

BRB No. 04-0917 BLA

BETTY MORGAN)	
(Widow of WALTER E. LENIG))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 09/21/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits (04-BLA-5209) of

¹ Claimant, Betty Morgan, is the widow of the miner, Walter E. Lenig, who died on March 3, 2003. The death certificate signed by Dr. Abdul-Al lists the cause of death as anthracosilicosis due to lung cancer. Director's Exhibit 4. The miner was awarded benefits pursuant to the Director's Motion to Remand to award benefits on a claim filed on September 25, 2001. Director's Exhibit 1. That claim is not before the Board. Claimant is not, however, eligible for derivative survivor's benefits based on the filing date of the miner's claim. See *Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-18-22 (1989); cf., *Neeley v.*

Administrative Law Judge Ralph A. Romano 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). The administrative law judge adjudicated this survivor's claim, filed on March 12, 2003, pursuant to the provisions at 20 C.F.R. Part 718, noting that the Director, Office of Workers' Compensation Programs, (the Director) agreed that the miner had pneumoconiosis which arose out of coal mine employment and which was totally disabling, consistent with the final award of benefits on the miner's claim. Decision and Order at 2. The administrative law found, however, that the weight of the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the evidence at Section 718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director declines to participate in this appeal.²

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. Death is due to pneumoconiosis where pneumoconiosis is a substantially contributing cause or factor leading to the miner's death, where death is caused by complications of pneumoconiosis, or where the presumption set forth at Section 718.304, relating to complicated pneumoconiosis, is applicable. 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause of a miner's death" if it hastens the miner's death. 20

Director, OWCP, 11 BLR 1-85, 1-86-87 (1988).

² This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 4, 5.

C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant contends that the administrative law judge erred in finding that pneumoconiosis was not a substantially contributing cause of the miner's death pursuant to Section 718.205(c). Specifically, claimant maintains that the administrative law judge failed to give proper consideration to the reports of the miner's treating physicians, Drs. R. Kraynak and Abdul-Al, that the miner's death was due to pneumoconiosis. Claimant also contends that the administrative law judge erred in accepting the contrary conclusions of non-examining physicians, Drs. Sherman and Cander, that the miner's death was unrelated to pneumoconiosis. Additionally, claimant contends that administrative law judge failed to provide a rationale for his findings sufficient to satisfy the provisions 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). Lastly, claimant asserts that the administrative law judge erred in requiring claimant to withdraw a medical opinion from one of his treating physicians, Dr. M. Kraynak, since that evidence constituted relevant, probative evidence that the miner's death was due to pneumoconiosis.

The administrative law judge is charged with determining the credibility of the evidence of record and the weight to be accorded the evidence when determining whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The question of whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Section 718.104(d)(5) provides that a treating physician's opinion may be given controlling weight, "provided that the weight given to the opinion shall be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-368 (3d Cir. 2002); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango*, 104 F.3d 573, 21 BLR 2-12; *Williams*, 338 F.3d 501, 22 BLR 2-625. Thus, the opinions of treating physicians should not automatically be presumed to be correct, entitled to the greatest weight, or considered to have the most probative value. Additionally, an administrative law judge cannot discredit the report of a physician solely because the physician did not examine the miner. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). Instead, the administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to the

opinions of treating physicians as warranted. 20 C.F.R. §718.104(d)(5); *Mancia*, 130 F.3d 579, 21 BLR 2-114; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Williams*, 338 F.3d 501, 22 BLR 2-625; *Clark*, 12 BLR 1-149; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

In the present case, the administrative law judge acknowledged that both Dr. R. Kraynak and Dr. Abdul-Al were the miner's treating physicians, but permissibly found that their opinions were not supported and not well-reasoned and did not, therefore, support claimant's burden of establishing that the miner's death was due to pneumoconiosis under Section 718.205(c). In so finding, the administrative law judge determined that Dr. R. Kraynak's report was insufficient to establish that the miner died due to pneumoconiosis because 1) his office notations were extremely brief and did not indicate that a thorough and complete medical examination of the miner was conducted and 2) that Dr. R. Kraynak based his conclusion that the miner's death was hastened by pneumoconiosis, in part, on his statement that absent the presence of pneumoconiosis the miner could have been a surgical candidate and thus been in a better position to fight off lung carcinoma. The administrative law judge noted, however, that this statement was contradicted by Dr. Sherman's finding that the miner's cancer had already metastasized to the bones; thus, eliminating surgical resection as an option for treating the miner's cancer. The administrative law judge concluded based on Dr. Sherman's high qualifications as a pulmonary specialist, that that doctor's analysis of the treatment options available to the miner was entitled to greater weight. *Wetzel*, 8 BLR at 141; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998). Thus, the administrative law judge concluded that the opinion of Dr. R. Kraynak was not well supported by his office notes and that his statement that, absent pneumoconiosis, the miner could have fought off his cancer was outweighed by the opinion of Dr. Sherman. This was proper. 20 C.F.R. §718.104(d)(5); *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Clark*, 12 BLR 1-155; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

A review of the record supports the administrative law judge's rejection of Dr. R. Kraynak's report. While his treatment notes refer to black lung and breathing checkups, they do not contain any specific information regarding the effects of the miner's black lung or problems with breathing. Claimant's Exhibit 39. In his deposition, Dr. R. Kraynak, responding to the question of what role anthracosilicosis played in the miner's death, stated "[i]f you took black lung out of the picture [the miner] would have survived longer. His debilitated respiratory system would have been in a better position to fight off the carcinoma, and as well as giving his overall body more vigor and just, and more ability to fight off the renal failure and other problems that [the miner] did have." Claimant's Exhibit 37 at 13. Dr. R. Kraynak concluded, therefore, that pneumoconiosis was "a substantial contributing factor and the primary factor in [the miner's] death." Claimant's Exhibit 37 at 13. The administrative law judge, however, permissibly found that this was not sufficient to show that pneumoconiosis hastened the miner's death. *See Williams*, 338 F.3d at 517, 22 BLR at 2-

655.

Likewise, the administrative law judge also properly found that while Dr. Abdul-Al stated that the miner's death was due to pneumoconiosis, his hospital treatment records lacked any mention of his treatment of the miner for pneumoconiosis and he failed to offer any explanation for his conclusion that the miner's death was due to pneumoconiosis. Decision and Order at 5; Claimant's Exhibits 38, 42; *see Lango*, 104 F.3d 573, 21 BLR 2-12. Contrary to claimant's assertions, therefore, the administrative law judge permissibly exercised his discretion in according less weight to the opinions of the miner's treating physicians, Drs. R. Kraynak and Abdul-Al. *See* 20 C.F.R. §718.104(d); *Clark*, 12 BLR at 1-155; *Wetzel*, 8 BLR 1-139; *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46.

Claimant further asserts the administrative law judge erred in concluding that the physician's signature on the death certificate was illegible as the certificate clearly indicated that the physician was Dr. Abdul-Al. Director's Exhibit 4. Although the certificate states that the miner's cause of death was "anthrasilicosis" due to lung cancer, it does not provide any additional explanation. The administrative law judge, therefore, permissibly found that it did not establish death due to pneumoconiosis. *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Claimant also asserts that the administrative law judge erred in crediting the opinions of Drs. Sherman and Cander, that pneumoconiosis played no role in the miner's death, as the opinions were problematic and not well-reasoned. Employer's Brief at 13-17, 27; Director's Exhibits 9, 19. Claimant contends: Dr. Cander's opinion was not thorough and that Dr. Cander did not explain the basis for discounting pneumoconiosis as a factor in the miner's death; Dr. Cander is not certified in the field of pulmonary medicine or pathology; and the opinions of both Dr. Sherman and Dr. Cander were equivocal and conclusory and did not demonstrate a thorough knowledge of the miner's condition.

In according greatest weight to the opinions of Drs. Cander and Sherman, the administrative law judge found that both physicians opined that the miner's death was caused by lung cancer with metastases to the bones. Decision and Order at 6. The administrative law judge found that their opinions were the best supported by the underlying hospital records and were thus the best reasoned medical opinions of record. This constitutes a permissible exercise of the administrative law judge's discretion in weighing the opinions, *see Clark*, 12 BLR 1-149; *Peskie*, 8 BLR 1-126; *Lucostic*, 8 BLR 1-46. Claimant's assertions to the contrary are, therefore, no more than impermissible requests for the Board to reweigh the evidence which is outside its scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Further, contrary to claimant's contention, the administrative law judge has provided rationale for his findings that is consistent with the requirements of the APA. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As the administrative law judge's findings pursuant to Section 718.205(c) are supported by substantial evidence, they are affirmed. 20 C.F.R. §718.205(c); *see Lukosevicz*, 888 F.2d 1001, 13 BLR 2-100.

Lastly, we reject claimant's general assertion that the administrative law judge erred in requiring him to withdraw a medical opinion by Dr. M. Kraynak, one of his treating physicians, which was relevant and probative. Claimant's Exhibit 40. Contrary to claimant's assertion, the record clearly demonstrates that claimant's withdrawal of that opinion was voluntary. *See* Hearing Transcript at 10. Further, as noted by the Director, pursuant to the regulations at 20 C.F.R. 725.414(a)(2)(i), since claimant had already submitted the medical opinions of Drs. R. Kraynak and Dr. Abdul-Al, the administrative law judge would have had to exclude the opinion of Dr. M. Kraynak as exceeding the evidentiary limitations. *See* 20 C.F.R. §725.414(a)(2)(i); *see also Dempsey v. Sewell Coal Co.*, 23 BLR 1-53 (2004). We, thus, reject claimant's assertion in this regard.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge