BRB No. 04-0694 BLA

MARTHA J. PERRY (Widow of GEORGE PERRY) Claimant-Petitioner v. MYNU COALS, INCORPORATED/ HOBET MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/28/2005 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Douglas A. Smoot and Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits (2003-BLA-6226) of Administrative Law Judge Richard A. Morgan 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). Based on a stipulation of the parties, the administrative law judge credited the miner with at least ten years of coal mine employment, Decision and Order at 3; Hearing Transcript at 6-7, and adjudicated this survivor's claim pursuant to 20 C.F.R. Part 718 based on claimant's August 20, 2001 filing date. Director's Exhibit 3. Addressing the merits of entitlement, the administrative law judge found the medical evidence sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment. Decision and Order at 18. However, the administrative law judge found the medical evidence of record insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 17-20. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish entitlement to benefits. In particular, claimant contends that the administrative law judge erred in finding that the opinion of Dr. Mellen, the autopsy prosector, was equivocal as to the existence of complicated pneumoconiosis. In addition, claimant contends that the administrative law judge erred in not according more weight to Dr. Mellen's opinion based on his status as prosector. Claimant further contends that the administrative law judge erred in weighing the opinion of Dr. Perper. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not respond on the merits of this appeal.[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 rational, supported by substantial evidence,

[1] Claimant is the widow of the miner, George Perry, who died on January 13, 2001. Director's Exhibit 9.

[2] The parties do not challenge the administrative law judge's decision to credit the miner with at least ten years of coal mine employment, his finding that Mynu Coals, Incorporated is the properly designated responsible operator, or his finding that simple pneumoconiosis arising out of coal mine employment was established. These findings are therefore affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable 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 survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). In survivors' claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if it was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. 718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that it contains no reversible error. The administrative law judge considered all of the relevant evidence of record and rationally found that the medical evidence was insufficient to establish that the miner was suffering from complicated pneumoconiosis pursuant to Section 718.304 or that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Contrary to claimant's contentions, the administrative law judge reasonably exercised his discretion as trier-of-fact in finding that the medical opinion of Dr. Mellen, the autopsy prosector, was equivocal and thus entitled to little weight as the physician was unable to state whether the large lesions he described on autopsy would appear on an x-ray as an opacity of greater than one centimeter. Decision and Order at 17; Joint Exhibit 1; *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *see Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003). In addition, the administrative law judge reasonably found Dr. Mellen's opinion to be equivocal because the physician determined that the 4 cm. mass found in the miner's right upper lung was a mixture of pneumoconiosis and lung cancer, but did not specify the amount related to either condition. Decision and Order at 17; Director's Exhibit 10; Joint Exhibit 1. Consequently, the administrative law judge found that it was not possible to determine

whether the portion of the mass attributable to coal dust exposure was large enough to be considered complicated coal workers' pneumoconiosis. Decision and Order t 17.

Likewise, the administrative law judge reasonably accorded less weight to Dr. Mellen's opinion because the physician was not aware of claimant's lengthy smoking history. Specifically, the administrative law judge found that he was unable to determine whether Dr. Mellen's diagnosis of complicated pneumoconiosis would have changed if the physician had been aware of the miner's forty-year smoking history, in light of his mixed diagnosis of pneumoconiosis and lung cancer. Decision and Order at 17; *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Moreover, contrary to claimant's contention, the administrative law judge is not required to accord determinative weight to the opinion of Dr. Mellen based solely on his status as prosector inasmuch as the central issue herein was not the size of the lesions but rather of what the lesions were comprised. *Sparks*, 213 F.3d 186, 22 BLR 2-251; *Urgolites v. BethEnergy Mines, Inc*., 17 BLR 1-20 (1992).

In addition, we reject claimant's contention that the administrative law judge erred in finding the opinion of Dr. Perper, that the miner was suffering from complicated pneumoconiosis, entitled to less weight because Dr. Perper did not discuss Dr. Mellen's failure to consider the miner's smoking history. Claimant's Brief at 14. Contrary to claimant's contention, the administrative law judge reasonably accorded this opinion less weight because Dr. Perper relied on Dr. Mellen's description of the lesions found on autopsy without discussing whether Dr. Mellen's failure to be apprised of the miner's smoking history compromised the accuracy of his description of the lesions found on autopsy. Decision and Order at 18. Consequently, the administrative law judge acted within his discretion as trier-of-fact in according less weight to Dr. Perper's opinion than the opinions of Drs. Naeye, Morgan, Oesterling, and Rosenberg. Decision and Order at 18; *Underwood*, 105 F.3d 946, 21 BLR 2-23; *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Akers*, 131 F.3d 438, 21 BLR 2-269; *Kuchwara*, 7 BLR 1-167. As claimant does not otherwise challenge the administrative law judge's crediting of the contrary medical opinions of Drs. Naeye, Oesterling, Rosenberg, and Morgan as to the nature of the lesions found on autopsy, we affirm his determination that claimant has not established the existence of complicated pneumoconiosis pursuant to Section 718.304. Decision and Order at 18; 20 C.F.R. §718.304; *Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Gruller v. Bethlehem Mines, Inc.*, 16 BLR 1-3 (1991).

Moreover, we affirm the administrative law judge's finding that claimant has not established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) as claimant does not challenge the administrative law judge's finding with any specificity. Decision and Order at 19-20. Rather, claimant argues that because Dr. Mellen diagnosed complicated pneumoconiosis this created an irrebuttable presumption of death due to pneumoconiosis and, thus, he was not required to otherwise discuss a

cause of the miner's death. Claimant's Brief at 14-15. However, in light of our decision to affirm the administrative law judge's finding that claimant has not established the existence of complicated pneumoconiosis, *see* discussion, *supra*, we reject this contention. As claimant does not otherwise challenge the administrative law judge's findings at Section 718.205(c), we affirm his finding that claimant has not established that the miner's death was due to pneumoconiosis. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge