BRB No. 02-0261 BLA
and 02-0261 BLA-A

ROSIE TUCKER (Widow, on behalf of JERRY TUCKER, Deceased Miner)	)	
and	)	
ROSIE TUCKER, Individually	)	DATE ISSUED:
Claimant-Petitioner Cross-Respondent	)	
v.	)	
T & T KENTUCKY COAL COMPANY	)	
and	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
Employer/Carrier-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 Living Miner Benefits and Awarding Survivor Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

Ronald. E. Gilbertson (Bell, Boyd and Lloyd, PLLC), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the widow of the miner, appeals, the Decision and Order - Denying Living Miner Benefits and Awarding Survivor Benefits (01-BLA-0148 and 01-BLA-0149) of Administrative Law Judge Joseph E. Kane on claims of a miner and a survivor, 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] The lengthy history of these consolidated claims is set forth in the administrative law judge's Decision and Order. The administrative law judge noted that the miner had previously established twelve years of coal mine employment and the existence of pneumoconiosis and, based on the dates of filing, the administrative law judge adjudicated the claims pursuant to 20 C.F.R. Part 718. Considering the newly submitted evidence in conjunction with the evidence previously submitted in the miner's claim, the administrative law judge concluded that it failed to establish total disability, the element of entitlement previously adjudicated against the miner, and thus, was insufficient to establish a mistake in a determination of fact or a change in conditions sufficient to justify modification of the prior denial of benefits in the miner's claim. Accordingly, benefits in the miner's claim were denied. Turning to the survivor's claim, the administrative law judge found that the evidence of record was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, benefits were awarded in the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence failed to establish that the miner was totally disabled. Employer responds, urging affirmance of the administrative's law judge's denial of benefits in the miner's claim. On cross-appeal, employer (T & T Kentucky Coal Company) contends that the administrative law judge erred in finding that the evidence established death due to pneumoconiosis and in awarding benefits in the survivor's claim.[2] The Director, Office of Workers' Compensation Programs (the Director), is

[1] 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.

[2] By order dated June 3, 2002, the Board dismissed employer Standard Sign and Signal Company as a party to this appeal.

not participating in these appeals.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

To establish entitlement to survivor's 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if 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 the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Griffith v. Director, OWCP*, 49 F.3d 184, 186 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

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

Claimant contends that the administrative law judge erred in not finding a totally disabling respiratory impairment established pursuant to Section 718.204(b)(2)(iv) in the miner's claim, based on the weight of the medical opinions of record. Specifically, claimant contends that the administrative law judge erred in according greater weight to the opinions of Drs. Fino, Dahhan and Westerfield, consulting physicians, than to the reasoned and documented opinion of Dr.

Sundaram, the miner's treating physician.[3]

[3] Dr. Fino diagnosed the existence of simple coal workers' pneumoconiosis radiographically, but found no respiratory impairment, and found that the miner was not disabled from performing his last coal mine employment from a respiratory standpoint, Director's Exhibit 156; Dr. Dahhan found no evidence of a respiratory impairment or disability and concluded that the miner was able to perform his usual coal mine employment, Director's Exhibit 142; Dr. Westerfield found no total disability due to coal workers' pneumoconiosis, Director's Exhibit 158; Dr. Sundaram diagnosed the existence of pneumoconiosis and found that the miner was unable to perform his usual coal mine employment. Director's Exhibit 122.

In considering the medical opinion evidence, the administrative law judge accorded greater weight to the opinions of Drs. Fino, Dahhan and Westerfield, because he found them better documented and reasoned, than the opinion of Dr. Sundaram, which he found to be conclusory and lacking in documentation and explicit analysis. This was rational. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, contrary to claimant's contentions, the administrative law judge is not required to accord more weight to Dr. Sundaram's opinion, solely because he was the miner's treating physician, when his opinion is unreasoned, *see Jericol Mining, Inc. v. Napier*, F.3d , 2002 WL 1988221 (6th Cir., Aug. 30, 2002); *Wolfe Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-327 (6th Cir. 2002); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 1985); *Hall v. Director, OWCP*, 6 BLR 11-1306 (1984); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Thus, the administrative law judge rationally found the evidence insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). We therefore affirm the administrative law judge's finding that the evidence failed to establish a totally disabling respiratory impairment and, therefore, must affirm the denial of claimant's request for modification in the miner's claim.[4] *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

[4] The administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Regarding the award of benefits in the survivor's claim, employer cross-appeals, contending that the administrative law judge erred in his weighing of the evidence relevant to the cause of the miner's death.[5] Specifically, employer

[5] Dr. Caffrey, on examining medical records from the last five years of the miner's life, concluded that the miner definitely had simple coal workers' pneumoconiosis, but that the pneumoconiosis did not cause total disability or contribute to, or hasten the miner's death, Director's Exhibit 187. After reviewing the miner's autopsy report and death certificate Dr. Caffrey's opinion did not change. Director's Exhibit 183. Dr. Hansbarger, after reviewing the miner's autopsy slides, along with other medical records concluded that the miner's death was due to lung cancer caused by a long history of smoking, unrelated to the presence of moderate pneumoconiosis, Director's Exhibit 186; Dr. Perper, after an exhaustive review of the miner's medical record, including data submitted by other physicians, opined that the miner's simple coal workers' pneumoconiosis was a substantial contributing factor and that it hastened the miner's death. Director's Exhibit 189; Dr. Naeye, on reviewing the miner's occupational information, a copy of the miner's death certificate, an autopsy report with slides, medical records, and the opinions of other physicians, concluded that pneumoconiosis did not play a substantial role in the miner's death and that smoking was the major cause of disability and death,

contends that the administrative law judge erred in failing to address the miner's death certificate, autopsy report, smoking history, cardiac history and cancer in accordance with the requirements of the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554 (c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer also contends that the administrative law judge failed to consider fully the opinions of Drs. Fino, Branscomb, Caffrey, and Naeye and to give reasons for according less weight to their opinions and more weight to the opinion of Dr. Perper.

In weighing the relevant medical opinion evidence, the administrative law judge stated that he afforded "each opinion probative weight on the issue of death due to pneumoconiosis" as they were each "well-documented and well-reasoned to a point" but he determined that Dr. Perper's opinion had significant probative value as it was "exceptionally and scrupulously documented" and its review of the miner's medical history was "complete and authoritative". Decision and Order at 14. Specifically, the administrative law judge noted that Dr. Perper's "exhaustive medical review of June 12, 2000, comprised 581 pages of the record in the instant case," and was based "not only on [the miner's] medical data but also [on] relevant medical data espoused by other physicians." Decision and Order at 8. In addition, the administrative law judge determined Dr. Dennis's opinion had significant probative value because of his "unique and singular perspective" as the autopsy prosecutor. Decision and Order at 15. The administrative law judge quoted from Dr. Dennis's opinion that the autopsy showed "...dense fibrotic nodules were scattered throughout the entire architecture of the lung." Director's Exhibit 181; Decision and Order at 9. Contrary to employer's contention, we believe that the administrative law judge provided sufficient reasons for according greater weight to the opinions of Drs. Perper and Dennis on the cause of death. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Peabody Coal Co. v. Shonk*,

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Director's Exhibit 203; Dr. Dennis performed the autopsy on the miner and opined that the miner died due to pulmonary disease, which included moderate to severe anthracosilicosis. Dr. Dennis found a small cell carcinoma but stated that there was no evidence to suggest that the tumor caused the miner's death. Director's Exhibit 181.

906 F.2d 264 (7th Cir. 1990); *U.S. Steel Corp. v. Oravetz*, 686 F.2d 197 (3d Cir. 1982); *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688, 1-691 (1985); *Simila v. Bethlehem Mines Corp.*, 7 BLR 1-535 (1984); *Cantrell v. U.S. Steel Corp.*, 6 BLR 1-1003 (1984); *Clark*, *supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-229 (1984); *compare Peabody Coal Co. v. McCandless* 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Further, we reject employer's argument that the administrative law judge mischaracterized Dr. Dennis's opinion as finding that pneumoconiosis contributed to the miner's death because he never stated that the miner's anthracosilicosis contributed to the miner's death. The record reflects that Dr. Dennis found that the miner died of pulmonary disease and that that disease included anthracosilicosis. Director's Exhibit 181. We cannot, therefore, say that the administrative law judge acted irrationally in finding that Dr. Dennis's opinion supported a finding of death due to pneumoconiosis. *See Griffith*, *supra*; *Brown*, *supra*. Likewise, contrary to employer's argument that the administrative law judge did not consider the miner's history of smoking, cancer, and cardiac problems, the administrative law judge did review the medical opinion evidence which addressed the miner's history of smoking, cancer, and cardiac problems. This is sufficient. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984).

Employer, however, is correct in contending that the administrative law judge did not discuss two pieces of evidence: the miner's death certificate, which listed the cause of death as respiratory arrest due to lung cancer with metastasis to the brain, and Dr. Branscomb's opinion, that pneumoconiosis did not contribute to or hasten the miner's death. Director's Exhibit 180; Employer's Exhibit 2. Because there is no evidence regarding the qualifications of the coroner who signed the death certificate or evidence that he had personal knowledge of the miner's condition, from which he could assess the cause of death, we deem administrative law judge's failure to address the death certificate to be harmless error. *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988)(administrative law judge errs in accepting death certificate at face value without considering underlying basis for coroner's conclusions as to cause of death). Likewise, we deem the administrative law judge's failure to consider Dr. Branscomb's opinion to be harmless error in light of the reasons the administrative law judge gave for according determinative weight to the opinions of Drs. Perper and Dennis, *i.e.*, that the opinion of Dr. Perper was an "exceptionally and scrupulous documented" review of the miner's medical history and the opinion of Dr. Dennis was particularly probative because of Dr. Dennis's "unique and singular perspective" as the autopsy prosector. Employer does not

argue that Dr. Branscomb's opinion warrants special consideration for any reason but that the administrative law judge's failure to consider it constitutes an APA violation. We conclude, therefore, that even if the administrative law judge had considered the opinion of Dr. Branscomb, a reviewing physician, which was much like the opinions of the other reviewing physicians, *i.e.*, Drs. Caffrey, Naeye, and Hansbarger, the administrative law judge's reasons for affording determinative weight to the opinions of Drs. Perper and Dennis would not have changed. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We, therefore, affirm the administrative law judge's finding that the evidence was sufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c), and affirm the award of benefits in the survivor's claim.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge