

BRB No. 07-0628 BLA

A.S. )  
(Widow of E.R.S.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
LEECO, INCORPORATED )  
c/o ACORDIA EMPLOYERS SERVICE )  
 )  
Employer-Respondent ) DATE ISSUED: 04/22/2008  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order-Denial of Benefits (05-BLA-5915) of

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<sup>1</sup> Claimant is the widow of the miner, who died on June 10, 2004. Director's Exhibit 50. The miner filed an application for benefits on January 27, 2003. Director's Exhibit 2. Prior to his death, the miner requested a formal hearing. Director's Exhibit 30. Claimant filed her survivor's claim on August 2, 2004. Director's Exhibit 42. Due to the miner's death, his claim is being pursued by his widow.

Administrative Law Judge Thomas F. Phalen, Jr., on a miner's claim and 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 credited the miner with twenty-nine years of coal mine employment, based on a stipulation of the parties.<sup>2</sup> The administrative law judge accepted employer's concession that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and he found that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits on both the miner's and the survivor's claims.

On appeal, claimant asserts that the administrative law judge erred in finding that pneumoconiosis was not a factor in the miner's disability or death. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits on the miner's claim, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For a survivor's claim filed on or after January 1, 1982, where pneumoconiosis is not the cause of death, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially

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<sup>2</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 43.

contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

### MINER'S CLAIM

Pursuant to 20 C.F.R. §718.204(c), claimant asserts that the administrative law judge erred in discounting Dr. Baker's opinion. We disagree. The administrative law judge reviewed the medical opinions of four physicians. Dr. Caffrey opined that the miner's coal workers' pneumoconiosis was too mild to have caused any disabling respiratory impairment. Director's Exhibit 54. Dr. Rosenberg opined that the miner was disabled by his advanced lung cancer that was unrelated to coal dust inhalation, and that his disability was unrelated to coal workers' pneumoconiosis or coal dust exposure. Employer's Exhibits 1, 3-5. Dr. Fino opined that the miner was disabled due to his cigarette smoke-induced emphysema, and stated that the miner's coal dust exposure did not result in a functional impairment or disability.<sup>3</sup> Employer's Exhibit 7. Dr. Baker opined that the miner's coal workers' pneumoconiosis, cancer, and chronic obstructive pulmonary disease related to both smoking and coal dust exposure contributed fully to his disabling impairment. Director's Exhibit 13.

The administrative law judge found that Dr. Caffrey's opinion that the miner's coal workers' pneumoconiosis would not have caused a disabling impairment merited "some weight" based on Dr. Caffrey's expertise<sup>4</sup> and his opportunity to view the miner's autopsy lung tissue slides. Decision and Order at 14. The administrative law judge further chose to accord "great weight" to Dr. Rosenberg's opinion that the miner's disability was due to lung cancer and not coal workers' pneumoconiosis, because Dr. Rosenberg had "cogently explained" that there were no physical findings indicative of disability due to coal workers' pneumoconiosis. *Id.* The administrative law judge further

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<sup>3</sup> During Dr. Fino's deposition, he indicated that the statement in his written report that "there is insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis," was in error, and he opined that "[t]here definitely [was] pneumoconiosis present. . . ." Employer's Exhibit 7. The administrative law judge noted Dr. Fino's correction of his opinion and stated "I place no weight on Dr. Fino's report but find that his deposition represents his opinion" as to the cause of the miner's total disability. Decision and Order at 14.

<sup>4</sup> The administrative law judge had noted that Dr. Caffrey is Board-certified in Anatomical and Clinical Pathology. Decision and Order at 7; Director's Exhibit 54.

noted that Drs. Rosenberg and Fino agreed that the extensive type of emphysema the miner had is a type that is caused by smoking, and he found that Dr. Fino's opinion, that the miner was disabled by smoking-related emphysema, supported the opinions of Drs. Caffrey and Rosenberg.

In assessing Dr. Baker's opinion, the administrative law judge determined that the opinion was entitled to less weight, because Dr. Baker was not "privity to any of the autopsy evidence that demonstrated mild CWP compared with extensive panlobular emphysema," and because the pulmonary function study he considered was invalidated. The administrative law judge stated that Dr. Baker's "knowledge of this may have altered his opinion." *Id.* at 14. The administrative law judge accorded greatest weight to Dr. Rosenberg's opinion, as supported by the opinions of Drs. Caffrey and Fino.

Contrary to claimant's contention, the administrative law judge reasonably accorded less weight to Dr. Baker's opinion because the physician did not have a complete picture of the miner's health, which, the administrative law judge found, was characterized by mild coal workers' pneumoconiosis and extensive, smoking-related emphysema, and because Dr. Baker's opinion was based on a pulmonary function study that had been invalidated. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*)(Boggs, J., concurring); *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Moreover, the administrative law judge acted within his discretion to find that the weight of the more probative medical opinion evidence did not establish that the miner's disability was due to pneumoconiosis.<sup>5</sup> *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, we reject claimant's contention and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). Since we affirm the administrative law judge's finding that the evidence did not establish that the miner's disability was due to pneumoconiosis, an essential element of entitlement in his claim pursuant to Part 718, *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2, we affirm the administrative law judge's denial of benefits on the miner's claim.

## SURVIVOR'S CLAIM

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<sup>5</sup> Claimant also asserts that the administrative law judge may have "selectively analyzed" the medical evidence. Claimant's Brief at 4. Claimant does not substantiate this allegation in any manner, and we decline to discuss it further. *See Cox v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988).

Pursuant to 20 C.F.R. §718.205(c), the record reflects that no evidence was presented that pneumoconiosis caused or hastened the miner's death, and the administrative law judge found that the relevant medical opinions were "unanimous" in stating that the miner's death was unrelated to pneumoconiosis.<sup>6</sup> Decision and Order at 16. Claimant, however, contends that since Dr. Baker diagnosed a moderate pulmonary impairment, "it is reasonable to conclude that the miner's moderate pulmonary impairment weakened his lungs," and that thus, "it can be reasonably concluded that coal workers' pneumoconiosis did contribute" to the miner's death. Claimant's Brief at 4.

Claimant's contention lacks merit. An administrative law judge's findings "must be based solely on the medical evidence contained in the record." *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). The administrative law judge correctly noted that Dr. Baker did not address the cause of the miner's death. Therefore, we reject claimant's contention and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c), and we affirm the denial of survivor's benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2

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<sup>6</sup> As the administrative law judge found, the miner's death certificate listed lung cancer as the sole cause of death, and Dr. Baker's opinion, which predated the miner's death, did not address the cause of his death. Decision and Order at 16; Director's Exhibits 13, 50. Further, he found that Drs. Oesterling, Rosenberg, and Vuskovich opined that pneumoconiosis did not contribute to or hasten the miner's death from lung cancer due to smoking. Employer's Exhibits 3, 6-8, 10. Additionally, the record reflects that the report of the miner's autopsy did not address the cause of his death. Director's Exhibit 51.

Accordingly, the administrative law judge's Decision and Order-Denial of 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