

BRB No 99-1283 BLA

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NORMA L. SWETNAM)	
(Widow of JAMES L. SWETNAM))	
Claimant-Petitioner)	DATE ISSUED:
v.)	
ARCH MINERAL CORPORATION)	
Employer-Respondent)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	DECISION and ORDER

Party-in-Interest

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

David W. Whipple (Whipple Law Firm, P.C.), Kansas City, Missouri, for claimant.

Catherine MacPherson (MacPherson Law Offices, LLC), Rawlins, Wyoming, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-1213) of Administrative Law Judge Jeffrey Tureck 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). James L. Swetnam, the miner, died of complications following lung surgery on June 26, 1995. Prior to the hearing, the parties stipulated that the miner had thirty-five years of coal mine employment and “[t]hat the miner has/had pneumoconiosis (black lung) as defined by the Act and regulations.” Director's Exhibit 26. The administrative law judge accepted the parties’ stipulations, but found that claimant failed to establish that pneumoconiosis hastened the

miner's death pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge failed to determine whether pneumoconiosis as defined by the Act hastened the miner's death, and erred in discounting the opinion of Dr. Thomas Beller, the miner's treating physician, that pneumoconiosis contributed to the miner's death. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to 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 supported by substantial evidence, is rational, and is in accordance with 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 be entitled to survivor's benefits under the Act, 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; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). 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. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death in any way. *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 874, 20 BLR 2-334, 2-340 (10th Cir. 1996). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge inquired only whether "clinical" pneumoconiosis hastened death rather than whether "legal" pneumoconiosis hastened death. *See* 20 C.F.R. §718.201. As noted above, the parties stipulated that the miner had pneumoconiosis as defined by the Act. Director's Exhibit 26. Review of the record indicates that the parties agreed that the miner had clinical "coal workers' pneumoconiosis" based upon biopsy findings of coal macules, but they disagreed as to whether the miner's other pulmonary conditions, including chronic obstructive pulmonary disease (COPD) and emphysema, constituted pneumoconiosis under the Act. The administrative law judge did not clarify the situation when he noted simply that, "the parties agree that the miner had coal workers' pneumoconiosis arising out of his coal mine employment," and then proceeded to consider death causation pursuant to Section 718.205(c)(2).

Nevertheless, based on our review of the record and the administrative law judge's Decision and Order in light of the arguments raised, we conclude that remand is not required in this case.

¹The parties agreed that the miner's lung cancer was due to smoking, not coal dust exposure.

That is so because, in denying benefits, the administrative law judge found that claimant's key evidence--Dr. Beller's opinion--was insufficient to carry claimant's burden to establish that pneumoconiosis hastened the miner's death. The administrative law judge accorded diminished weight to Dr. Beller's opinion that pneumoconiosis contributed to the miner's death because he found Dr. Beller's opinion equivocal and not well reasoned.

Review of the record indicates that Dr. Beller, who treated the miner during his hospitalization for lung surgery to remove cancer, indicated that the miner developed post-surgical complications leading to pneumonia, septic shock, and death. Director's Exhibit 25; Claimant's Exhibit 2. Dr. Beller stated that the miner's pre-existing chronic obstructive pulmonary disease (COPD), emphysema, and "coal workers' pneumoconiosis" were all factors that compromised the miner's ability to fight infection and recover from the surgery. *Id.* Dr. Beller believed that the primary cause of the miner's emphysema was cigarette smoking, but stated that coal workers' pneumoconiosis "contribut[ed] to" the miner's "emphysema and impaired lung function and therefore substantially contributed to his death." Claimant's Exhibit 2.

Dr. Beller also testified at the hearing, reiterating his opinion that "coal workers' pneumoconiosis" was one factor that resulted in the miner's inability to recover from lung surgery, and which therefore contributed to his death. Tr. at 41. Dr. Beller admitted that he had not listed coal workers' pneumoconiosis or pneumoconiosis on the miner's death certificate, but stated that he nevertheless considered it a factor in the miner's death. Tr. at 56, 78-79. The administrative law judge asked Dr. Beller to explain specifically how pneumoconiosis contributed to the miner's death. Dr. Beller responded that:

It contributed to it in terms of him having significant dust within his lungs, some emphysematous change within his lungs associated with the coal dust exposure, it *may* have caused some aggravation of his obstructive airways disease, his COPD that was caused by smoking. And in this way, it contributed to the severity of the obstructive airways disease that resulted in his subsequent development of the pneumonia and respiratory failure and death.

² Dr. Beller listed the cause of death as pneumonia and septic shock, due to COPD, due in turn to "post operative thoracotomy for lung carcinoma." Director's Exhibit 11. Dr. Beller listed "hiatal hernia and reflux esophagitis" as other significant conditions contributing to death. *Id.*

Hearing Transcript at 80 (emphasis supplied).

The administrative law judge took into account Dr. Beller's treating status and his Board-certification in Pulmonary Disease and Critical Care, but found it significant that when asked to explain how pneumoconiosis hastened the miner's death, Dr. Beller responded only that it "may" have aggravated the miner's underlying COPD, which in turn led to pneumonia and respiratory failure. The administrative law judge permissibly found that this reasoning was equivocal and speculative when compared to Dr. Jerome Kleinerman's opinion that the miner's pneumoconiosis was too mild to have hastened his death due to post-operative complications. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Claimant asserts that the administrative law judge erred in so finding because Dr. Kleinerman opined only that the miner's clinical "coal workers' pneumoconiosis" was too mild to have hastened death. What claimant overlooks, however, is that the administrative law judge considered Dr. Beller's view that the miner's COPD and emphysema were either partially related to coal dust or may have been aggravated by "coal workers' pneumoconiosis," and reduced the miner's ability to survive lung surgery. The administrative law judge was not persuaded by Dr. Beller's reasoning, finding that, "even if Dr. Beller's opinion regarding the contribution of the miner's pneumoconiosis to his . . . overall pulmonary condition is correct, at best he is guessing that the pneumoconiosis contributed to his death." Decision and Order at 5.

An administrative law judge is not bound to accept the opinion or theory of any given physician, but may weigh the medical evidence and draw his own inferences. *American Coal Co. v. Benefits Review Board [Callor]*, 738 F.2d 387, 391, 6 BLR 2-81, 2-89 (10th Cir. 1984). The administrative law judge witnessed Dr. Beller's testimony and was "in a unique position to determine credibility and weigh the evidence." *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993); *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge has broad discretion to determine the weight and credibility of the evidence, *see Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39, he permissibly found Dr. Beller's opinion that pneumoconiosis hastened the miner's death to be equivocal and not well reasoned. The administrative law judge found no other credible evidence that pneumoconiosis hastened the miner's death. Because the administrative

³Dr. Kleinerman believed that the miner's COPD, emphysema, and bronchitis were related to smoking, not coal dust exposure. Director's Exhibit 23; Employer's Exhibit 1.

law judge acted within his discretion in according less weight to Dr. Beller's opinion, and substantial evidence supports the administrative law judge's finding, we affirm the administrative law judge's finding pursuant to Section 718.205(c)(2).

Because claimant has failed to establish that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(2), a necessary element of entitlement in a Part 718 survivor's claim, we affirm the denial of benefits. *See Trent, supra; Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

⁴ Claimant argues that the diagnoses of anthracosis in the hospital pathology reports, and Dr. Kleinerman's findings of pseudo-asbestos bodies and silicotic fibrosis in the lymph nodes prove that "legal" pneumoconiosis hastened the miner's death. However, no physician opined that anthracosis, pseudo-asbestos bodies, or fibrotic lymph nodes played any role in the miner's death. In particular, Dr. Beller's explanation of death causation was limited to coal workers' pneumoconiosis, COPD, and emphysema. Additionally, the administrative law judge considered Dr. Kennedy's brief, handwritten note that "CWP" contributed to the miner's death, Director's Exhibit 14, but was unpersuaded by what he found to be "Dr. Kennedy's scrawled and unexplained notations" Decision and Order at 3. The administrative law judge further noted that the miner's other hospital treating physicians did not address whether pneumoconiosis hastened death, and that consulting physician Dr. Rose did not diagnose pneumoconiosis. Director's Exhibits 12, 21.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge