

BRB No. 04-0698 BLA

HELEN D. DUDASH)	
(Widow of MICHAEL DUDASH, JR.))	
)	
Claimant-Petitioner)	
)	DATE ISSUED: 04/15/2005
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Sarah M. Hurley (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:

Claimant¹ appeals the Decision and Order Denying Benefits (2003-BLA-6499) of Administrative Law Judge Janice K. Bullard 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). Based on a stipulation of the parties, the administrative

¹ Claimant is the widow of the miner, Michael Dudash, Jr., who died on July 10, 2000. Director's Exhibit 5. Claimant filed her application for benefits on July 29, 2002. Director's Exhibit 3.

law judge credited claimant with forty years of coal mine employment, Decision and Order at 2; Hearing Transcript at 5, and adjudicated this survivor's claim pursuant to 20 C.F.R. Part 718. Noting that the miner was receiving benefits at the time of his death based on a claim filed August 23, 1989,² the administrative law judge accepted the parties' stipulation of the existence of pneumoconiosis arising out of coal mine employment. Decision and Order at 2, 3; Hearing Transcript at 5. However, the administrative law judge found the medical evidence of record insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in this survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding the medical evidence insufficient to establish that the miner's death was due to pneumoconiosis. In particular, claimant contends that the administrative law judge erred in failing to accord determinative weight to the medical opinions of Drs. Bemiller and Swain, the miner's treating physicians. The Director, Office of Workers' Compensation Programs (the Director), has responded urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.³

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, 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

² The miner filed an application for benefits on August 23, 1989, which was awarded by the district director on February 23, 1990. Director's Exhibit 1.

³ The parties do not challenge the administrative law judge's decision to credit claimant with forty years of coal mine employment, or her finding that the existence of pneumoconiosis arising out of coal mine employment has been established. These findings are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge properly set forth all of the medical evidence of record regarding the cause of the miner's death, including the death certificate and the medical opinions of Drs. Bemiller, Swain, and Sherman, as well as treatment notes and summaries from the miner's hospitalizations. Decision and Order at 3-5; Director's Exhibits 5-8, 32; Claimant's Exhibits 1, 2.

In reviewing the relevant evidence, the administrative law judge stated that the death certificate, signed by the deputy coroner, Diana M. Smith, R.N., lists the immediate cause of the miner's death as cardiac arrhythmia with cardiorespiratory arrest, cardiomegaly and coal workers' pneumoconiosis. Decision and Order at 3; Director's Exhibit 5. However, the administrative law judge accorded the death certificate little weight as the document fails to provide a rationale for listing coal workers' pneumoconiosis as a cause of the miner's death. Decision and Order at 7. In addition, she found that it was not prepared by a medical doctor nor was an autopsy performed. *Id.* Therefore, the administrative law judge rationally found that the death certificate was insufficient to establish that the miner's death was due to pneumoconiosis. *Id.*; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). In addition, we affirm the administrative law judge's finding that the medical treatment notes and hospital records are insufficient to establish that the miner's death was due to pneumoconiosis as she rationally found that these records, while highlighting the severity of the miner's cardiac problems, only confirm the presence of pneumoconiosis and are not sufficient to establish that the miner's pneumoconiosis was a causative factor in his death. Decision and Order at 7; Director's Exhibits 6-8; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

With regard to the medical opinions of record, claimant generally contends that the administrative law judge erred in failing to accord determinative weight to the opinions of Drs. Bemiller and Swain, the miner's treating physicians. Specifically, claimant contends that these opinions are well reasoned and documented as they are supported by the additional medical notes and hospital records contained in the formal record. Claimant's Brief at 3. Claimant also contends that the administrative law judge erred in crediting the medical opinion of Dr. Sherman, that the miner's pneumoconiosis was not a contributing factor in his death, over the opinions of Drs. Bemiller and Swain. Claimant's Brief at 4. These contentions lack merit.

Contrary to claimant's contentions, the administrative law judge rationally found the medical opinion evidence insufficient to establish that the miner's death was due to pneumoconiosis, finding that the opinions of Drs. Bemiller and Swain, the only evidence supportive of claimant's burden, were not well reasoned or documented and thus entitled to little weight. Decision and Order at 5-6. Initially, the administrative law judge found that the record showed that both Dr. Bemiller and Dr. Swain had extensive knowledge of the miner and his conditions as they saw him extensively over the course of at least a decade. Decision and Order at 6; Claimant's Exhibits 1, 2. The United States Court of Appeals for the Third Circuit,⁴ within whose jurisdiction this case arises, has held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician. *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); 20 C.F.R. §718.104(d). Herein, the administrative law judge, nonetheless, rationally found that despite their status as treating physicians, she was unable to accord the opinions of Drs. Bemiller and Swain controlling weight because the opinions were not well reasoned or documented. Decision and Order at 6.

Specifically, the administrative law judge reasonably exercised her discretion as trier-of-fact, in finding that the opinion of Dr. Bemiller was insufficient to establish that the miner's death was due to pneumoconiosis because the opinion was conclusory and because the physician failed to provide any objective data which supported his opinion.⁵ Decision and Order at 6; Claimant's Exhibit 1; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fuller v.*

⁴ The administrative law judge found that this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's most recent coal mine employment was in Pennsylvania. Decision and Order at 3, n.3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁵ Dr. Bemiller, in a one page letter dated August 20, 2003, stated

Mr. Dudash Jr. had a long history of working in the coal mines for many years. He later became symptomatic with shortness of breath secondary to Black Lung Disease (Pulmonary Anthrasilicosis) which also aggravated his Coronary Artery Atherosclerosis. Obviously the Coal Workers Pneumoconiosis contributed to his poor health of many years duration and to his death.

Claimant's Exhibit 1.

Gibraltar Coal Corp., 6 BLR 1-1291 (1984); *see generally Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991). Likewise, the administrative law judge rationally found that the opinion of Dr. Swain was ambiguous and that it did not definitively conclude that the miner's death was hastened by pneumoconiosis.⁶ Decision and Order at 6; Claimant's Exhibit 2. In particular, the administrative law judge found that Dr. Swain's statement was ambiguous as to the effect of pneumoconiosis on the miner's death, finding that the physician concluded only that the miner's marked dyspnea and difficulty breathing were hastened by his severe lung disease. *Id.* As it was not inherently unreasonable for the administrative law judge to determine that Dr. Swain's opinion was not a conclusive opinion that pneumoconiosis hastened the miner's death, we affirm her determination that this opinion was insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a contributing cause of the miner's death because the physician did not provide a definitive opinion and did not state the bases for his conclusions. Decision and Order at 6; Claimant's Exhibit 2; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *see also Lango*, 104 F.3d 573, 21 BLR 2-12; *Siwec*, 894 F.2d 635, 13 BLR 2-259.

Furthermore, we reject claimant's general assertion that the opinions of Drs. Bemiller and Swain are well reasoned and documented because they are supported by the medical treatment notes and hospital records. Contrary to claimant's assertion, the administrative law judge rationally found that these records did not establish that the miner's death was due to pneumoconiosis. Rather, she found that they "bolster[ed]" the view that the Miner had pneumoconiosis - an element of entitlement already established" in this case. Decision and Order at 7; Director's Exhibits 6-8; *see Kuchwara*, 7 BLR 1-

⁶ Dr. Swain, in a one page letter dated September 2, 2003, stated

At the time I took over Mr. Dudash's care, there was quantitative, qualitative, subjective and objective evidence of coal-worker's pneumoconiosis, which was severe in nature, proven by conventional X ray and CT scan. He was status post coronary artery bypass grafting in November of 1983. He had multiple episodes of congestive heart failure after his bypass, most significant in 1995 with multiple hospital admissions. He continued to have marked dyspnea and difficulty breathing until the time of his death, all of which were hastened by his severe lung disease.

Claimant's Exhibit 2.

167. Substantial evidence supports the administrative law judge's finding. Director's Exhibits 6-8.

Moreover, the mere presence of pneumoconiosis is insufficient to establish entitlement to benefits in a survivor's claim. Rather, claimant has the burden of establishing that the miner's death was due to, or hastened by, pneumoconiosis. As the administrative law judge, within a reasonable exercise of her discretion as trier-of-fact, found that the only evidence supportive of claimant's burden was not credible, we affirm her finding that claimant failed to prove that pneumoconiosis caused or hastened the miner's death pursuant to Section 718.205(c).⁷ 20 C.F.R. §718.205(c); *see Lukosevicz*, 888 F.2d 1001, 13 BLR 2-100; *Neeley*, 11 BLR 1-85; *see also Addison*, 11 BLR 1-68.

⁷ In light of the affirmance of the administrative law judge's finding that the opinions of Drs. Bemiller and Swain, the only evidence supportive of claimant's burden, were insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death, we need not address claimant's further contentions regarding the contrary evidence of record because any error in the administrative law judge's consideration of those opinions would be harmless. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge