

BRB No. 04-0432 BLA

RESSIE D. COWLEY)	
(Widow of CHARLES HOLMES COWLEY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KESSCOALS, INCORPORATED)	
)	
and)	DATE ISSUED: 11/22/2004
)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Respondent)	
)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, carrier for employer KessCoals, Incorporated.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2003-BLA-0062) of Administrative Law Judge Gerald M. Tierney 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).¹ This case involves a request for modification.² The administrative law judge considered Dr. Bates's supplemental opinion on modification, but found it to be unpersuasive. The administrative law judge therefore concluded that claimant had failed to prove a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and denied claimant's request for modification. Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant contends that the administrative law judge erred by rejecting Dr. Bates's supplemental opinion. Employer/carrier responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director) has indicated that he will not 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 survivors' benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. For survivor's claims filed on or after January 1,

¹ Claimant is the surviving spouse of the deceased miner.

² Claimant filed her application for survivor's benefits on January 27, 1999. Director's Exhibit 1. In a Decision and Order issued on February 6, 2001, Administrative Law Judge Richard A. Morgan found that claimant established the existence of pneumoconiosis arising out of coal mine employment but denied the claim because the evidence did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 34. In making this determination, the administrative law judge gave greater weight to Dr. Fino's opinion that the miner's death was due to a pulmonary embolus unrelated to pneumoconiosis over the unsupported opinion of Dr. Bates, who listed the cause of death as pulmonary embolism due to pneumoconiosis on the death certificate. Director's Exhibit 15. Claimant filed a request for modification and submitted a supplemental opinion from Dr. Bates. Director's Exhibit 36, 37.

1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, 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)-(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); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

Claimant contends that the administrative law judge improperly rejected the report of Dr. Bates, the miner's treating physician. We disagree. The administrative law judge considered the death certificate signed by Dr. Bates on which he listed the cause of death as pulmonary embolism as due to pneumoconiosis. Decision and Order at 2. The administrative law judge also considered the newly submitted letter dated March 16, 2001, in which Dr. Bates further discussed the miner's cause of death. The administrative law judge found Dr. Bates' opinion to be "confusing, equivocal, and undocumented." Decision and Order at 3. The administrative law judge first found that there are no underlying documents to support Dr. Bates's conclusion that the miner's lung disease contributed to his demise. The administrative law judge also found that Dr. Bates did not indicate his awareness of the miner's smoking history of up to thirty cigarettes a day for forty years. *Id.* The administrative law judge next found that Dr. Bates's statement, that the miner "most likely" developed deep venous thrombosis and pulmonary embolism from his right-sided heart failure from cor pulmonale and sedentary lifestyle due to limitation of activities directly related to dyspnea on exertion, was equivocal. Decision and Order at 4. The administrative law judge lastly found that Dr. Bates did not link the miner's dyspnea, pulmonary hypertension or cor pulmonale to pneumoconiosis or coal mine dust induced disease.

Contrary to claimant's contentions, the administrative law judge considered Dr. Bates's status as the miner's treating doctor since 1997 and acted within his discretion as fact-finder in concluding that Dr. Bates's opinion is undocumented, equivocal, and confusing and therefore insufficient to prove the miner's death was due to pneumoconiosis. *See Clark v. Karst-Robbins Co.*, 12 BLR 1-149(1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In addition, it was rational for the administrative law judge to question the credibility of Dr. Bates's report, in light of his failure to discuss the miner's smoking history. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). 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 inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As the administrative law judge's findings are supported by substantial evidence, we affirm the

denial of claimant's request for modification and his finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Accordingly, the administrative law judge 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