BRB No. 01-0347 BLA

IVA HUBBELL (Widow of RAY HUBBELL) Claimant-Respondent v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Darlene Robinson, Oakland City, Indiana, for claimant.

Laura Metcoff Klaus, (Greenberg Traurig), Washington D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-467 and 98-BLA-468) of Administrative Law Judge Donald W. Mosser denying benefits on a miner's claim and awarding benefits on a survivor's claim[1] filed pursuant to the provisions of Title IV of the

[1] Claimant, Iva Hubbell, is the widow of the miner, Ray Hubbell, who died on December 17, 1996. The death certificate lists the causes of death as "bronchogenic

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge found that the evidence of record established a coal

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carcinoma" and "black lung." Director's Exhibit 30. The miner initially filed a claim on December 11, 1981, which was denied by the district director. Director's Exhibit 23. The miner took no further action until the filing of a second claim on December 10, 1985 which was again denied by the district director. Director's Exhibit 23. The miner filed a third claim on November 12, 1992. Director's Exhibit 1. On May 22, 1995, Administrative Law Judge Rudolf L. Jansen issued a Decision and Order awarding benefits on the claim. Director's Exhibit 26. Subsequently, the Board issued a Decision and Order vacating the award of benefits and remanding the case for further consideration. *Hubbell v. Peabody Coal Co.*, BRB No. 95-2233 BLA (Dec. 20, 1995); Director's Exhibit 27. On remand, Judge Jansen issued a Decision and Order denying benefits. Director's Exhibit 28. Subsequently, on October 1, 1997, claimant sought modification of the denial of the miner's claim, Director's Exhibit 32, which was denied by the district director, Director's Exhibit 34. Claimant requested a hearing before an administrative law judge on the denial of modification on the miner's claim. Director's Exhibit 35. Claimant filed a separate survivor's claim on March 17, 1997. Director's Exhibit 1A. Initially, benefits were awarded by the district director on the survivor's claim. Director's Exhibit 13A. Employer, subsequently sought a hearing before an administrative law judge on the survivor's claim. Both hearing requests were consolidated and the administrative law judge, without objection, considered both claims based on the evidence of record. On November 30, 2000, the administrative law judge issued the Decision and Order from which employer now appeals.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

mine employment history of forty-three years, Decision and Order at 4, and that both the x-ray evidence and the medical opinion evidence submitted subsequent to the prior denial of the miner's claim established the existence of pneumoconiosis. Decision and Order at 5-7, 13-14. The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment because he established over ten years of coal mine employment, and that employer failed to rebut the presumption. Decision and Order at 16. The administrative law judge concluded, however, that the evidence failed to establish a totally disabling respiratory impairment due to pneumoconiosis. Decision and Order at 16-19. Accordingly, benefits were denied on the miner's claim. Turning to the survivor's claim, the administrative law judge concluded that the evidence of record established "that pneumoconiosis at least hastened [the miner's] death." Decision and Order at 21. Accordingly, benefits were awarded on the survivor's claim.

On appeal, employer contends that the administrative law judge erred in determining that the evidence of record established the existence of pneumoconiosis. Employer further asserts that, even if the evidence established the presence of pneumoconiosis, the administrative law judge erred in concluding that the evidence established that the miner's death was due to pneumoconiosis. Lastly, employer objects to the application of the newly revised regulations to the instant claim. Claimant responds and does not challenge the administrative law judge's denial of benefits on the miner's claim, but urges affirmance of the award of benefits on the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.[3]

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).

To establish entitlement to survivor's benefits, claimant must demonstrate by a

[3] Because no challenge has been made to the denial of benefits on the miner's claim, the denial is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Further, the administrative law judge's findings on length of coal mine employment and entitlement to the presumption that pneumoconiosis arose out of coal mine employment, are affirmed as unchallenged on appeal.

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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hasten's the miner's death. 20 C.F.R. §718.205(c)(5); *see Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Employer asserts that the record does not contain any reasoned medical opinions that pneumoconiosis caused, contributed to, or hastened the miner's death. Specifically, employer argues that the opinion of the miner's treating physician, Dr. Avena, Director's Exhibits 4A, 5A; Employer's Exhibits 54, 57-59, which the administrative law judge relied upon to support his determination, was conclusory and unsupported by underlying documentation and should not be accorded any greater weight based on Dr. Avena's status as a treating physician. Likewise, employer contends that the administrative law judge erred in finding that the opinions of Drs. Long and Ridge buttressed Dr. Avena's opinion because they were also conclusory and unsupported. Employer further asserts that the administrative law judge erred in discounting Dr. Tuteur's opinion because he did not offer an opinion on whether pneumoconiosis hastened the miner's death when, in fact, Dr. Tuteur specifically stated that neither the inhalation of coal dust, nor the development of coal workers' pneumoconiosis was directly or indirectly responsible for causing, hastening, or contributing to the miner's death. Director's Exhibit 62. Lastly employer argues that the administrative law judge's finding in the miner's claim, that the miner's respiratory impairment was not due to pneumoconiosis, precludes a finding in the survivor's claim that death was due to pneumoconiosis.

We reject employer's assertions and affirm the administrative law judge's determination that pneumoconiosis at least hastened [the miner's] death. Contrary to employer's contention that Dr. Avena's opinion was a bare assertion unsupported by any documentation, the administrative law judge, in according great weight to Dr. Avena's opinion, found that it was particularly credible because Dr. Avena had treated the miner during the last three years of his life, attended him during numerous hospitalizations, and was extremely familiar with his condition. Decision and Order at 15, 20.

As trier-of-fact, the administrative law judge has wide discretion to determine if, in fact, a given medical opinion is sufficiently reasoned to support claimant's burden. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States*

Steel Corp., 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). In the instant case, we are unable to say that the administrative law judge's according of greatest weight to Dr. Avena's opinion regarding the cause of the miner's death constituted an abuse of that discretion. Contrary to employer's argument, the administrative law judge rationally concluded that Dr. Avena's familiarity with the miner's condition and his continuous treatment of the miner for the last three years of his life provided a sound basis for the medical conclusions reached by the physician. *See Clark*, *supra*; *see also Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990). Accordingly, we conclude that the administrative law judge, in a proper exercise of his discretion, rationally found that Dr. Avena's opinion supported a conclusion that the miner's death was hastened by pneumoconiosis. *See Shonk*, *supra*; *Clark*, *supra*. For the same reasons, we reject employer's assertion that the administrative law judge impermissibly accorded greatest weight to Dr. Avena's opinion because he was the treating physician. As discussed above, the administrative law judge fully discussed the reasons why Dr. Avena's familiarity with the miner's condition and his lengthy treatment of the miner made his opinion particularly probative. This was rational. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Cf. Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2- (7th Cir. 2001); *Railey*, *supra*; *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

Employer also contends that the administrative law judge erred in finding that the opinion of Dr. Long and the death certificate signed by Dr. Ridge supported the opinion of Dr. Avena. Decision and Order at 21. The administrative law judge also stated, however, that he placed little weight on Dr. Long's opinion because the basis of her opinion was not clear and gave no particular weight to the death certificate signed by Dr. Ridge because there was no evidence in the record of Dr. Ridge's credentials and no indication that Dr. Ridge had even treated the miner. Thus, while the administrative law judge may have erred in stating that the opinions of Drs. Long and Ridge supported Dr. Avena's opinion, considering the administrative law judge's decision as a whole, we cannot say that the administrative law judge committed reversible error in his consideration of the opinions of Drs. Long and Ridge. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Next, employer asserts that the administrative law judge erred in according less weight to the opinion of Dr. Tuteur because he failed to address whether pneumoconiosis hastened the miner's death. Contrary to employer's argument, however, the administrative law judge concluded that because Dr. Tuteur failed to recognize that the miner suffered from pneumoconiosis, his opinion regarding the cause of the miner's death was entitled to less weight. This was rational. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 54 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Revnack*, *supra*. We thus conclude that the administrative law judge has provided a permissible basis for

according less weight to the opinion of Dr. Tuteur. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Employer also asserts that the administrative law judge's finding in the miner's claim, that the miner's respiratory impairment was not due to pneumoconiosis, effectively bars the survivor's claim. This argument is rejected, however, inasmuch as disability and disability causation are not essential elements to be established in a survivor's claim. 20 C.F.R. §718.205(a), (c).

Finally, employer objects to the application of the amended regulations. While employer concedes that the amended regulation at 20 C.F.R. §718.205(c)(5), that pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death, and the amended regulation at 20 C.F.R. §718.201(c), which redefines pneumoconiosis to recognize that it is a latent and progressive disease, merely codify existing case law, *see Railey*, *supra*; *see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993)*; see also Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 1048, 21 BLR 2-391, 396-397 (7th Cir. 1998); *see also Plesh v. Director, OWCP*, 71 F.3d 103, 108, 20 BLR 2-30, 40 (3d Cir. 1995); *Curse v. Director, OWCP*, 843 F.2d 456, 457 (11th Cir. 1988); *Back v. Director, OWCP*, 796 F.2d 169, 9 BLR 2-93 (6th Cir. 1986), it nonetheless, contends that the administrative law judge's decision must be vacated and the case be remanded to the district director so that employer may respond with proof to the change in law. We disagree. Inasmuch as employer acknowledges that the changes to the amended regulations merely codified existing case law, we do not believe that employer has shown how this change compels a reopening of the record in the instant case. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999). Nor, contrary to employer's assertion, does the amended regulation at 20 C.F.R. §718.104(d), dealing with the consideration of treating physicians, require a remand of this case because Section 718.104(d) was not applied and is inapplicable to the instant case because the medical opinion evidence was developed prior to January 19, 2001. 20 C.F.R. §718.101. Moreover, in any event, as discussed, *supra*, the administrative law judge rationally accorded greater weight to the opinion of Dr. Avena, the miner's the treating physician, because he provided the best reasoned opinion of record. *See Tedesco*, *supra*; *Clark*, *supra*; *Peskie*, *supra*; *Lucostic*, *supra*.

We, therefore, affirm the administrative law judge's finding that the medical evidence established that the miner's pneumoconiosis hastened his death. 20 C.F.R. §718.205(c)(5); *see Railey*, *supra*. Further, because death due to pneumoconiosis, an essential element of entitlement, was not established in this survivor's claim, we need not consider employer's argument concerning the existence of pneumoconiosis. *See Neeley*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge