BRB No. 94-0170 BLA

SHIRLEY MAYS (Widow of JAMES R. MAYS) and BETTY JEAN MAYS (Surviving Divorced Spouse of JAMES R. MAYS) Claimants-Respondents v. PINEY MOUNTAIN COAL COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order-Award of Attorney Fees of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher (Wolfe & Farmer), Norton, Virginia, for claimant Shirley Mays.

Martin Wegbriet (Client Centered Legal Services of Southwest Virginia, Inc.), Castlewood, Virginia, for claimant Betty Jean Mays.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Jeffrey S. Goldberg (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, United States Department of Labor.

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order and the Supplemental Decision and Order-Award of Attorney Fees (92-BLA-1454) of Administrative Law Judge Joel R. Williams awarding benefits on two survivors' claims[1] 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 that the evidence established approximately forty years of qualifying coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded to both claimants. Subsequently, the administrative law judge awarded attorney's fees of $3,093.75 for 24.75 hours of legal services at an hourly rate of $125.00 to Vernon Williams, who represented Shirley Mays in the proceedings below. On appeal, employer contends that the administrative law judge erred in finding that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). In addition, employer asserts that if the award of benefits is affirmed, it should not be liable for full benefits to each claimant. Employer also contends that the administrative law judge erred in failing to address its objections to the attorney fee petition. Both claimants respond, urging affirmance of the awards of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds with respect to the amount of the benefic awarded, asserting that the Act provides for an award of full benefits to each

[1] The miner, James R. Mays, married Betty Jean Mays on December 18, 1946. Director's Exhibit 10. The marriage ended in divorce on May 20, 1981. Director's Exhibit 12. The miner married Shirley Mays on July 9, 1981. Director's Exhibit 14. The miner died on March 17, 1991. Decision and Order at 2; Director's Exhibit 15. The miner's widow, Shirley Mays, filed an application for survivor's benefits on March 26, 1991. Director's Exhibit 2. The miner's surviving divorced spouse, Betty Jean Mays, filed an application for benefits on April 3, 1991. Director's Exhibit 3.

claimant in this case. Oral Argument was held in Bristol, Virginia, on June 11, 1997, pursuant to the Board's Order of May 13, 1997.

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 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 under 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205. Failure to establish any element precludes entitlement. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Employer initially contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205© under the "hastening of death" standard articulated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. Employer's Brief at 14. In *Shuff*, *supra*, the Court construed "substantial contributing cause" under Section 718.205(c)(2) as encompassing situations in which "pneumoconiosis actually hastened the miner's death." *See also Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 816, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178, 183, 16 BLR 2-121 (7th Cir. 1992); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100 (3d Cir. 1989).

The miner's death certificate reflects the immediate cause of death as cancer of the pancreas with metastases and no contributing causes. Director's Exhibit 15. Dr. Stefanini performed an autopsy and Drs. Naeye, Hansbarger, Robinette, Kleinerman and Stewart rendered opinions after reviewing autopsy slides and/or medical records and reports. Director's Exhibits 16, 18, 45; Employer's Exhibits 1, 3, 5; Claimant's Exhibit 1. All of the physicians attributed the immediate cause of the miner's death to cancer. Drs. Naeye, Hansbarger, Robinette, Kleinerman and Stewart also diagnosed simple pneumoconiosis, while Dr. Stefanini diagnosed "coal worker's (sic) pneumoconiosis, complicated (conglomerates)." Director's Exhibits 16, 18, 45; Employer's Exhibits 1, 3, 5; Claimant's Exhibit 1. The administrative law judge noted Dr. Stefanini's anatomical findings and his remarks in the autopsy protocol as well as in his supplemental report which stated that:

> It cannot be stated that coal worker's (sic) pneumoconiosis was the cause of death in this case as the patient expired from adenocarcinoma, most likely of pancreatic origin, metastatic to multiple organs and causing obstructive

> jaundice. However, the patient's immediate cause of death was failure to expectorate mucus with confluent atelectases of lungs, complicated also by terminal thrombosis of the pulmonary arterial tree with multiple recent infarcts of lungs. In this condition the presence of additional pulmonary pathology as represented by coal worker's (sic) pneumoconiosis of the complicated type could be considered a complicating factor in the demise of Mr. Mays.

Decision and Order at 4; Director's Exhibit 17.

Our dissenting colleague contends that the administrative law judge was irrational in rejecting Dr. Stefanini's diagnosis of complicated pneumoconiosis while accepting his analysis of the way the miner's pneumoconiosis hastened his death. We disagree. The issue before the administrative law judge was a question of law, *i.e.*, whether the evidence established the existence of complicated pneumoconiosis in accordance with 20 C.F.R. §718.304. Dr. Stefanini's anatomical diagnosis:

> 6. Coal workers' pneumoconiosis, complicated (conglomerates)
> a) fibroanthracosis, mediastinal lymph nodes

Director's Exhibit 16, cannot satisfy any of the criteria set forth in Section 718.304 for establishing complicated pneumoconiosis. The administrative law judge had no choice but to accept the opinion of the other doctors that the miner had simple pneumoconiosis. Thus, the administrative law judge's decision to reject the diagnosis of complicated pneumoconiosis does not reflect lack of respect for Dr. Stefanini's medical judgment. The administrative law judge pointed out that Dr. Stefanini is a board-certified pathologist and the doctor who performed the autopsy on the miner's chest cavity. Decision and Order at 3. The administrative law judge credited Dr. Stefanini's medical judgment that claimant's pneumoconiosis hastened his death because the doctor reasonably explained that the immediate cause of death was the inability of the miner's lungs to expectorate secretions and the presence of severe pneumoconiosis in the lungs would contribute to this problem. The doctor's judgment that the miner's pneumoconiosis would have affected his ability to expectorate mucus was not based upon his characterization of the miner's pneumoconiosis as complicated, as the dissent suggests, it was based upon his first-hand observations as prosector. Moreover, both Drs. Hansbarger and Naeye described the miner's pneumoconiosis as severe. Director's Exhibit 45; Decision and Order at 5; Director's Exhibit 18; Decision and Order at 4.

Contrary to our dissenting colleague's contention, the administrative law judge did not selectively analyze the evidence. He clearly stated that Dr. Hansbarger "testified that the miner's death was not related in whole or in part to his pneumoconiosis and opined further that he believed that the miner would have died at the same time and of the same causes if he had never set foot in a mine." Decision and Order at 6. The administrative law judge also noted Dr. Hansbarger's concession that if pneumoconiosis were severe and disabling it could contribute to the inability to expectorate secretions. Dr. Hansbarger

maintained that although the miner's pneumoconiosis was severe it would not have "contributed to his demise in a major way" because it was of "a simple variety." Decision and Order at 5.

The doctor's opinion was undermined by the administrative law judge's references to *Shuff, supra*, and *Lukosevicz, supra*. The miners in those cases, like the miner in the case at bar, died of pancreatic cancer and the courts upheld the findings that simple pneumoconiosis hastened death in both cases. Decision and Order at 7. These decisions demonstrate the falsity of the dissent's assertion that Dr. Kleinerman's finding that pancreatic cancer caused death supports a finding that pneumoconiosis did not hasten death.

The administrative law judge credited the opinion of Dr. Naeye, which was supportive of Dr. Stefanini's opinion, over that of Dr. Hansbarger. The administrative law judge observed that both Drs. Naeye and Hansbarger are board-certified in clinical and anatomical pathology, but Dr. Naeye is also chairman of the department of pathology at the Pennsylvania State University College of Medicine. Decision and Order at 4, 6. Dr. Naeye diagnosed severe, simple pneumoconiosis, "characterized by the presence of many anthracotic deposits, a few of which reach macronodular size." Decision and Order at 5. The doctor opined that claimant's pneumoconiosis may have been disabling but stated that it "would be difficult to substantiate" since the miner also had severe emphysema, unrelated to coal dust exposure." Decision and Order at 5. Finally, employer's assertion that the administrative law judge ignored the medical opinions of Drs. Tolosa and Kleinerman is without merit inasmuch as the administrative law judge discussed their findings, but concluded they were not relevant to the narrow issue of whether pneumoconiosis hastened death by causing an inability to expectorate secretions. Decision and Order at 7.

In sum, the administrative law judge discussed all of the relevant evidence and reasonably concluded that pneumoconiosis hastened the miner's death because according to the well reasoned medical opinion of Dr. Stefanini, it contributed to the miner's inability to expectorate mucus. The administrative law judge explained how both the opinions of Drs. Naeye and Hansbarger were supportive of Dr. Stefanini's opinion and where they parted on the issue of disability, the administrative law judge reasonably credited the opinion of Dr. Naeye over that of Dr. Hansbarger. The administrative law judge has broad discretion in weighing and assessing the evidence of record in determining whether a party has met its burden of proof and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that pneumoconiosis hastened the miner's death and, thus, that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c). *See Lukosevicz, supra; Shuff, supra*.

Employer next objects to the district director's computation of full benefits for each claimant. Specifically, employer asserts that each claimant should not be paid full benefits, but instead employer's liability must be limited to the amount of benefits the deceased

miner would receive if he were totally disabled. Claimant Betty Mays responds, asserting that each claimant is entitled to full benefits, but that the issue is not properly before the Board and has not been preserved for appeal since no appeal or other request for a hearing was taken within sixty days of the district director's notice regarding benefits. The Director responds, asserting that both the widow and surviving divorced spouse are entitled to full benefits. Employer replies, reiterating its original argument and contending that although the Board may consider the issue raised to be premature on the basis that the administrative processing is incomplete, the issue is not waived since it was raised in the appeal and based on the administrative law judge's Decision and Order.

We reject claimant's assertion that this issue is not properly before the Board. In his Decision and Order, the administrative law judge determined that both claimants were entitled to survivor's benefits "under the Act," Decision and Order at 8. The district director's computation of benefits, *see* 20 C.F.R. §725.520, is a ministerial act mandated by the terms of the administrative law judge's award. The issue of the propriety of the administration of the award of benefits is therefore properly before the Board on appeal herein.

Subsequent to the issuance of the administrative law judge's Decision and Order, the district director issued notices directing employer to pay full independent benefits to both claimant Shirley Mays and claimant Betty J. Mays. Employer objected to the award of full independent benefits to both claimants, noting that the regulations at 20 C.F.R. §725.533(a)(4) provide that benefits shall be reduced if a claim for benefits from an additional beneficiary is filed, or that such claim is effective for a payment during the month of filing, or a dependent qualifies under this part for an augmentation portion of a benefit of a miner or widow for a period in which another dependent has previously qualified for an augmentation. In addition, employer notes that the regulations at 20 C.F.R. §725.537 provide that beginning with the month in which a person other than a miner files a claim and becomes entitled to benefits, the benefits of other persons entitled to benefits with respect to the same miner, are adjusted downward, if necessary, so that no more than the permissible amount of benefits (the maximum amount for the number of beneficiaries involved) will be paid. Thus, employer would argue that a widow and a surviving divorced spouse would receive an amount equal to that of a primary beneficiary supplemented by an augmentee, or 150% of the basic benefit amount. The Director asserts that Sections 725.533 and 725.537 are inapplicable in this case which involves two primary and independent beneficiaries. The Director asserts that employer's contention would require that one former spouse be considered the primary beneficiary on the claim, while the remaining spouse be classified as a dependent and the single full basic benefit would be increased by an additional 50% to take account of the surviving spouse augmentee. The Director asserts this methodology cannot be reconciled with the mandated treatment of widows under the Act and the Social Security Act in effect at the time of the 1972 Amendments to the Black Lung Benefits Act which provided a full widow's benefit to both a surviving spouse and a surviving divorced spouse.

The Act and its implementing regulations do not address, by their explicit terms, the

allocation of benefits between a surviving spouse and a surviving divorced spouse.[2] Section 412(a)(2) of the Act provides, in pertinent part, that benefits payments shall be made as follows:

> In the case of death of a miner due to pneumoconiosis or, except with respect to a claim filed under Part C of this subchapter on or after the effective date of the Black Lung Amendments of 1981, of a miner receiving benefits under this part, benefits shall be paid to his widow (if any) at the rate the deceased miner would receive such benefits if he were totally disabled.

30 U.S.C. §922(a)(2). A miner, as the primary beneficiary, is entitled to a full basic benefit. 30 U.S.C. §922(a)(1); 20 C.F.R. §§410.510, 725.520. Upon a miner's death due to pneumoconiosis, his widow is compensated as a primary beneficiary. *Id*. Section 402(e) of the Act defines the term "widow" to include not only a surviving spouse, but also a surviving divorced spouse, 30 U.S.C. §902(e), as does the Social Security Act, 42 U.S.C. §416(d)(2). Congress specifically changed the Section 402(e) definition of a widow to conform to the definition of a widow under the Social Security Act. The Social Security Act currently provides that both a surviving spouse and a surviving divorced spouse receive a full (100%) benefit payment. *See* Social Security Program Operations Manual 24 (POMS) RS

[2] In the 1980 version of the Coal Mine (Black Lung Benefits Act) Procedure Manual, Chapter 2-900, §8(b) (February 1980) [1980 Manual], benefits in a case of two survivors' claims were based on a formula which provided that the amount payable to each surviving spouse of the miner was the primary basic benefit, augmented for one dependent (one-half of a primary basic benefit), which was divided into equal shares. This method provided each claimant an equal share of the sum of one primary benefit (100%) augmented for one dependent (50% of the primary benefit), or 75% each (½ of 150%). In the 1992 version of the Coal Mine (Black Lung Benefits Act) Procedure Manual [1992 Manual], benefits in a case of two survivors' claims were based on a formula which provided that full benefits were payable to each surviving spouse of the miner as a primary beneficiary of the deceased miner, which amounts to 100% of the primary benefits to each claimant plus any augmentation.

00615.682. As there is no provision of the Act suggesting that the payment scheme is altered where, as in the instant case, the miner is survived by two "widows," it is reasonable to conclude that each surviving "widow" is entitled to compensation under the Act as a primary beneficiary, thereby receiving 100% of a basic benefit. Inasmuch as the Director's reasonable interpretation of 30 U.S.C. §922(a)(2) is "entitled to substantial deference unless it is plainly erroneous or inconsistent with the regulations," *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1987); *Wellmore Coal Corp. v. Stiltner*, 81 F.3d 490, 494, 20 BLR 2-211, 219 (4th Cir. 1996); *see Shuff*, *supra*; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), we hold that an award of a full basic benefit to each claimant was not inconsistent with the Act and we affirm the administrative law judge's award, as implemented by the district director.

Finally, the award of an attorney fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Employer contends that the administrative law judge erred in failing to address ten specific objections to counsel Vernon M. Williams' request for attorney's fees in the administrative law judge's Supplemental Decision and Order-Award of Attorney Fees dated June 7, 1994. Counsel, who represented Shirley Mays, requested a fee of $3,093.75 for 24.75 hours of legal services at an hourly rate of $125.00. Employer filed a response to this fee petition objecting to the amount of time spent by Vernon Williams on August 24, 1992; November 4, 1992; November 19, 1992; January 19, 1993; February 3, 1993; February 5, 1993; March 12, 1993; May 16, 1993 and November 6, 1993. The administrative law judge noted that employer objected to the amount of the fee requested, but concluded that this was not a case of co-counsel and that each claimant was entitled to her own attorney. Thus, the administrative law judge found that the fee requested was reasonable and necessary and ordered employer to pay $3,093.75 to claimant's attorney. Supplemental Decision and Order at 2. In so finding, the administrative law judge did not address each of the objections or make a specific finding that the time spent on the above dates was reasonable. Hence, the case must be remanded. *See* 20 C.F.R. §725.366(b); *Ovies v. Director, OWCP*, 6 BLR 1-689 (1983). Consequently, we vacate the attorney fee award and remand the case for consideration of the specific objections.

Accordingly, the Decision and Order of the administrative law judge awarding benefits in these survivor's claims is affirmed with full benefits payable to each claimant. The administrative law judge's Supplemental Decision and Order-Award of Attorney Fees is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's affirmance of the administrative law judge's finding that the medical opinion evidence established that the miner's death was due to pneumoconiosis pursuant to Section 718.205© under the hastening of death standard articulated by the United States Court of Appeals for the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). In his consideration and evaluation of the medical opinions of record, the administrative law judge acknowledged that Dr. Stefanini diagnosed complicated pneumoconiosis, but went on to find that Dr. Stefanini's diagnosis of complicated pneumoconiosis was not credible inasmuch as it was outweighed by the combined opinions of every other physician, all of whom diagnosed only simple pneumoconiosis. Inasmuch as claimants were thus precluded from the benefit of invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304, claimants had the burden of persuasion by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). As the administrative law judge discredited Dr. Stefanini's diagnosis of complicated pneumoconiosis, a diagnosis which Dr. Stefanini appears to have relied upon in his determination that the miner's pneumoconiosis was severe enough to interfere with his ability to expectorate mucus secretions, the administrative law judge's reliance on Dr. Stefanini's opinion in finding that the miner's death was due to pneumoconiosis does not appear to be rational nor supported by the evidence of record. Moreover, the administrative law judge appears to have selectively analyzed the opinions of Drs. Hansbarger and Naeye in concluding that their opinions supported Dr. Stefanini's conclusion as Dr. Hansbarger explicitly opined that he believed that the miner's pneumoconiosis did not contribute to or hasten his death in any way. Director's Exhibit 45. Dr. Naeye's opinion was equivocal in that he stated the miner's pneumoconiosis "may have been severe enough to have prevented" the miner from performing hard physical work in coal mine employment, but Dr. Naeye did not address the issue of whether pneumoconiosis contributed to death. Decision and Order at 4-5; Director's Exhibit 18. Finally, the administrative law judge did not acknowledge that Dr. Kleinerman's opinion supports a finding of no death due to pneumoconiosis inasmuch as he found that the cause of death was carcinoma of the pancreas with metastases. Employer's Exhibit 1. Contrary to the majority opinion in this case, and mindful of the Board's circumscribed standard of review, I do not believe that without further analysis of all relevant evidence that the administrative law judge's determination at Section 718.205© is affirmable. Therefore, I would remand the case to the administrative law judge for reconsideration of the medical

opinions with instructions to state an explicit rationale for his credibility determinations with respect thereto pursuant to Section 718.205(c).

I concur in all other respects in the majority opinion.

NANCY S. DOLDER
Administrative Appeals Judge

Deskbook Sections VII.F and X.I.

An administrative law judge properly relied on the opinion of a physician who performed an autopsy to find that pneumoconiosis hastened death by causing an inability to expectorate mucus secretions and, thus, the administrative law judge properly found that the miner's pneumoconiosis substantially contributed to death pursuant to 20 C.F.R. §718.205(c). ***Mays v. Piney Mountain Coal Company, Inc.***, BRB No. 94-0170 BLA (Sept. 30, 1997)(Dolder, J., dissenting in part and concurring in part).

Deskbook Section II.B.1.

Where a miner is survived by two dependent "widows," *i.e.*, a surviving spouse and a surviving divorced spouse, each surviving "widow" is entitled to compensation under Section 412(a)(2) of the Act as a primary beneficiary, thereby each receiving 100% of a basic benefit. ***Mays v. Piney Mountain Coal Company, Inc.***, BRB No. 94-0170 BLA (Sept. 30, 1997)(Dolder, J., dissenting in part and concurring in part).

STACEY,

On the first page of this document, I had to make 2 changes, Claimants-Petitioners was changed to Claimants-Respondents and Employer-Respondent was changed to Employer-Petitioner.

Thanks,
Renee A.