

BRB No. 96-0188 BLA

ALICE POTTER)	
(Widow of IRA POTTER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

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

James D. Holliday, Hazard, Kentucky, for claimant.

Edward Waldman (J. Davitt McAteer, 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, the United States Department of Labor.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (94-BLA-1846) of Administrative

¹ Claimant is Alice Potter, widow of Ira Potter, the miner, whose three claims for benefits were finally denied before he died on May 17, 1992. Director's Exhibits 8, 24. Mrs. Potter filed her application for benefits on October 7, 1992. Director's Exhibit 2.

Law Judge Robert G. Mahony denying benefits on a 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 found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(2) but concluded that the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) and, accordingly, denied benefits.

On appeal, claimant contends initially that the administrative law judge failed to apply the proper regulations to this claim. Further, claimant argues that the administrative law judge erred in weighing the medical evidence pursuant to Section 718.205(c)(2). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.²

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).

Claimant first contends that, because the miner's initial claim was filed in 1975, Part 727 applies to her survivor's claim if she can establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Claimant's Brief at 11-12. Contrary to claimant's contention, her survivor's claim alleging death due to pneumoconiosis is separate from the miner's earlier claims alleging total disability due to pneumoconiosis and thus is not subject to the merger provision of Section 725.309(d). *Earl Patton Coal Co. v. Patton*, 848 F.2d 668, 11 BLR 2-97, 2-102 (6th Cir. 1988). Moreover, because the miner's claims were finally denied, derivative entitlement is unavailable to claimant.³ Section 718.205(c) applies to survivors' claims filed on or after January 1, 1992. 20 C.F.R. §718.205(c). Because this claim was filed on October 7, 1992, the administrative law judge properly applied Section 718.205(c).

To establish entitlement to benefits under Section 718.205(c), claimant must prove that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a). For survivor's claims filed after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or 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

² We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2) and 718.205(c)(1) and (3). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Section 422(l) of the Act, 30 U.S.C. §932(l), relieves survivors of the burden of filing a claim and proving their own entitlement to benefits in cases involving awards to deceased miners on claims filed prior to January 1, 1982. *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989).

States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

The miner's death certificate lists lung cancer as the immediate cause of death and no other causes or conditions. Director's Exhibit 8. Dr. Besserer, who performed the autopsy, diagnosed lung cancer and "minimal simple coal workers' pneumoconiosis" but did not determine the cause of death or list any factors contributing to death. Director's Exhibit 11. Dr. Naeye reviewed the autopsy report and slides and concluded that the miner's "mild" simple pneumoconiosis was "not severe enough to have hastened his death." Director's Exhibit 11. Dr. Buddington reviewed the autopsy report and slides, the death certificate, and the miner's hospital records and concluded that pneumoconiosis hastened the miner's death, albeit to a small degree, by contributing to the metabolic stress he suffered as a result of chemotherapy. Claimant's Exhibits 1, 4. Dr. Sundaram, the miner's treating physician, stated that based on the examinations, exposure history, clinical findings, and autopsy report, the miner had pneumoconiosis which hastened his death by anywhere from several days to between one and two years. Director's Exhibit 17. Dr. Sundaram explained that the pneumoconiosis depressed the miner's lung function, which caused complications that made treatment of his lung cancer more difficult and less likely to succeed. Director's Exhibit 17 at 12-13.

The administrative law judge stated that he accorded diminished weight to Dr. Buddington's opinion because "[i]t is unclear from his report and deposition what evidence he specifically reviewed." Decision and Order at 3. He also declared Dr. Buddington's opinion to be equivocal on the issue of whether pneumoconiosis was a substantially contributing cause of death. *Id.*

The administrative law judge also discounted the opinion of Dr. Sundaram. Initially, the administrative law judge found that Dr. Sundaram failed to indicate what documentation he reviewed in his May 26, 1993 letter stating that pneumoconiosis hastened the miner's death by several days. Further, the administrative law judge stated that he accorded "no weight" to Dr. Sundaram's October 11, 1993 deposition testimony because, "having stated . . . that the miner's death was hastened only a few days by pneumoconiosis" in his letter, Dr. Sundaram "change[d] this to 1 to 2 years in his deposition" without explanation. Decision and Order at 3. Finally, the administrative law judge found that Dr. Sundaram failed to mention pneumoconiosis in the miner's treatment records.

The administrative law judge accorded greater weight to the opinion of Dr.

Besserer, who he found "well qualified to make the determination of cause of death, and whose opinion was supported by that of Dr. Naeye, "who is equally qualified." Decision and Order at 3-4. Thus, he concluded that the evidence failed to establish that pneumoconiosis hastened the miner's death.

Based on our review of the record, we agree with claimant's contention that the administrative law judge's reasons for discrediting Dr. Buddington's opinion are not supported by substantial evidence. Claimant's Brief at 13-14; see *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*). Contrary to the administrative law judge's finding, Dr. Buddington indicated that he reviewed the autopsy report, fifty-three slides, the death certificate, and the miner's hospital records in rendering his opinion. Claimant's Exhibit 1, 4. Further, in finding Dr. Buddington's opinion equivocal, the administrative law judge failed to discuss the physician's deposition testimony in which he explained in detail the mechanism by which he believed pneumoconiosis hastened the miner's death. Claimant's Exhibit 4 at 7-8. Because the administrative law judge did not consider the entirety of Dr. Buddington's opinion, we vacate his finding pursuant to Section 718.205(c)(2).

Claimant also contends that the administrative law judge erred in discrediting the opinion of the miner's treating physician. Claimant's Brief at 12. Although an administrative law judge is not required to accord greatest weight to a treating physician's opinion, *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Berta v. Peabody Coal Co.*, 16 BLR 1-69 (1992), he must consider the physician's treating status and supply valid reasons for the weight to be accorded to such an opinion. See *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Griffith, supra*. Here, the administrative law judge considered Dr. Sundaram's status as the miner's treating physician, but failed to provide reasons for according less weight to his opinion that are supported by the record as a whole.

For example, although it is true that Dr. Sundaram stated in a brief letter to claimant's attorney only that he had "reviewed the records" on claimant and could testify that pneumoconiosis shortened his life by several days, Director's Exhibit 17 at 33, in his deposition testimony the physician cited the examination, history, and clinical findings obtained in treating the miner and his review of the autopsy report in support of his opinion. Director's Exhibit 17 at 6-10, 18-19. Further, Dr. Sundaram, board-certified in internal and pulmonary medicine, Director's Exhibit 17 at 4-5, explained that he would modify the statement in his letter because pneumoconiosis could have hastened the miner's death by as much as one to two years by depressing his lung function, thereby making his cancer more difficult to treat. Director's Exhibit 17 at 12-15. In addition, the physician testified regarding his 1992 treatment of the miner and stated that based on the examination, clinical findings,

and coal dust exposure history, he believed then that claimant had a chronic dust disease of the lungs and that a portion of his bronchitis was due to coal dust exposure.⁴ Director's Exhibit 17 at 7-10.

Because the administrative law judge did not consider Dr. Sundaram's opinion as a whole in assessing its credibility, see *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), and because his subsequent analysis of the physicians' qualifications is not supported by the record,⁵

⁴ Dr. Sundaram diagnosed chronic obstructive pulmonary disease in the miner's hospital records. Director's Exhibit 11. If linked to coal dust exposure, this condition could constitute pneumoconiosis. 20 C.F.R. §718.201. The administrative law judge did not indicate how he weighed Dr. Sundaram's testimony that part of the miner's pulmonary impairment diagnosed in 1992 was due to coal dust exposure in finding that the hospital records "made no mention of pneumoconiosis." Decision and Order at 3.

⁵ The administrative law judge found Dr. Besserer to be "well qualified to make the determination of cause of death." Decision and Order at 3. To the extent that the administrative law judge relied upon Dr. Besserer's qualifications, we note that his credentials are not of record. The administrative law judge also found Dr. Naeye to be board certified in anatomic and clinical pathology and therefore "equally qualified," Decision and Order at 2, 4, but the record contains no evidence of Dr. Naeye's certification. The credentials of Drs. Buddington and Sundaram are in the record. Director's Exhibit 17; Claimant's Exhibit 1.

see *Tackett, supra*, we remand this case for the administrative law judge to consider the opinions of Drs. Buddington and Sundaram in their entirety along with all other relevant evidence to determine whether pneumoconiosis hastened the miner's death. See 20 C.F.R. §718.205(c)(2); *Brown, supra*.

However, we reject claimant's contention that Dr. Naeye's opinion must be discredited as hostile to the Act. Claimant's Brief at 14. Dr. Naeye did not foreclose the possibility that simple pneumoconiosis could ever hasten death, but merely stated that the miner's simple pneumoconiosis was too mild to have hastened his death. Director's Exhibit 11. Further, we reject claimant's argument that the miner's death certificate must be disregarded. Claimant's Brief at 15. The miner's death certificate is relevant to a determination of whether pneumoconiosis hastened his death, and the administrative law judge is bound to consider all duly admitted evidence and draw his own conclusions and inferences therefrom. See 30 U.S.C. §932(b); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

McGRANERY REGINA C.
Administrative Appeals Judge