

BRB No. 05-0458 BLA
and 05-0458 BLA-A

OSCAR SIZEMORE (Deceased))
)
 and)
)
 BELVIA SIZEMORE)
 (Widow of OSCAR SIZEMORE))
)
 Claimant-Respondent)
 Cross-Petitioner)
)
 v.)
)
 SHAMROCK COAL COMPANY,) DATE ISSUED: 12/12/2005
 INCORPORATED)
)
 and)
)
 JAMES RIVER COAL COMPANY)
)
 Employer/Carrier-)
 Petitioner)
 Cross-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order-Award of Miner's Benefits and Denial of Survivor's Benefits of Daniel J. Roketenetz, Administrative Law Judge United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky for employer.

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

PER CURIAM:

Employer appeals and claimant¹ cross-appeals the Decision and Order-Award of Miner's Benefits and Denial of Survivor's Benefits (2003-BLA-0161 and 2003-BLA-5770) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) on claims 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 lengthy history of this case is set forth in the administrative law judge's decision and the Board's prior decision and decision on reconsideration. *Sizemore v. Shamrock Coal Co.*, BRB No. 97-1493 BLA (Jul. 24, 1998)(unpub.) and *Sizemore v. Eastern Assoc. Coal Corp.*, BRB No. 97-1493 BLA (Jul. 26, 2000)(*en banc recon.*)(unpub.).

The administrative law judge found that the evidence established a coal mine employment history of thirty-one and one-half years. On the miner's claim, the administrative law judge found that employer failed to establish that it was entitled to modification of the prior award of benefits in the miner's November 20, 1992 duplicate claim. Decision and Order at 7-19. Accordingly, the administrative law judge again determined that entitlement was established on the miner's claim.

Regarding the May 15, 2001 survivor's claim, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Decision and Order at 19-22. Accordingly, benefits were denied on the survivor's claim.

On appeal, employer contends that the prior administrative law judge made a mistake in a determination of fact when he found that the miner's disability was due to pneumoconiosis and that the administrative law judge erred, therefore in denying employer's request for modification and in awarding benefits on the miner's claim.²

¹ Claimant, Belvia Sizemore, is the surviving widow of the miner, Oscar Sizemore, who died on May 29, 2000. The death certificate lists the miner's cause of death as lung cancer due to black lung disease. Director's Exhibit 113. The instant appeal encompasses both an award of benefits on a miner's claim and a denial of benefits on a survivor's claim. Claimant is not eligible for derivative survivor's benefits based on the filing date of the miner's claim. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf.*, *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86-87 (1988).

² We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, as well as his determination that employer failed to establish a mistake in the determination that the miner suffered from pneumoconiosis

Neither claimant, nor the Director, Office of Workers' Compensation Programs, (the Director) has filed a brief in this appeal.

On cross-appeal, claimant contends that the administrative law judge erred in finding that the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). In response to claimant's cross-appeal, employer urges that the denial of survivor's benefits be affirmed. The Director has not filed a brief 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that the prior administrative law judge did not make a mistake in a determination of fact when he found that the miner's total disability was due to pneumoconiosis. Specifically, employer contends that the administrative law judge erred in crediting the opinions of Drs. Clarke and Myers, that the miner's disability was due, in part, to coal workers' pneumoconiosis and coal mine dust exposure, Director's Exhibits 27, 46, because the doctors failed to assess how much of the miner's totally disabling respiratory impairment was due to pneumoconiosis and how much was due to scleroderma. Employer contends that because it is impossible to separate the effects of these two risks factors based on the physicians' conclusions, the administrative law judge impermissibly substituted his expertise for those of the medical professionals when he determined that the physicians' conclusions supported a finding of disability causation. Employer further contends that inasmuch as Drs. Broudy, Rosenberg, Fino and Dahhan, provided sound and persuasive medical rationale for their conclusions that the miner was not totally disabled due to pneumoconiosis, Director's Exhibits 26, 29; Employer's Exhibits 2-4, 7, 8, the administrative law judge erred in rejecting their opinions for the reason that the

arising out of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Further, while employer asserts generally that the "weight of the medical opinions do not establish total disability," Employer's Brief in Support of Petition for Review at 11, such an assertion does not allege specific error in the administrative law judge's finding of total disability or brief the issue in terms of relevant law. Thus, we have no substantial issue to review regarding the administrative law judge's finding of total disability and that finding is, accordingly, affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

physicians failed to diagnose the existence of pneumoconiosis. Additionally, employer contends that the administrative law judge's rejection of Dr. Broudy's opinion because Dr. Broudy failed to provide a basis for his conclusions is not supported by the record.

In reviewing the administrative law judge's findings, we conclude that he rationally determined that the prior finding: that the miner established disability causation pursuant to Section 718.204(c), was correct, therefore, the administrative law judge properly found, that no mistake in a determination of fact had been made by the prior administrative law judge. Accordingly, we reject employer's assertion in this regard and affirm the administrative law judge's determination that employer failed to establish a basis for modifying the prior award of benefits on the miner's claim. See *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In making this finding the administrative law judge considered the quality of the evidence in determining whether the opinions were supported by their underlying documentation and were adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo*, 17 BLR 1-85; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Decision and Order at 18-19. Further, the administrative law judge acted within his discretion, as fact-finder, in concluding that the opinions of Drs. Clarke and Myers were sufficient to support a finding of disability causation since the physicians found that both pneumoconiosis and scleroderma contributed to the miner's totally disabling respiratory impairment. 20 C.F.R. §718.204(c); see *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003). Further, contrary to employer's assertion, the administrative law judge permissibly accorded less weight to the opinions of Drs. Broudy, Fino, Rosenberg and Dahhan on the issue of disability causation as these physicians failed to diagnose the existence of pneumoconiosis. See *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); see also *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-374 (4th Cir. 2002). Employer's assertions in this case are tantamount to requests that the Board reweigh the evidence of record, a role outside the Board's scope, see *Anderson*, 12 BLR at 1-113. Accordingly, we affirm the administrative law judge's finding that the miner's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and we affirm the award of benefits on the miner's claim.

Regarding the denial of benefits on the survivor's claim, claimant asserts that the administrative law judge erred in finding that pneumoconiosis was not an underlying factor in the miner's death. Claimant argues that the conclusions of Dr. Spady, the miner's treating physician, were entitled to the greatest weight under 20 C.F.R. §718.104(d) and *Tussey*, 982 F.2d 1036, 17 BLR 2-16. Claimant contends that Dr. Spady treated the miner for chronic obstructive pulmonary disease and listed black lung as a

cause of the miner's death on the death certificate. Claimant further argues that the opinions of Drs. Rosenberg and Dahhan, both of whom ruled out pneumoconiosis as playing any role in the miner's death, should have been accorded less weight since neither physician examined the miner. Additionally, claimant asserts that the administrative law judge "may" have impermissibly selectively analyzed the evidence of record, Claimant's Brief at 5.

Section 718.104(d) provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

- 1) Nature of relationship.
- 2) Duration of relationship.
- 3) Frequency of treatment.
- 4) Extent of treatment.

20 C.F.R. §718.104(d)(1)-(4). The regulation also requires, however, that the administrative law judge consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

In concluding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205, the administrative law judge found that while Dr. Spady was the miner's treating physician, the physician's conclusion that the miner's death was due to pneumoconiosis was not entitled to great weight as the reports of the physician did not address the causes of the miner's death. Decision and Order at 21; Director's Exhibits 113, 115. Thus, despite Dr. Spady's status as the miner's treating physician, because his conclusions were insufficiently supported, the administrative law judge properly rejected his opinion. 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); see *Peabody Coal Co. v. McCandless*, 225 F.2d 465, 22 BLR 2-311 (7th Cir. 2001).

Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Dr. Rosenberg and Dahhan, that pneumoconiosis did not contribute to the miner's death, Employer's Exhibits 2, 4, 8, because the administrative law judge found that that these physicians offered more detailed conclusions than those of Dr. Spady. This was proper. 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d 501, 22 BLR 2-623; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Clark*, 12 BLR at 1-155; see *Island*

Creek Coal Co. v. Compton, 211 F.3d 203, 22 BLR 2-162, 2-177 (4th Cir. 2000). In conclusion, claimant has failed to demonstrate that the administrative law judge has selectively analyzed the evidence. We, therefore, affirm the administrative law judge's determination that the evidence of record was insufficient to establish that the miner's death was caused or hastened by his pneumoconiosis. 20 C.F.R. §718.205(c), and we affirm the denial of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order-Award of Miner's Benefits and Denial of Survivor's Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge