

BRB Nos. 99-0970 BLA
and 99-0970 BLA-A

SANDRA WELLS)	
(Widow of DAVID A. WELLS))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	DATE ISSUED:
)	
EXPANSION COAL COMPANY,)	
INCORPORATED)	
)	
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals and employer cross-appeals the Decision and Order (98-BLA-1093) of Administrative Law Judge Daniel L. Leland denying benefits 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). Employer conceded the existence of pneumoconiosis. However, the administrative law judge found the evidence insufficient to establish that the miner's death was due

¹Claimant is the widow of the miner, David A. Wells, who died on January 18, 1997. Director's Exhibits 1, 9. The miner filed a claim for benefits on May 16, 1994. Director's Exhibit 27. On June 18, 1996, Administrative Law Judge Robert G. Mahony issued a Decision and Order awarding benefits in the miner's claim. *Id.* In his decision, Judge Mahony dismissed employer as the responsible operator and found that the Black Lung Disability Trust Fund was liable for the payment of benefits. *Id.* The Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration, requesting that Judge Mahony find that Southbend Coal Company is the responsible operator and, thus, order it to pay benefits or, in the alternative, remand the claim to the district director for further development of the responsible operator issue. *Id.* In a Decision and Order on Reconsideration dated March 10, 1997, Judge Mahony denied the relief requested by the Director. *Id.* Claimant filed a survivor's claim for benefits on March 14, 1997. Director's Exhibit 1.

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

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of survivor's benefits. On cross-appeal, employer contends that the administrative law judge erred in failing to dismiss it as the responsible operator. Employer further contends that the administrative law judge erred in failing to admit Employer's Exhibits 20, 21, and 22 into evidence. In response to employer's cross-appeal, claimant contends that the administrative law judge properly denied employer's request to admit Employer's Exhibits 20, 21, and 22 into evidence. Claimant also contends, however, based on principles of collateral estoppel, that employer should be dismissed as the responsible operator and liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund). The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to dismiss employer as the responsible operator and conceding that the Trust Fund is liable for the payment of any potential benefits in this case.

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

²The administrative law judge found employer to be the properly designated responsible operator in this case.

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.³ See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. See *Boyd, supra*.

Initially, we will address employer's contention, on cross-appeal, that the administrative law judge erred in finding it to be the properly designated responsible operator. As previously noted, claimant contends that employer should be dismissed as the responsible operator and liability for the payment of benefits should be transferred to the Trust Fund. The Director also contends that the Board should dismiss employer as the responsible operator. Moreover, the Director concedes that the Trust Fund is liable for the payment of any potential benefits in this case. In light

³Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

of the Director's concession, we reverse the administrative law judge's finding that employer is the properly designated responsible operator and dismiss it as a party in this case. See generally *Bucshon v. Peabody Coal Co.*, 4 BLR 1-608 (1982).

Next, we address claimant's contention that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) in a case in which the disease actually hastens his death. See *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Whereas Drs. Green and Perper opined that pneumoconiosis contributed to the miner's death, Claimant's Exhibits 1, 2, Drs. Branscomb, Broudy, Bush, Caffrey, Castle, Fino, Gaziano, Hutchins, Kleinerman, Morgan and Naeye opined that pneumoconiosis did not cause, contribute to, or hasten the miner's death, Employer's Exhibits 1, 3-11, 13-20. Dr. Dennis, in an autopsy report dated March 18, 1997, opined that the miner "died as a result of extensive cardiopulmonary disease, pulmonary congestion, black pigment deposition, fibrosis, macule formation and anthracosilicosis change in association with left ventricular hypertrophy, cardiovascular disease inclusive of coronary artery disease." Director's Exhibit 10. The death certificate signed by Dr. Younes indicates that the miner's death was caused by cardiac arrest, chronic obstructive pulmonary disease and coal workers' pneumoconiosis. Director's Exhibit 9. The administrative law judge permissibly discredited the opinions of Drs. Dennis, Green, Perper and Younes because he found them to be not well reasoned.⁴ See *Clark v. Karst-Robbins Coal Co.*, 12 BLR

⁴The administrative law judge stated that "Dr. Dennis listed coal dust related lung disease as one of a number of factors causing the miner's death but he provided no further explanation of how he reached this conclusion." Decision and Order at 10. Further, the administrative law judge stated that "Dr. Perper placed great emphasis on his finding that chronic obstructive lung disease can be caused by coal dust exposure, but assuming that this is accurate, he failed to provide any cogent reasons for his determination that the [miner's] chronic obstructive lung disease arose out of his coal mine employment, and he did not fully consider the miner's very heavy and prolonged cigarette smoking history." *Id.* In addition, the administrative law judge stated that "[l]ike Dr. Perper, [Dr. Green] failed to convincingly demonstrate that the miner's severe centrilobular emphysema resulted from coal mine dust exposure rather than cigarette smoking." *Id.* The administrative law judge also observed that "Dr. Green cited cor pulmonale as a cause of death but he was the only pathologist to diagnose this condition." *Id.* Moreover, the administrative law judge observed that Dr. Younes "stated in the death certificate

1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting the opinions of Drs. Dennis, Green,⁵ Perper and Younes.

Claimant asserts that the administrative law judge erred in failing to consider

that pneumoconiosis contributed to the [miner's] death, but as is true with most death certificates, no rationale for this finding is provided." *Id.* at 9-10.

⁵Claimant asserts that the administrative law judge erred in failing to consider the qualifications of Dr. Green. The administrative law judge observed that "both Dr. Naeye and Dr. Kleinerman are expert pathologists in the field of occupational lung diseases and that Drs. Caffrey, Hutchins, and Bush are also highly respected pathologists." Decision and Order at 10. The administrative law judge also observed that "[t]he credentials of...Dr. Green are not in the record." *Id.* Although a letter dated March 15, 1999 by claimant's counsel indicates that Dr. Green's qualifications are contained in Claimant's Exhibit 2, the record does not contain Dr. Green's credentials. Claimant's Exhibit 2. Further, the administrative law judge stated, "[e]ven assuming that Dr. Green is as expert on the pathology of occupational lung diseases as Dr. Naeye and Dr. Kleinerman, I believe that his opinion is not as convincing as the opinions of the other pathologists in this case." Decision and Order at 10. Hence, we hold that claimant's assertion lacks merit. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

how the opinions of Drs. Green and Perper comport to the current medical literature, which reflects that centrilobular and centriacinar emphysema may both be contributed to or caused by coal mine dust exposure as well as other general dust exposure. Contrary to claimant's assertion, the administrative law judge stated that Dr. Green "averred that there is a wealth of evidence that coal mine dust exposure can cause emphysema and chronic bronchitis and that the [miner's] chronic obstructive lung disease was caused in part by coal mine dust, as well as cigarette smoking." Decision and Order at 7. Moreover, the administrative law judge stated, "[l]ike Dr. Perper, [Dr. Green] failed to convincingly demonstrate that the miner's severe centrilobular emphysema resulted from coal mine dust exposure rather than cigarette smoking." *Id.* at 10.

Further, claimant asserts that the administrative law judge should have accorded determinative weight to Dr. Younes' opinion due to his status as the miner's treating physician. The Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of nontreating physicians. See *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). The Sixth Circuit has also indicated, however, that this principle does not alter the administrative law judge's duty, as trier of fact, to evaluate the credibility of the treating physician's opinion. See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In the present case, the administrative law judge rationally found that Dr. Younes' opinion is insufficient to establish that the miner's death was due to pneumoconiosis because he found it to be not well reasoned. See *Clark, supra*; *Fields, supra*; *Fuller, supra*. Thus, we reject claimant's assertion that the administrative law judge should have accorded determinative weight to Dr. Younes' opinion due to his status as the miner's treating physician.

In addition, claimant asserts that the administrative law judge should have accorded great weight to the opinion of Dr. Dennis in view of Dr. Dennis' status as the autopsy prosector. The Board has held that an administrative law judge may not mechanically, without a valid explanation, accord greater weight to the opinion of the autopsy prosector over the contrary opinions of the reviewing pathologists simply on the grounds that the prosector had the benefit of performing a gross examination on the miner's lungs. See *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Here, the administrative law judge stated that "[a]lthough Dr. Dennis was the autopsy prosector, I find no basis for giving more weight to his opinion than the opinions of the pathologists who reviewed the autopsy slides." Decision and Order at 10. Thus, we reject claimant's assertion that the administrative law judge erred by not according greater weight to Dr. Dennis' opinion based on his status as the autopsy prosector. See *Urgolites, supra*. Since the administrative law judge properly discredited the only medical opinions of record which could support a

finding that pneumoconiosis hastened the miner's death, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). See *Brown, supra*.

Hence, in view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, see *Trumbo, supra*; *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 survivor's benefits.⁶

Accordingly, the administrative law judge's Decision and Order denying benefits is reversed with regard to the responsible operator finding and affirmed with regard to the findings on the merits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

⁶In view of our disposition of the case on the merits under 20 C.F.R. §718.205(c), we decline to address employer's contention, on cross-appeal, that the administrative law judge erred in failing to admit Employer's Exhibits 20, 21 and 22 into the record.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge