover, the Board has held that evidence prepared in anticipation of litigation may properly be credited by the administrative law judge. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Consequently, it was proper for the administrative law judge to consider all of the evidence of record. *See Melnick, supra; Brown, supra.*

Claimant's only other assertion is that if the evidence is "fairly weighed" it is sufficient to establish that the miner's death is due to pneumoconiosis. At best, claimant's assertion constitutes a request to the Board to reweigh the medical evidence, which the Board is prohibited from doing. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Accordingly, we reject claimant's assertion of error and we affirm the administrative law judge's finding that claimant has not established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Thus, we affirm the administrative law judge's denial of benefits on the survivor's claim.

Because we affirm the administrative law judge's denial of benefits on both the miner's and the survivor's claims, we do not need to reach employer's assertions raised in its cross-appeal.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge