BRB No. 01-0380 BLA

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| MATHEL E. SPENCER<br>(Widow of CAMPBELL E. SPENCER<br><br>Claimant-Petitioner<br><br>v.<br><br>DANTE COAL COMPANY<br><br>Employer-Respondent<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED:<br><br>DECISION and ORDER |

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick, Morgantown, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-267) of Administrative Law Judge Gerald M. Tierney 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).[1] Based on the filing date of December 10, 1998, the administrative

[1] 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, 725 and 726). All citations to the regulations, unless otherwise noted, refer

law judge adjudicated this claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge credited the miner with thirty-five years of coal mine employment, found employer to be the responsible operator, found the existence of pneumoconiosis arising out of coal mine employment established, but found that the miner's death was not caused, contributed to or hastened by pneumoconiosis. Accordingly, benefits were denied.

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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).

[2] Claimant is the widow of the miner, Campbell E. Spencer, who died on September 24, 1998. *See* Director's Exhibits 1, 10.

On appeal, claimant argues that the administrative law judge erred in not finding that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), declines to respond to claimant's arguments on the merits, but contends that the new regulations will not affect the outcome of this case.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[3] We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(2) and 718.203(b)(2000), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death; if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death; if death was caused by complications of pneumoconiosis; or if the presumption set forth at Section 718.304, relating to complicated pneumoconiosis, is applicable.[4] 20 C.F.R. §§718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5).

Initially, claimant argues that employer's submission of four medical consultant reports violates the current rule limiting the amount of evidence which parties may develop and submit in a claim. Claimant's argument is without merit. The recent changes in the regulations governing the quantity of evidence which the parties may develop and submit in a claim apply to all claims filed after January 19, 2001. *See* 20 C.F.R. §§725.2(c), 725.414. Since the present claim was filed prior to January 19, 2001. Claimant's argument is without merit. The administrative judge law properly accepted into evidence all the medical reports submitted by employer at the hearing. *Id.*; *see* Hearing Transcript at 8; Employer's Exhibits 1-6.

Likewise, we do not find persuasive claimant's argument that the findings of the West Virginia Coal Workers' Pneumoconiosis Board rendered in 1982 are relevant to the present survivor's claim. *See* Director's Exhibit 35-7. As the findings of the West Virginia Coal Workers' Pneumoconiosis Board relate to the presence of a respiratory impairment during the miner's lifetime and do not address the cause of the miner's death, the administrative law judge did not err when he declined to rely on this report as it is insufficient to meet claimant's burden of proof at Section 718.205. *See* 20 C.F.R. §718.205(c); *Neeley, supra*. We, therefore, affirm the administrative law judge's treatment of the findings of the West Virginia Coal Workers' Pneumoconiosis Board as supported by substantial evidence.

[4] Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Finally, claimant asserts that the administrative law judge should not have relied on the medical opinions of Drs. Naeye, Bush and Tomashefski because these physicians did not have an opportunity to examine the miner during his lifetime nor did they actually perform the autopsy. In finding the opinions of these physicians more persuasive concerning the issue of whether pneumoconiosis was a factor in the miner's death, the administrative law judge is not required to reject the medical opinions of these physicians because they did not perform the autopsy or examine the miner during his lifetime. *See Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, BLR 2- (4th Cir. 2000). The administrative law judge is, however, required to provide a rational explanation for his credibility findings regarding the medical opinions. *Id*. In accepting the conclusions of Drs. Naeye, Bush, and Tomashefski, that the miner's pneumoconiosis did not cause, contribute to or hasten the miner's death, as more persuasive than the opposing conclusions of Drs. Hummer and Rizkalla, the administrative law judge rationally found that Drs. Bush and Tomashefski provided a more detailed explanation of the disease process for coal workers' pneumoconiosis and that the expertise of Dr. Naeye rendered his explanation regarding the cause of the miner's death more credible. *See* Decision and Order at 4; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 506 U.S. 1050 (1993); *Akers*, *supra*; *Sparks*, *supra*. Furthermore, the administrative law judge permissibly relied upon Dr. Renn's medical opinion, in which he attributed the miner's death to acute broncho-pneumonia and bronchiolitis superimposed on tobacco induced chronic bronchitis and pulmonary emphysema and not pneumoconiosis, based on his qualifications in pulmonary medicine. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modif. on recon.* 21 BLR 1-52 (1997). As claimant has raised no additional arguments regarding the treatment of the medical opinion evidence by the administrative law judge, we affirm the finding of the administrative law judge that claimant failed to establish by a preponderance of the evidence that the miner's death was due to pneumoconiosis and the denial of benefits as it is supported by substantial evidence. *See* 20 C.F.R. §718.205; *Shuff*, *supra*; *Neeley*, *supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge