BRB No. 99-0553 BLA

ANNE SABO (o/b/o and Widow of FRANK SABO)	)	
Claimant-Petitioner	)	
v.	)	
BELLAIRE CORPORATION	)	DATE ISSUED:
Employer-Respondent	)	
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 on Both Claims of George P. Morin, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld & Schiller), Pittsburgh, Pennsylvania, for claimant.

John C. Artz (Polito & Smock, P.C.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits on Both Claims

[1] Claimant, Anne Sabo, is the widow of Frank Sabo, the miner, who died on May 21, 1997. Director's Exhibit 7. The widow filed her application for benefits on June 20, 1997, which was denied by the district director on July 10 and November 26, 1997. Director's Exhibits 25, 30, 36.

(98-BLA-0309) of Administrative Law Judge George P. Morin on a miner's and 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). With respect to the miner's claim, the administrative law judge acknowledged that the miner's current August 2, 1996 claim was a duplicate claim[2] and, adjudicating this claim pursuant to 20 C.F.R. Part 718, found that employer conceded that the miner worked in qualifying coal mine employment for more than twenty years and that he suffered from coal workers' pneumoconiosis. Next, the administrative law judge found that because claimant established that the miner's pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b), an element previously adjudicated against the miner, she also established a material change in conditions pursuant to 20 C.F.R. §725.309. However, the administrative law judge determined that claimant failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits on the miner's claim. Regarding the survivor's claim, the administrative law judge found that there was no evidence to establish that the miner's death was due to

[2] The miner filed his first application for benefits on May 1, 1978. Director's Exhibit 20. By Decision and Order dated July 9, 1982, Administrative Law Judge Charles P. Rippey denied the claim and the Board affirmed the denial, *Sabo v. North American Coal Corp.*, BRB No. 82-1400 BLA (Jan. 31, 1985)(unpub.). Director's Exhibit 20. The miner took no further action on this claim, and subsequently, filed a duplicate application for benefits on February 19, 1985, which was denied on August 12, 1985. Director's Exhibit 21. The miner did not pursue this claim further. Thereafter, the miner filed a third application on August 2, 1996, which was awarded by the district director on January 3 and March 11, 1997. Director's Exhibits 1, 13, 17. Both the miner's and survivor's claims were consolidated and assigned to Administrative Law Judge George P. Morin for adjudication. Both claims are presently pending.

pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits on the survivor's claim.

On appeal, claimant argues that the administrative law judge erred by failing to find total respiratory disability pursuant to Section 718.204(c)(4) in the miner's claim, and death due to pneumoconiosis pursuant to Section 718.205(c) in the survivor's claim. Employer responds, urging affirmance of the denials on both claims. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating he will not participate 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 the 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).

With respect to the miner's claim, claimant contends that medical opinions obtained on behalf of the Department of Labor demonstrate total respiratory disability pursuant to Section 718.204(c)(4) because both Drs. Reddy and Long opined that the miner was totally disabled as a result of his coal workers' pneumoconiosis. Specifically, claimant contends that the administrative law judge erred by failing to adopt Dr. Long's opinion that, although the MVV portion of the pulmonary function study conducted on September 20, 1996 was invalid, the remaining FVC and FEV_1 values were valid, and, therefore, supportive of total respiratory disability. We disagree. The administrative law judge, within a proper exercise of his discretion, found the credibility of the opinions of Dr. Long and Dr. Reddy undermined inasmuch as their opinions were based upon the invalid September 20, 1996 pulmonary function study. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 9; Director's Exhibit 5. Additionally, the administrative law judge found the opinion of Dr. Long, who is Board-eligible in internal medicine, outweighed by the opinions of Drs. Altmeyer and Fino, who are Board-certified in internal and pulmonary medicine. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *see also Trumbo*, *supra*; *Winters*, *supra*; Decision

[3] We affirm the administrative law judge's findings regarding the existence of pneumoconiosis and pursuant to Sections 718.203(b), 718.204(c)(1)-(3), and 725.309 inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3.

and Order at 9; Director's Exhibits 4, 10. Inasmuch as the administrative law judge reasonably determined that the opinions of Drs. Reddy and Long were less credible, and hence, entitled to less weight, we reject claimant's contentions.

Claimant additionally argues that the administrative law judge erroneously accorded greater weight to the opinions of Drs. Altmeyer, Bennett and Fino, who admitted that they had no objective testing to support their opinions that the miner was not totally disabled. Specifically, claimant avers that, notwithstanding Dr. Altmeyer's inability to obtain reliable pulmonary function studies, he, nonetheless, opined that the miner had a mild degree of airways obstruction and doubted the existence of any disabling lung dysfunction. Claimant is correct that Dr. Altmeyer was unable to obtain reliable pulmonary function studies because the miner "was unable to properly perform the FVC and slow VC maneuvers." However, he conducted a physical examination of the miner, obtained valid arterial blood gas studies, which yielded normal values,[4] and reviewed the September 1996 pulmonary function study. Director's Exhibit 16. Inasmuch as the administrative law judge properly found that Dr. Altmeyer's diagnosis of mild airways obstruction was based on the physician's physical examination of the miner and the FEV-1/FVC ratio of the September 20, 1996 pulmonary function study, we reject claimant's argument. *See Trumbo*, *supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

Claimant contends, likewise, that the administrative law judge improperly relied upon Dr. Bennett's opinion because Dr. Bennett stated that the objective testing he obtained did not allow him to "quantitate" the miner's disability. Employer's Exhibit 1. Claimant also argues that Dr. Fino's opinion is based almost entirely on his invalidation of the MVV portion of the September 1996 pulmonary function study, and absent this test, there is no diagnostic evidence to support Dr. Fino's opinion. Contrary to claimant's contention, Dr. Bennett opined that the miner:

> did not have any disability due to the simple coal workers[']
> pneumoconiosis as his PO_2 [of the arterial blood gas study] was 78 just
> prior to his major medical ordeal. Any abnormalities of pulmonary

[4] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed the table values. 20 C.F.R. §718.204(c)(1), (c)(2).

> function, though unfortunately [sic] we cannot quantitate exactly due to his underlying mental status and inability to cooperate with pulmonary function testing, would likely be due to his very heavy cigarette smoking which would override any effects of coal dust.

Employer's Exhibit 1. Furthermore, in opining that the miner did not suffer from a totally disabling respiratory or pulmonary impairment, both Drs. Bennett and Fino reviewed all of the medical evidence of record, including pulmonary function studies, non-qualifying blood gas studies, electrocardiograms, medical reports of examining physicians, and hospitalization records. Director's Exhibit 35; Employer's Exhibit 1.

The administrative law judge permissibly discounted the opinions of Drs. Reddy and Long, and reasonably found the opinions of Drs. Altmeyer, Fino, and Bennett entitled to dispositive weight. *See Trumbo*, *supra*; *King*, *supra*. Inasmuch as the administrative law judge properly found that the preponderance of the medical opinion evidence failed to demonstrate that the miner was totally disabled, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4), *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985), and now turn to the administrative law judge's consideration of the survivor's claim on the merits of entitlement.

To establish entitlement to benefits on a survivor's claim filed on or after January 1, 1982, a claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 718.205(a). Death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

With respect to the survivor's claim, claimant argues that the administrative law judge misinterpreted the medical records pertaining to the miner's death because the administrative law judge failed to find that these reports demonstrate that the miner's pneumoconiosis substantially contributed to his death. Claimant posits that because the miner's pneumoconiosis compromised his lung function and resulted in his inability to recover from pneumonia, his pneumoconiosis ultimately

contributed to his demise. Claimant's argument lacks merit. After reviewing all of the evidence relevant to the cause of the miner's death,[5] the administrative law judge properly found that the evidence of record is devoid of a physician's opinion concluding that the miner's death was substantially contributed to or hastened by pneumoconiosis. *See Brown*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); Decision and Order at 10-11. We, therefore, affirm the administrative law judge's finding that claimant failed to satisfy her burden of establishing that the miner's pneumoconiosis caused or substantially contributed to his death pursuant to Section 718.205(c) inasmuch as this determination is rational and supported by substantial evidence.

Accordingly, the Decision and Order - Denying Benefits on Both Claims of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[5] A review of the record reveals the following medical opinions relevant to Section 718.205(c): Dr. Georges completed the death certificate and listed the primary cause of death as overwhelming sepsis due to, or a consequence of aspiration pneumonia, due to or a consequence of hypoxic encephalopathy. Director's Exhibit 26. Drs. Bennett and Fino each opined that the miner's pneumoconiosis played no role in his death. Director's Exhibit 35; Employer's Exhibit 1. Dr. Altmeyer did not find evidence of pneumoconiosis in his initial report, Director's Exhibit 16. In a subsequent report, after reviewing additional medical evidence, he stated that his earlier opinion regarding the existence of pneumoconiosis was unchanged, and also opined that pneumoconiosis was not a substantially contributing cause or factor in the miner's death. Director's Exhibit 34. The miner's hospitalization records do not address the cause of the miner's death. Director's Exhibit 26.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge