

BRB No. 01-0615 BLA

HELEN MUDERY)
(Widow of MICHAEL MUDERY))
)
 Claimant-Petitioner)

v.)

NEMACOLIN MINES CORPORATION)
)
 and)

DATE ISSUED:

INTERNATIONAL BUSINESS &)
MERCANTILE REASSURANCE)
COMPANY)

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 On Remand - Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Daniel L. Chunko (Phillips & Faldowski, P.C.), Washington, Pennsylvania, for claimant.

George H. Thompson (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, the miner=s widow, appeals the Decision and Order On Remand - Denying Benefits (99-BLA-229) of Administrative Law Judge Richard A. Morgan rendered 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 This case is on appeal to the Board for the second time. In the first Decision and Order, the administrative law judge found that claimant established that the miner suffered from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his death was due to pneumoconiosis. Benefits were, therefore, awarded. Pursuant to employer=s appeal, the Board affirmed the administrative law judge=s finding that the evidence was sufficient to establish the existence of pneumoconiosis, but vacated the administrative law judge=s findings that pneumoconiosis arose out of coal mine employment and hastened the miner=s death and remanded the case for reconsideration of the evidence on those issues. *Mudery v. Nemaquin Mines Corp.*, BRB No. 99-0805 BLA (Apr. 31, 2000)(unpub.). On remand, the administrative law judge concluded that the evidence of record was insufficient to establish that the miner=s pneumoconiosis arose out of coal mine employment and that he did not, therefore, need to address whether the miner=s death was due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred: in finding less than ten years of coal mine employment; in finding that the evidence was insufficient to establish that pneumoconiosis arose out of coal mine employment; in finding that claimant failed to meet her burden of establishing causality; and in failing to give deference to the opinion of Dr. Ashcraft. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers= Compensation Programs (the Director), has filed a letter indicating that he would 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 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 establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner=s death was due to pneumoconiosis. 20 C.F.R. ' '718.3, 718.202,

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, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors= claims filed on or after January 1, 1982, death will be considered to be 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 the miner=s death if it hastens the miner=s death. 20 C.F.R. ' 718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Claimant first contends that the miner was employed as a coal miner for 19.33 years. As the administrative law judge determined, however, claimant established only seven years of covered coal mine employment from 1972 to 1979, because the miner=s work in the coke yards from 1949 to 1962 and from 1964 to 1967 does not constitute covered coal mine employment under the Act. Further, claimant testified that the miner worked in the coal mines for only seven years, Hearing Transcript at 8-9. *Huston v. Director, OWCP*, 8 BLR 1-328 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Morris v. Director, OWCP*, 6 BLR 1-653 (1983); *see Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). We, therefore, affirm the administrative law judge=s finding that only seven years of covered coal mine employment were established.

Claimant next contends that the evidence is sufficient to establish that the miner=s pneumoconiosis arose out of coal mine employment and that claimant met her burden of proof on this issue. We disagree. The administrative law judge permissibly found the opinions of the autopsy prosecutors, Drs. Ashcraft and Chikersal, insufficient to establish that pneumoconiosis arose out of coal mine employment as they overstated the miner=s employment history and failed to consider claimant=s employment in the coke yards. *See Barnes v. Director, OWCP*, 19 BLR 1-71 (1995)(*en banc recon.*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see e.g. Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Further, the administrative law judge also accorded little weight to the opinions of Drs. Sinnenberg, Oesterling and Jaworski, as they also relied on an inaccurate length of coal mine employment history and stated that they could not determine whether claimant=s pneumoconiosis was due to exposure during coal mine employment or in the coke yards. *Clark, supra; Tucker, supra; Addison, supra.*

Additionally, contrary to claimant=s contention, the administrative law judge was not required to give greater deference to the opinion of Dr. Jaworski as he was the miner=s

treating physician where, as here, he found Dr Jaworski's opinion unreasoned. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Thus, the administrative law judge concluded that claimant failed to present competent medical evidence showing that his pneumoconiosis arose out of coal mine employment. *Tucker, supra; Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986). We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish that pneumoconiosis arose out of coal mine employment as it is supported by substantial evidence and in accordance with law.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, since the administrative law judge rationally concluded that the evidence of record was insufficient to establish that pneumoconiosis arose out of coal mine employment, an essential element of entitlement, *Boyd, supra*, the administrative law judge properly declined to address the issue of death due to pneumoconiosis. We must, therefore, affirm the administrative law judge's denial of benefits in this survivor's claim as it is supported by substantial evidence and in accordance with law. 20 C.F.R. '718.203(c); *see Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff=g sub nom. Greenwich Collieries v. Director, OWCP [Ondecko]*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge