

BRB Nos. 03-0797 BLA
and 03-0797 BLA-A

MOLLIE E. HARVEY (Widow of VIRGIL D. HARVEY))	
)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
BELVA COAL COMPANY/CAYMEN COAL, INCORPORATED)	DATE ISSUED: 08/30/2004
)	
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (2001-BLA-0047) of Administrative Law Judge Richard A. Morgan denying benefits 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). This case is on appeal before the Board for a second time. In the last appeal, the Board affirmed as unchallenged

the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), (3), and death due to pneumoconiosis under 20 C.F.R. §718.205(c)(1), (3), but vacated his findings under Sections 718.202(a)(2), (4) and 718.205(c)(2), (4), (5), and remanded this case for a reevaluation and weighing of the medical opinions of record thereunder. On remand, the administrative law judge found the weight of the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4) and 718.203(b), but insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), (4), (5). Accordingly, benefits were denied.

In the present appeal, claimant contends that the evidence is sufficient to establish death due to pneumoconiosis at Section 718.205(c)(2), (4), (5). Employer responds, urging affirmance of the denial of benefits. Employer has also filed a cross-appeal, challenging the administrative law judge's finding that pneumoconiosis was established under Section 718.202(a)(2), (4), to which claimant responds, urging affirmance of the administrative law judge's findings, and employer replies, reiterating its arguments on cross-appeal. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).¹

¹This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's last year of qualifying coal mine employment occurred in the State of West Virginia. Director's Exhibits 2, 22-2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Claimant contends that the administrative law judge erred in weighing the conflicting medical opinions at Section 718.205(c). Specifically, claimant argues that the administrative law judge erroneously credited the opinions of employer's experts and failed to accord proper weight to the opinions of Drs. Green, Donahoe and DeLara which, taken together, are reasoned and sufficient to establish that pneumoconiosis was a significant contributing cause of the miner's death. Claimant's arguments lack merit.

After considering 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 contains no reversible error. The administrative law judge accurately reviewed the conflicting medical opinions of record and the relative qualifications of the physicians, and permissibly accorded no weight to the opinion of Dr. Donahoe, who indicated on the miner's death certificate that chronic obstructive pulmonary disease (COPD) was a significant condition contributing to the cause of death, because the physician did not explain the underlying bases for his conclusions or relate the miner's COPD to coal mine employment. Decision and Order at 22; Decision and Order on Remand at 11; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). The administrative law judge properly found that the opinion of the autopsy prosector, Dr. DeLara, was insufficient to establish that the miner's death was due to pneumoconiosis, as the physician attributed the miner's death to severe acute bronchopneumonia but failed to indicate whether the simple pneumoconiosis or related COPD that he diagnosed played any role in the miner's death. Decision and Order at 22; Decision and Order on Remand at 12; *see Shuff*, 967 F.2d 977, 16 BLR 2-90; *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

The administrative law judge also acted within his discretion in according little weight to Dr. Green's opinion, that pneumoconiosis was a significant contributing factor to the miner's death from severe acute bronchopneumonia since it "would have caused significant compromise of his pulmonary reserve thus making it more difficult to recover from an episode of pneumonia," Claimant's Exhibit 1, as the administrative law judge found that the physician did not identify the clinical tests which supported this conclusion. Decision and Order on Remand at 16; *see generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Noting that Dr. Green was the only pathologist of record, including the prosector, who characterized the miner's pneumoconiosis as "severe" and who described areas of pulmonary fibrosis related to pneumoconiosis which had progressed to the stage of honeycomb fibrosis, the administrative law judge found that Dr. Green's analysis of the available medical data was "somewhat cursory" and lacked sophistication in that the physician failed to specify the size of the macules, micronodules and interstitial fibrosis he observed. Decision and Order on Remand at 16-17; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge permissibly concluded that Dr.

Green's opinion was insufficient to meet claimant's burden under Section 718.205(c) because it was not as well-reasoned as the contrary opinions of Drs. Naeye, Bush, Castle and Morgan, buttressed by the opinion of Dr. Fino, that even if pneumoconiosis were present, it was unrelated to the miner's death from acute bronchopneumonia attributable to recurrent bouts of aspiration pneumonia caused by multiple strokes and dementia. *Id.* We reject claimant's argument that, consistent with *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), the opinions of employer's experts can carry little or no weight because they did not diagnose pneumoconiosis and the administrative law judge found the existence of the disease established at Section 718.202(a)(2), (4). Claimant's reliance upon *Scott* is misplaced, as the pertinent issue therein was the cause of the living miner's totally disabling respiratory impairment, *Scott*, 289 F.3d 263, 22 BLR 2-372, while the issue in the present survivor's claim was the cause of the miner's death; moreover, employer's experts did not relate the miner's death to any underlying lung disease regardless of cause.

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). The administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) is supported by substantial evidence and is affirmed. Consequently, we affirm the administrative law judge's denial of benefits, and need not address employer's arguments on cross-appeal regarding the issue of the existence of pneumoconiosis at Section 718.202(a)(2), (4).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's determination to affirm the administrative law judge's decision denying benefits in this widow's claim. I write separately because I do not agree with the majority's view that the rationale of *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) does not apply to survivors' claims (doctors' opinions which directly contradict the administrative law judge's finding of pneumoconiosis arising out of coal mine employment can carry little weight at most on the issue of causation at 20 C.F.R. §718.204(b)). A doctor who is incapable of finding a miner totally disabled by pneumoconiosis because he did not diagnose the pneumoconiosis which the medical evidence established is, for the same reason, also incapable of finding that pneumoconiosis contributed to the miner's death.

It is unnecessary, however, to address employer's argument that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202, because a fair reading of the administrative law judge's decision reveals that he found that claimant did not offer substantial evidence to support a finding of death due to pneumoconiosis. Although claimant argues that the administrative law judge erred in failing to credit Dr. Green's opinion, claimant has no response to the specific criticisms the administrative law judge leveled against Dr. Green's opinion. Instead, she asserts that under *Scott*, "even a poorly documented medical opinion, which links the disability to

pneumoconiosis...is entitled to be considered as substantial evidence...” on the issue of causation. Brief for Claimant at 12. The Fourth Circuit held causation established in *Scott* where the evidence showed: three possible sources for the miner’s totally disabling respiratory impairment: - pneumoconiosis, smoking and cardiac problems; a poorly documented opinion linked the miner’s disability to his pneumoconiosis; and there was no credible evidence eliminating pneumoconiosis as a cause.

In contrast to *Scott*, the issue in the case at bar is whether pneumoconiosis was a substantially contributing cause of death, where the immediate cause was bronchopneumonia. The court’s logical inevitability analysis which underpins the court’s decision in *Scott* has no application to this case. Hence, the administrative law judge properly held that claimant failed to establish that the miner’s death was due to pneumoconiosis. For that reason, I concur in the majority’s determination to affirm the administrative law judge’s Decision and Order denying benefits.

REGINA C. McGRANERY
Administrative Appeals Judge