

BRB No. 00-0222 BLA

ANNA VASOS)	
(Widow of ANDREW VASOS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
FLORENCE MINING COMPANY)	DATE ISSUED:
)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGranery, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-BLA-0932) of Administrative Law Judge Michael P. Lesniak 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that the miner worked in qualifying coal mine employment for twenty-six years and suffered from pneumoconiosis arising out of his coal mine employment. [1999] Hearing Transcript at 8-9. Next, the administrative law

judge found that claimant established that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer raises specific challenges to the administrative law judge's weighing of the medical opinion evidence and contests the administrative law judge's determination that the miner's death was substantially contributed to by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he will not participate in this appeal.

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 the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits on a survivor's claim filed on or after January 1, 1982, a claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 718.205(a). Death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the

¹ Claimant, Anna Vasos, is the widow of Andrew Vasos, the miner, who died on July 23, 1996. Director's Exhibit 8. The miner filed his first application for benefits on September 2, 1981, which was denied on December 31, 1981. Director's Exhibit 38. The miner did not pursue this denial. Subsequently, the miner filed a duplicate application for benefits on December 15, 1986. Director's Exhibit 38. Administrative Law Judge Mollie W. Neal denied benefits in a Decision and Order issued on September 2, 1992, which the Benefits Review Board affirmed. *See Vasos v. Florence Mining Co.*, BRB No. 93-0134 BLA (Jul. 25, 1994) (unpub.); Director's Exhibit 38. The widow filed her application for benefits on June 17, 1997. Director's Exhibit 1.

² We affirm the administrative law judge's findings regarding length of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment inasmuch as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2, 4 n.3.

miner's death. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Employer argues that the administrative law judge provided faulty reasons for discrediting the opinion of Dr. Kleinerman. Specifically, employer contends that Dr. Kleinerman's opinion that it is unnecessary to label the pneumoconiosis nodules should not detract from his otherwise extensive qualifications. Employer also avers that Dr. Kleinerman's failure to diagnose an etiology of the miner's centrilobular emphysema is irrelevant because Dr. Kleinerman did not attribute the miner's demise to emphysema or any occupationally-acquired pulmonary disease. Additionally, employer argues that Dr. Kleinerman's opinion that the miner did not have cor pulmonale was based upon not only his criticism of the autopsy prosector's methods for measuring the ventricles, but also his finding that there was no clinical evidence of the disease. Employer's arguments lack merit and we affirm the administrative law judge's finding that Dr. Kleinerman's opinion was entitled to less weight. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); Decision and Order at 12. The administrative law judge rationally found that, despite Dr. Kleinerman's statement in his December 1998 report that the primary cause of centriacinar emphysema is heavy and prolonged cigarette smoking, Dr. Kleinerman acknowledged that the miner was a nonsmoker with no family history or predisposition for emphysema, but, failed to indicate the etiology of the miner's emphysema. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984). In addition, the administrative law judge permissibly discounted Dr. Kleinerman's criticisms of the autopsy prosector's methods for measuring the heart ventricles and diagnosing cor pulmonale inasmuch as the validity of the prosector's method was not questioned by any other physician of record. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-112 (3d Cir. 1997); Decision and Order at 12. Furthermore, the administrative law judge rationally found that, notwithstanding the fact that Dr. Kleinerman chaired the group of physicians who developed the pathological standards for diagnosing the existence of pneumoconiosis, this physician's opinion was not reasoned because he concluded that the designations of pneumoconiosis, *i.e.*, macule, micronodule, and macronodule, are minor and meaningless, contrary to the opinions of Drs. Osterling and Perper that the designations are necessary. *See Williams, supra*; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Director's Exhibit 32; Employer's Exhibits 1, 5, 7, 8; Claimant's Exhibits 1, 2. Hence, we reject employer's arguments.

Similarly, employer argues that the administrative law judge erroneously discredited

² In reports dated January 25, 1998 and December 11, 1998, Dr. Kleinerman opined that the miner's simple coal workers' pneumoconiosis did not result in a respiratory dysfunction or disability, centriacinar emphysema, or death. Employer's Exhibits 1, 5. Likewise, Dr. Kleinerman reiterated his opinions during his depositions on March 22, 1998 and on May 18, 1999. Employer's Exhibit 8.

the opinion of Dr. Oesterling. Specifically, employer asserts that the administrative law judge's reasons for discrediting Dr. Oesterling's opinion have no bearing on the miner's cause of death and he improperly extracted certain portions of Dr. Oesterling's opinion to discredit it. The administrative law judge permissibly found that Dr. Oesterling's opinion regarding the cause of death was undermined because no other physician of record shared, corroborated, or discussed the same conclusions held by Dr. Oesterling regarding the etiology of the miner's centrilobular emphysema and the presence of non-occupational granulomatous disease. *See Williams, supra*; Decision and Order at 12-13; Director's Exhibit 32; Employer's Exhibit 7. Hence, the administrative law judge, within a rational exercise of his discretion, accorded less weight to Dr. Oesterling's opinion. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); Decision and Order at 13.

Employer additionally alleges that the administrative law judge erroneously discounted the opinion of Dr. Pickerill by misreading this report, by failing to consider that Dr. Pickerill examined the miner twice before he died, and by discrediting Dr. Pickerill's opinion because Dr. Pickerill did not address the etiology of the miner's centrilobular emphysema. We disagree. The administrative law judge properly found that Dr. Pickerill's opinion, that the miner's simple coal workers' pneumoconiosis was not a major contributing factor to his death, was vague on the bases that Dr. Pickerill failed to address the miner's centrilobular emphysema, unlike the other physicians of record, and mechanically deferred to Dr. Kleinerman's statements with respect to the absence of cor pulmonale. Decision and Order at 13; Employer's Exhibit 4. Inasmuch as it is within the administrative law judge's discretion to determine whether a physician's opinion is vague or equivocal, and thus, entitled to less weight, we reject employer's contentions. *See Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20 (3d Cir. 1997); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). Employer avers that the administrative law judge erroneously accorded greater weight to the opinion of Dr. Rizkalla, the autopsy prosector, over those of the reviewing pathologists based on the mere fact that Dr. Rizkalla conducted the autopsy. We disagree. The administrative law judge properly assessed the credibility and weight of the reviewing pathologists' contrary opinions, and did not give complete deference to Dr. Rizkalla's opinion but provided a reasoned explanation for his preference of Dr. Rizkalla's opinion that coal workers' pneumoconiosis in the form of macular and micronodules substantially contributed to the miner's death. *See Amax Coal Co. v. Director, OWCP [Rehmel]*, 993 F.2d 600, 17 BLR 2-91 (7th Cir. 1993); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992); Decision and Order at 13; Director's Exhibits 9, 10; Employer's Exhibit 6. Consequently, the administrative law judge acted

3 In his review of the autopsy and medical records, Dr. Oesterling opined that the miner's "moderately severe micronodular coalworkers' [sic] pneumoconiosis ... result[ed] in little or no functional alteration in his pulmonary status, thus it did not in any way contribute to or hasten his death[,] which was the result of severe myocardial damage secondary to ischemic heart disease and myocarditis." Director's Exhibit 32; Employer's Exhibit 7.

within his discretion, after reviewing all of the relevant evidence, in finding that Dr. Rizkalla's opinion was well reasoned, probative and reliable, and, therefore, entitled to dispositive weight. *See Williams*, 114 F.3d at 25, 21 BLR at 2-112; *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 874, 20 BLR 2-335, 2-341 (10th Cir. 1996); *Lucostic, supra*. Additionally, the administrative law judge properly found that the opinion of Dr. Perper, who similarly opined that coal workers' pneumoconiosis was a substantial contributory cause of the miner's death, was consistent with that of Dr. Rizkalla. *See Williams, supra*; Decision and Order at 13-14; Claimant's Exhibits 1, 2. Furthermore, the administrative law judge rationally credited the opinions of both Drs. Rizkalla and Perper that the cause of the miner's emphysema was coal mine employment, a pulmonary condition, satisfying the statutory definition of pneumoconiosis, *see* 20 C.F.R. §718.201, and that such contributed to the miner's death. *See Lango, supra; Lukosevicz, supra; Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993); Decision and Order at 13.

Employer argues that the administrative law judge improperly relied on Dr. Rizkalla's diagnosis of cor pulmonale because Dr. Rizkalla failed to diagnosis the additional ailment of right-sided congestive heart failure, as required by Section 718.204(c)(3). As employer contends, a diagnosis of cor pulmonale with right-sided congestive heart failure as stated in Section 718.204(c)(3) is listed as one of the regulatory criteria for determining whether a miner is suffering or did suffer from a total respiratory disability, a requisite element to entitlement in a living miner's claim filed pursuant to Part 718. *See* 20 C.F.R. §718.204(c)(3). However, in this survivor's claim, the administrative law judge credited Dr. Rizakalla's opinion that coal workers' pneumoconiosis and its associated centria lobular emphysema and cor pulmonale was a substantially contributing factor in the miner's death. *See* 20 C.F.R. §§718.204(a), 718.205(a). Accordingly, we reject employer's argument.

Employer further contends that the administrative law judge erroneously accorded determinative weight to Dr. Perper's opinion on the grounds that it was corroborative of Dr. Rizkalla's opinion. Employer asserts that the administrative law judge failed to resolve the discrepancies contained in Dr. Perper's opinion when compared to that of Dr. Rizkalla and the other physicians of record. We disagree. Contrary to employer's contention that Dr. Perper was the only physician who labelled the miner's pneumoconiosis as severe, Dr. Oesterling diagnosed "moderately severe micronodular coalworkers' [sic] pneumoconiosis." Director's Exhibit 32. Contrary to employer's argument that Dr. Perper opined that coal workers' pneumoconiosis directly caused the miner's death, Dr. Perper testified during his deposition on January 14, 1999 that the cause of the miner's death was "cardio-pulmonary arrest due to arteriosclerotic heart disease with renal failure... ." Claimant's Exhibit 2 at 14. The other two discrepancies that employer cited, that Dr. Perper is the only pathologist to find a coal workers' pneumoconiosis nodule measuring one centimeter and to comment that the miner had abnormal objective tests, are unwarranted inasmuch as the administrative law judge, within a proper exercise of his discretion, found that Dr. Perper's opinion that coal workers' pneumoconiosis associated with centrilobular emphysema substantially contributed to the miner's demise was consistent with that of Dr. Rizkalla. *See Fagg, supra; Calfee v. Director,*

OWCP, 8 BLR 1-7, 1-10 (1985); Decision and Order at 14.

Lastly, employer contends that the administrative law judge erred by failing to discuss the medical evidence accumulated during the miner's lifetime, particularly the pulmonary function and arterial blood gas study evidence and the medical evidence demonstrating whether hypoxemia existed. We disagree. The administrative law judge properly considered and addressed all of the post-mortem medical evidence to determine whether coal workers' pneumoconiosis substantially contributed to or hastened the miner's death pursuant to Section 718.205(c)(2). *See* 20 C.F.R. §718.205(c)(2); *Lango, supra*; *Lukosevicz, supra*. Absent countervailing clinical evidence impacting the credibility of the post-mortem medical evidence, the administrative law judge did not err by failing to discuss evidence accumulated during the miner's lifetime. *See Kertesz, supra*. Consequently, the administrative law judge reasonably found that the opinions of Drs. Rizkalla and Perper, that coal worker's pneumoconiosis hastened the miner's death, outweighed those of Drs. Kleinerman, Oesterling, Pickerill, and Naeye because the latter physicians' opinions were less reasoned and credible. Hence, we reject employer's argument.

Inasmuch as the administrative law judge's determination, that the preponderance of the evidence established that pneumoconiosis was a substantially contributing cause to the miner's death, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's Section 718.205(c) finding. *See Lukosevicz, supra*; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 816, 17 BLR 2-135, 2-140 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge