

BRB No. 00-1109 BLA

NESSEL ALESHIRE)
(Widow of CHESTER A. ALESHIRE))

Claimant-Respondent)

v.)

U.S. STEEL MINING COMPANY,)
INCORPORATED)

Employer-Petitioner)

DATE ISSUED: _____

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order of Robert J. Lesnick, Administrative Law Judge,
United States Department of Labor.

Ray E. Ratliff, Jr., Charleston, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia,
for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Acting 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 and DOLDER,
Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0909) of Administrative Law Judge Robert J. Lesnick awarding 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).¹ The administrative law judge credited the miner with at

¹The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9,

least twenty-seven years of coal mine employment. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant² established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) (2000), 718.203(b) (2000) and established that pneumoconiosis substantially contributed to the miner's death pursuant to 20 C.F.R. §718.205(c) (2000). Decision and Order at 9-11. Accordingly, benefits were awarded, commencing August 1, 1997.

2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

²Claimant is Nessel Aleshire, widow of Chester A. Aleshire, the miner, who died on August 20, 1997. Director's Exhibit 8. Claimant filed her claim for benefits on September 2, 1998. Director's Exhibit 1.

On appeal, employer asserts that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4) (2000) and that pneumoconiosis substantially contributed to the miner's death at Section 718.205(c) (2000). Employer's Brief at 4-7. Claimant has filed a response brief, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.³

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).

Employer contends that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. DeJosef, the autopsy prosector, and the opinion of Dr. Bush, who reviewed the autopsy slides, pursuant to Section 718.202(a)(4) (2000) and Section 718.205(c) (2000). Employer's Brief at 4-7. Pursuant to Section 718.202(a)(4) (2000), the administrative law judge found the existence of pneumoconiosis based on the opinions of Drs. Fritzhand, Thavaradhara, Dehmlow, Vidal, and Gaziano, after stating that Dr. Bush, a "well-credentialed pathologist," did not find that the miner had coal workers' pneumoconiosis "upon a review of the histological slides and other available medical data." Decision and Order at 10. In doing so, the administrative law judge noted that Dr. Dehmlow was "the miner's attending physician. . .immediately prior to [the miner's] death," that Dr. Vidal was "the miner's treating physician for many years,"⁴ and that Dr. Gaziano is "a well-credentialed reviewing pulmonologist,⁵ [who] diagnosed pneumoconiosis, despite a negative x-ray reading and ambiguous autopsy results." *Id.* Thus, the administrative law judge concluded that "the clear preponderance of the medical opinion evidence establishes the presence of "legal" pneumoconiosis, as defined in § 718.201."⁶ *Id.*

³We affirm the administrative law judge's findings regarding the length of coal mine employment and pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3) (2000) and 20 C.F.R. §718.203(b) (2000) as they 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).

⁴In his 1998 opinion, Dr. Vidal noted that he first saw the miner on September 17, 1987, and that he treated the miner many times from 1987-1997. Director's Exhibit 11.

⁵Dr. Gaziano is Board-certified in internal medicine and chest disease and is a B-reader. Director's Exhibit 12.

⁶Pursuant to 20 C.F.R. §718.202(a) (2000), the administrative law judge initially found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R.

§718.202(a)(1) and (a)(2) (2000). Decision and Order at 9. After considering the medical opinion evidence at Section 718.202(a)(4) (2000), the administrative law judge stated that he additionally “reviewed and considered all of the relevant evidence, both favorable and unfavorable” and found “that although the evidence is inconclusive regarding whether the miner suffered from ‘medical’ pneumoconiosis, he clearly suffered from ‘legal’ pneumoconiosis.” Decision and Order at 10. Accordingly, the administrative law judge’s findings are consistent with the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

Pursuant to Section 718.205(c), the administrative law judge initially noted that “none of the physicians found that pneumoconiosis is the primary or immediate cause of death” and that pneumoconiosis is not listed as a cause of death on the autopsy report or the death certificate. Decision and Order at 11. However, the administrative law judge, citing *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), considered whether the evidence established that pneumoconiosis was a substantially contributing cause of the miner’s death. *Id.* In this regard, the administrative law judge noted that Dr. Dehmlow, the miner’s attending physician, Dr. Vidal, the miner’s treating physician, and Dr. Gaziano, a Board-certified pulmonologist, all found that pneumoconiosis significantly contributed to the miner’s death. *Id.* On the other hand, the administrative law judge noted that the opinion of Dr. Bush, a Board-certified pathologist, who found no pneumoconiosis, is the only opinion which contradicts the opinions of Drs. Dehmlow, Vidal, and Gaziano.⁷ *Id.*

After weighing the conflicting medical opinion evidence, the administrative law judge concluded that a clear preponderance of this evidence establishes that the miner’s pneumoconiosis was a substantially contributing cause of his death. Decision and Order at 11. In making this determination, the administrative law judge found that the opinions of Drs. Dehmlow, Vidal, and Gaziano “are most consistent with the miner’s 27+ year coal mine employment history, the miner’s long history of worsening shortness of breath, abnormalities found on various clinical tests, and the miner’s death by a respiratory-related cause.”⁸ *Id.*

⁷In considering the autopsy report at 20 C.F.R. §718.202(a)(2) (2000), the administrative law judge noted that Dr. DeJosef, the autopsy prosector, “diagnosed several conditions which may be consistent with a finding of coal workers’ pneumoconiosis, such as marked chronic obstructive pulmonary disease, interstitial fibrosis, marked with anthracotic pigments.” Decision and Order at 9. However, the administrative law judge found the autopsy report to be “inconclusive” regarding whether or not the miner had pneumoconiosis.

⁸The causes of death listed on the autopsy report are septicemia and klebsiella pneumoniae. Director’s Exhibit 9.

Contrary to employer's assertions, the administrative law judge permissibly weighed all the relevant evidence regarding the existence of pneumoconiosis⁹ and the cause of the miner's death,¹⁰ see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); see also *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences), and his findings are supported by substantial evidence, see *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985). Therefore, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) (2000), see 20 C.F.R. §718.202(a); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and the administrative law judge's finding that the miner's pneumoconiosis substantially contributed to his death pursuant to Section 718.205(c)(2) (2000), see 20 C.F.R. §718.205(c)(2), (c)(5); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000)(administrative law judge may properly discredit a physician's opinion, that the miner's pneumoconiosis did not contribute to his death, when it is based on the erroneous assumption that the miner did not have pneumoconiosis); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

⁹Employer contends that the administrative law judge erred in finding the existence of pneumoconiosis when the autopsy evidence does not establish the presence of the disease. Employer's Brief at 4-6. Contrary to employer's contention, it was not unreasonable for the administrative law judge to find that the miner established the existence of legal pneumoconiosis based on the opinions of Drs. Dehmlow, Vidal, Gaziano, Fritzhand, and Thavaradhara even though he found the autopsy evidence "inconclusive" regarding the existence of clinical pneumoconiosis. See *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); see also *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

¹⁰Employer asserts, citing *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), that the administrative law judge erred in failing to perform his "gatekeeping function" by relying on the "unsupported, unexplained and speculative statement" of Dr. Dehmlow regarding the cause of the miner's death. Employer's Brief at 6-7. We reject employer's assertion inasmuch as Dr. Dehmlow's opinion is neither speculative nor unsupported. Dr. Dehmlow, who attended the miner prior to his death, affirmatively found that pneumoconiosis significantly contributed to the miner's death. Director's Exhibit 10. Dr. Dehmlow's opinion is supported by the opinions of Dr. Vidal, who was the miner's treating physician for ten years, and Dr. Gaziano. Director's Exhibits 11-12. Drs. Vidal and Gaziano also affirmatively found that pneumoconiosis significantly contributed to the miner's death. Director's Exhibits 11-12.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge