BRB No. 00-0193 BLA

JOSEPHINE BARNETTE (Widow of FLOYD BARNETTE)	)	
Claimant-Petitioner	)	
v.	)	
CLOVER MINING, INCORPORATED	)	
	)	DATE ISSUED:
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Mary Zanolli Natkin (Legal Practice Clinic at the Washington and Lee School of Law), Lexington, Virginia, for claimant.

K. Keian Weld (Employment Programs Litigation Unit), Charleston, West Virginia, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1702) of Administrative Law Judge Pamela Lakes Wood 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). The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in permitting employer to develop post-hearing evidence and in her consideration of the evidence pursuant to Section 718.205(c)(2). Employer/Carrier responds, urging affirmance of the decision. The Director, Office of Workers' Compensation Programs, has indicated that he will not 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'Keeffe 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 in a claim filed after January 1, 1982, 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 had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *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). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that

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Claimant is Josephine Barnette, the surviving spouse of the miner, Floyd Barnette, who died on January 7, 1996, due to a massive heart attack. Director's Exhibit 1.

The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.205(c)(1), (3), (4) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). *See Shuff, supra*.

On appeal, claimant first contends that the administrative law judge erred in permitting employer to submit post-hearing evidence by Dr. Fino. Claimant contends that employer never developed evidence, despite knowing for two years prior to the hearing that the sole issue for resolution was whether pneumoconiosis hastened the miner's death. Section 725.456(b)(1) provides that any evidence not submitted to the district director may be received in evidence subject to the objection of any party, if it is sent to all other parties at least twenty days before the hearing. 20 C.F.R. §725.456(b)(1). The hearing in the instant case was scheduled for March 24, 1999. Claimant submitted Dr. Green's medical opinion on February 4, 1999, approximately one month prior to twenty days before the hearing, and Dr. Jones's medical opinion on March 1, 1999, three days prior to the twenty day rule due date. At the hearing, employer objected to Dr. Jones' opinion as surprise evidence and requested the opportunity to supply post-hearing evidence. The administrative law judge stated at the hearing that it was her policy to permit a party which feels that it has been unfairly prejudiced to have the opportunity to rebut the evidence. Hearing Transcript at 22.

Claimant contends that the administrative law judge erred in finding that Dr. Jones's opinion constitutes surprise evidence. According to claimant, Dr. Green, whose opinion was submitted well in advance of twenty days prior to the hearing, reached the same conclusions, evaluated the identical issues, and reviewed the same evidence as Dr. Jones. Thus, Dr. Jones's opinion is not "surprise evidence." Claimant's Brief at 7-8. Subsequent to the hearing, claimant filed a Motion to Reconsider Ruling Allowing Employer to Develop Post-Hearing evidence, dated April 22, 1999, in which claimant argued that employer had not established good cause for submission of post-hearing evidence and that employer's due process rights would not be violated if it were denied the opportunity to submit post-hearing evidence. In her Order Denying Reconsideration of Ruling Allowing Post-Hearing Evidence, the administrative law judge disagreed with claimant's arguments, finding that it appeared that claimant withheld Dr. Jones's opinion until just prior to the twenty day deadline, to ensure that employer would not have an opportunity to respond. The administrative law judge further found that if this were not the case, it was nevertheless her policy, in the interest of fairness and in order to discourage such tactics, to allow parties to respond to evidence exchanged just prior to the twenty-day deadline. The administrative law judge thus found that employer had established good cause to submit Dr. Fino's report in response to Dr. Jones's opinion. The administrative law judge further found that Dr. Jones had not submitted any other opinions in this case and that his report is not cumulative of the other evidence of record. The administrative law judge concluded that "Dr. Fino's report is a measured, appropriate evidentiary response, and, in the sound exercise of my discretion, it will be admitted into

evidence, and Claimant's motion for reconsideration will be denied." Order Denying Reconsideration at 2.

In *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991), the Fourth Circuit, stated that it agreed with the general principle that due process, as incorporated into the Administrative Procedure Act, may override the twenty-day rule or require the development of post-hearing evidence in circumstances where the employer is denied any opportunity to respond to evidence submitted by the claimant which the decision maker considers dispositive. The Fourth Circuit continued that the purpose of the twenty-day rule is to prevent unfair surprise, but that rigidly enforced, the twenty-day rule itself would invite abuse by encouraging parties to withhold evidence until just before the deadline. Contrary to claimant's contention that Dr. Jones's opinion did not constitute surprise evidence, the administrative law judge permissibly found that Dr. Jones has not previously submitted an opinion in this case, and his opinion is not cumulative. We therefore affirm the administrative law judge's decision to permit post-hearing evidence responsive to Dr. Jones's opinion as she acted within her discretion in finding that claimant's submission of Dr. Jones's opinion, just prior to the deadline would unfairly prejudice employer; moreover, the administrative law judge properly provided claimant with an opportunity to respond to such evidence, if necessary, by motion. *See Henderson*, *supra*; *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Cabral v. Eastern Associated Coal Corp.*, 18 BLR 1-25 (1993); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987), *aff'g on recon. en banc*, 9 BLR 1-195 (1986); Hearing Transcript at 22 - 24.

Claimant next contends that the administrative law judge erred in her weighing of the evidence at Section 718.205(c)(2). Claimant contends that Dr. Fino's opinion fails to address whether pneumoconiosis hastened the miner's death. Claimant further contends

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Claimant is correct that the administrative law judge stated that the opinions of Drs. Green and Jones corroborate each other and were based essentially on the same theory that the heart and lung operate as a unit and that the miner's already compromised heart was further compromised due to pneumoconiosis. Decision and Order at 9. However, the administrative law judge also found that Dr. Jones agreed with Dr. Green, but suggested a "slightly different mechanism." Decision and Order at 10. While Dr. Green opined that there was evidence of increased pulmonary vascular pressures, which indicates an increased work load on the heart due to the miner's pneumoconiosis, Dr. Green opined that the miner's pneumoconiosis weakened the miner's pulmonary reserve, reducing cardiac oxygenation, thereby increasing the likelihood that the miner would suffer from a myocardial arrhythmia as well as diminishing his chances of surviving such an event. Claimant's Exhibits 1, 2.

that because Drs. Green and Jones personally reviewed the autopsy evidence and are board-certified pathologists, their opinions should have been credited. Lastly, claimant contends that the administrative law judge erred in relying upon Dr. Gaziano's opinion as the physician did not provide sufficient rationale for his findings.

Dr. Fino reviewed Dr. Jones's opinion, and opined that the miner died as a result of ischemic heart disease due to coronary artery atherosclerosis, and that the miner would have died as and when he did had he never worked in a coal mine. Employer's Exhibit 1. The administrative law judge found that Dr. Fino's opinion discussed medical literature which states that miners do not have an increased risk of death from coronary artery disease and that chronic hypoxia associated with complicated pneumoconiosis has not been shown to cause an increased incidence of myocardial infarction or cardiac arrhythmia. The administrative law judge found that claimant had established that it was possible that there was some decreased lung function that may have hastened the miner's death and employer had shown that it was also possible that the miner would have died in the same manner and at the same time had he never worked in the mines. In resolving the conflict in the evidence, the administrative law judge acknowledged the credentials of Drs. Green and Jones as pathologists, and noted that they are better equipped to assess the autopsy slides, but found that as board-certified pulmonologists, Drs. Fino and Gaziano are in a better position to assess the "likely physiology of claimant's condition." Decision and Order at 12. The administrative law judge then found that Drs. Green and Jones provided speculative opinions, and that Dr. Fino's opinion, as corroborated by Dr. Gaziano, provided a better reasoned and documented opinion. The administrative law judge additionally found that due to the limited medical data, it is unclear what the immediate cause of death was in this case. The administrative law judge noted that there is no clinical data as to the miner's respiratory condition in the months prior to his death, and that, in fact, there are no medical records for over a decade before the miner died. Under these circumstances, the administrative law judge concluded that claimant had not met her burden in establishing that the miner's death was due to pneumoconiosis.

We disagree with claimant that the administrative law judge committed error in her consideration of the medical opinion evidence. In a rational exercise of her discretion, the administrative law judge properly determined that claimant's physicians provided speculative opinions, and that Dr. Fino provided a better reasoned opinion that claimant's pneumoconiosis could not have contributed to the miner's death. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also permissibly relied upon the credentials of Drs. Fino and Gaziano as board-certified pulmonologists, finding that they were better qualified to discuss the miner's condition. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Massey v. Eastern Associated Coal*

Corp., 7 BLR 1-37 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 (1983). Moreover, contrary to claimant's contention, the administrative law judge permissibly found that a fair reading of Dr. Gaziano's opinion reflects that pneumoconiosis did not contribute in any way to the miner's death, and that this opinion supports Dr. Fino's opinion. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In light of the administrative law judge's additional finding that the record is devoid of any evidence that the miner's pneumoconiosis impaired him during his lifetime, we affirm the administrative law judge's determination that the findings by claimant's physicians are unsupported by any additional evidence other than the autopsy results, and that substantial evidence does not support claimant's entitlement to benefits. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Inasmuch as the administrative law judge properly considered the evidence pursuant to Section 718.205(c)(2), we affirm the administrative law judge's finding that claimant failed to meet her burden of proof in establishing that the miner's death was hastened by pneumoconiosis.

Dr. Gaziano completed a "Request for Reasoned Medical Opinion" from the United States Department of Labor, answering "no" to the question of whether the miner's death was due to pneumoconiosis. Director's Exhibit 11. Dr. Gaziano also answered "no" to whether pneumoconiosis was a substantially contributing cause or factor leading to death, and "no" to whether the miner's death was caused by complication of pneumoconiosis. *Id*. The physician's comments indicate that the manner of death would best be explained by a cardiac event such as lethal arrhythmia. *Id*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge