BRB No. 98-1535 BLA

ELLA MAE COOK (Widow of Alvin Jay Cook) Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 8/24/99 DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Mark E. Solomons (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1387) of Administrative Law Judge Daniel F. Sutton awarding 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). The administrative law judge, based on the parties' stipulation, credited the miner with at least fourteen years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found 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) and 718.203(b).[1] The administrative law judge also found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

[1]Although the administrative law judge found that collateral estoppel applies to preclude employer from relitigating the issues of pneumoconiosis and causal relationship of pneumoconiosis since they were decided in the prior miner's claim, the administrative law judge nonetheless considered these issues as properly before him in the survivor's claim. Decision and Order at 12.

Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant[2] responds, urging affirmance of the administrative law

[2]Claimant is the widow of the miner, Alvin Jay Cook, who died on May 18, 1996. Director's Exhibits 1, 8. The miner filed a claim on March 16, 1984. Director's Exhibit 29. On March 16, 1989, Administrative Law Judge Ben L. O'Brien issued a Decision and Order awarding benefits, *id*., which the Board affirmed, *Cook v. Eastern Associated Coal Corp.*, BRB No. 91-1578 BLA (Dec. 28, 1992)(unpub.). The Board subsequently issued an Order, which denied employer's request for reconsideration. *Cook v. Eastern Associated Coal Corp.*, BRB No. 91-1578 BLA (Order)(Jan. 19, 1996)(unpub.). Further, the Board issued a Decision and Order, which granted employer's second request for reconsideration, but denied the relief requested and affirmed its Decision and Order affirming Judge O'Brien's award of benefits. *Cook v. Eastern Associated Coal Corp.*, BRB No. 91-1578 BLA (Dec. 16, 1997)(unpub.). We note that the award of benefits on the miner's claim, which was

judge's Decision and Order.[3] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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filed after January 1, 1982, Director's Exhibit 10, does not provide a basis for a derivative survivor's award under Section 401(a) of the Act, 30 U.S.C. §901(a), nor does it provide the benefit of the miner's filing date to claimant under Section 422(l) of the Act, 30 U.S.C. §932(l). *See Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989). Claimant filed her survivor's claim on June 11, 1996. Director's Exhibit 1.

[3]Employer filed a brief in reply to claimant's response brief, which reiterates its prior contentions.

[4]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[5] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case lies, adopted the standard whereby pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

[5]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge considered the opinions of Drs. Dy, Gaziano, Jones, Kleinerman, Maramba and Naeye. Whereas Drs. Gaziano, Kleinerman and Naeye opined that pneumoconiosis was not a contributing cause of the miner's death, Director's Exhibit 10; Employer's Exhibits 2, 3, 5, 6, Drs. Maramba and Jones opined that pneumoconiosis was a contributing cause of the miner's death,[6] Claimant's Exhibits 1, 2; Employer's Exhibit 1. The death certificate, signed by Dr. Maramba, lists cardiorespiratory arrest as the immediate cause of the miner's death, and anthracosis, arteriosclerotic heart disease, left bundle branch block and generalized pulmonary emphysema as other significant conditions contributing to the miner's death. Director's Exhibit 8. Although Dr. Dy diagnosed anthracosis and mild macular anthracotic pneumoconiosis, he did not opine that either of these conditions contributed to the miner's death. Director's Exhibit 9. The administrative law judge properly accorded greater weight to the opinions of Drs. Jones and Maramba than to the contrary opinions of Drs. Gaziano, Kleinerman and Naeye because he found the opinions of Drs. Jones and Maramba to be better reasoned and documented.[7] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

[6]Dr. Maramba opined that the miner's occupational lung disease was an important contributing factor in his death. Claimant's Exhibit 1; Employer's Exhibit 1. Dr. Jones opined that the miner's death was hastened and/or a result of his occupational exposure to coal dust. Claimant's Exhibit 2.

[7]The administrative law judge stated that "the consultative report from Dr. Gaziano...consists of a form, on which Dr. Gaziano wrote 'yes' or 'no' next to a series of questions." Decision and Order at 14. The administrative law judge observed that Dr. Gaziano's "only explanation of his answers is found in comments inserted at the bottom of the form that [the miner's] autopsy revealed pneumoconiosis, that an antemortem pulmonary function study was disabling and that he died of a heart attack." *Id*. The administrative law judge determined that "these brief comments do not adequately reflect what medical evidence Dr. Gaziano relied upon, and they certainly provide no meaningful insight into his rationale underlying his conclusions." *Id*. Further, the administrative law judge stated that "Dr. Naeye failed to reconcile his statement that genetic panlobular emphysema is much less apt to cause cor pulmonale as other types of emphysema with his later acknowledgment that the autopsy showed that [the miner] suffered from cor pulmonale." *Id*. at 15. The administrative law judge also stated that the "excerpts from...[Dr. Naeye's] deposition transcript shows (sic)...[that] his answers to simple questions *on direct examination* were often convoluted and non-responsive, leading to a further erosion of the credibility of his opinions." *Id*.(emphasis in original). In

(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject employer's assertions that the administrative law judge failed to provide a valid basis for according dispositive weight to the opinions of Jones and Maramba,[8] and that the administrative law judge mischaracterized the medical opinions of Drs. Kleinerman, Maramba and Naeye. Moreover, we reject employer's assertions that the administrative law judge substituted his opinion for that of the physicians, and that the administrative law judge selectively analyzed the medical evidence of record.

Employer, citing *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), asserts that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), by finding that

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addition, the administrative law judge stated that Dr. Kleinerman's "statement that genetic centriacinar or panacinar emphysema can only be diagnosed by a blood test leaves the reported fact that one of [the miner's] seven siblings had some unspecified type of emphysema as the only objective inclination of a possible genetic etiology." *Id*. The administrative law judge observed that "[t]here is no evidence in the record that [the miner] ever underwent such a blood analysis." *Id*. at 11 n.4. In contrast, the administrative law judge stated that "the opinions expressed by the treating physician, Dr. Maramba, and the Claimant's consulting pathologist, Dr. Jones,...[are] better reasoned and better supported by the objective medical evidence." *Id*. at 15. The administrative law judge observed that "Dr. Maramba's opinions were formed over the course of a long treatment relationship which encompassed multiple hospitalizations, clinical observations and diagnostic tests." *Id*. at 14. Additionally, the administrative law judge observed that Dr. Jones's "unhesitating" conclusion with respect to the cause of the miner's death was "[b]ased on the medical evidence reviewed, including the unanimous pathological finding of diagnostic lesions (coal dust macules) of coal workers' pneumoconiosis and [the miner's] clinical history of repeated bouts of pulmonary insufficiency and chronic bronchitis attributed to occupational lung disease by Dr. Maramba." *Id*. at 7.

[8]We reject employer's assertion that the administrative law judge erred by failing to explain why he accorded greater weight to the opinion of Dr. Jones than to the contrary opinions of Drs. Kleinerman and Naeye, in view of the superior qualifications of Drs. Kleinerman and Naeye. An administrative law judge is not required to defer to a doctor with superior qualifications. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

the opinion of Dr. Maramba is entitled to greater weight than the contrary opinions of record based on the impermissible presumption that the opinion of a treating physician is entitled to great weight. In *Akers*, the administrative law judge concluded that the claimant established that pneumoconiosis contributed to the miner's death based on the testimony of Drs. Bembalkar and Hamdan, who had examined or treated the miner for only a month. The administrative law judge credited the testimony of Drs. Bembalkar and Hamdan over the testimony of all other doctors for no reason except that Drs. Bembalkar and Hamdan treated the miner. The United States Court of Appeals for the Fourth Circuit observed that in reaching his conclusion, the administrative law judge ignored entirely the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. Hence, the court held that the administrative law judge's invocation of a rule of absolute deference to treating and examining physicians relieved the administrative law judge of his statutory obligation to consider all of the relevant evidence of record. *Akers*, 131 F.3d at 441, 21 BLR at 2-275-2-276.

In the case at hand, the administrative law judge did not mechanically accord greater weight to the opinion of Dr. Maramba because of Dr. Maramba's status as the miner's treating physician. To the contrary, the administrative law judge stated, "I consider it particularly appropriate to rely on the opinion of the treating physician, Dr. Maramba, in this case where the evidence reflects that the diagnoses of pneumoconiosis, anthracosis and occupational chronic obstructive pulmonary disease have been consistently made over the course of an extensive treatment relationship and in the context of repeated hospitalizations for acute respiratory problems." Decision and Order at 15. The administrative law judge observed that "this is not a case where references to pneumoconiosis and occupational lung disease first appear in a physician's post-mortem statements which might lead to an inference that such findings are more likely influenced by an attempt to secure benefits than the diagnosis and treatment of illness." *Id*. Moreover, the administrative law judge reviewed the medical opinions of Drs. Gaziano, Kleinerman, and Naeye in detail, noting the doctors' respective qualifications, the nature of their findings, and the documentation underlying their conclusions. Decision and Order at 5-11. Thus, since the administrative law judge, as trier of fact, rationally accorded greater weight to the opinion of Dr. Maramba than to the contrary opinions of Drs. Gaziano, Kleinerman and Naeye because Dr. Maramba was the miner's treating physician, we reject employer's assertion that the administrative law judge violated the APA by finding that the opinion of Dr. Maramba is entitled to greater weight than the contrary opinions of record based on the impermissible presumption that the opinion of a treating physician is entitled to great weight. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Akers, supra*; *Onderko v.*

Director, OWCP, 14 BLR 1-2 (1989).

Next, employer asserts that the administrative law judge violated the APA by finding that the opinion of Dr. Dy is entitled to greater weight than the contrary opinions of Drs. Kleinerman and Naeye based on the impermissible presumption that the opinion of an autopsy prosector is entitled to great weight. We decline to address employer's argument, inasmuch as the administrative law judge provided valid alternate bases for discounting the opinions of Drs. Kleinerman and Naeye, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that he accorded greater weight to the opinions of Drs. Maramba and Jones than to the contrary opinions of Drs. Kleinerman and Naeye because he found the opinions of Drs. Maramba and Jones to be better reasoned and documented. *See Clark, supra*; *Fields, supra*; *Lucostic, supra*; *Fuller, supra*. Thus, any error by the administrative law judge in this regard would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We hold, therefore, that substantial evidence supports the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Shuff, supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge