

BRB Nos. 09-0352 BLA
and 09-0403 BLA

JACQUELINE J. KEENE)
(o/b/o and Widow of NORMAN KEENE))
)
Claimant-Petitioner)
)
v.)
)
CONSOLIDATION COAL COMPANY) DATE ISSUED: 02/26/2010
)
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 – Denial of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits of Administrative Law Judge Edward Terhune Miller rendered on a miner’s claim (2006-BLA-05149) and a survivor’s claim (2006-BLA-05148) 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). Initially, the administrative law judge found that this case involves a request

for modification of the denial of a subsequent miner's claim, filed on August 20, 2001,¹ and a survivor's claim, filed on January 3, 2005.² Adjudicating both claims under 20 C.F.R. Part 718, the administrative law judge found that the miner had at least thirty-nine years of coal mine employment. With respect to the miner's claim, the administrative law judge found that the evidence submitted since the prior denial, specifically the autopsy evidence, was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge found that claimant established a change in conditions and, thus, established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §§725.309 and 725.310. Turning to the merits of the miner's claim, the administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). In addition, the administrative law judge found that the evidence was sufficient to establish that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Nonetheless, the administrative law judge denied benefits in the

¹ The miner filed his initial claim for benefits on October 28, 1980, which was denied by the district director on October 24, 1984, based on the determination that the miner established none of the requisite elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1. A second claim was filed on January 14, 1986, which was denied by the district director on March 4, 1986. Director's Exhibit 2. The miner filed a third claim on August 20, 2001, which was denied by the district director on February 21, 2003. The miner requested review of the decision on March 31, 2003, which the Department of Labor classified as a request for modification of the February 21, 2003 denial. Director's Exhibit 32. This request for modification was denied by the district director on June 23, 2003. Director's Exhibit 33. However, subsequent to the transfer of the case to the Office of Administrative Law Judges, the miner died on July 27, 2004. Director's Exhibit 45. The case was then remanded to the district director for further development of the record, to name a successor for the miner, and for consolidation with a potential survivor's claim. Director's Exhibit 39. By Order dated May 31, 2005, the district director again denied the request for modification, finding that the miner was not totally disabled due to pneumoconiosis. Director's Exhibit 47.

² Claimant, the widow of the miner, filed a survivor's claim on January 3, 2005, which was denied by the district director on September 7, 2005, finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Director's Exhibits 2A, 11A. Claimant requested a hearing on September 29, 2005 and an amended request for a hearing on September 30, 2005. Director's Exhibits 12A, 13A. Both the miner's request for modification and the survivor's claim were forwarded to the Office of Administrative Law Judges, Director's Exhibit 15A, and assigned to Administrative Law Judge Edward Terhune Miller (the administrative law judge).

miner's claim because the evidence failed to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). With respect to the survivor's claim, the administrative law judge reiterated that claimant proved that the miner had pneumoconiosis and that it arose out of his coal mine employment, but nonetheless determined that claimant was unable to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both the miner's and the survivor's claims.

On appeal, claimant contends that the administrative law judge erred in denying benefits in both the miner's claim and the survivor's claim. With respect to the miner's claim, claimant generally contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c). In the survivor's claim, claimant generally contends that the administrative law judge erred in his weighing of the medical opinions and finding that the medical evidence was insufficient to establish that the miner's death was due to, or hastened by, pneumoconiosis pursuant to Section 718.205(c). In response, employer urges affirmance of the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim. Specifically, employer urges affirmance of the denial of benefits in the miner's claim, arguing that claimant has not raised any substantive issue or alleged any specific error in the administrative law judge's findings, but is merely seeking a reweighing of the medical evidence. With respect to the survivor's claim, employer contends that the administrative law judge properly weighed the medical evidence and found the evidence insufficient to establish that the miner's death was due to pneumoconiosis and, therefore, that the administrative law judge's findings are supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive brief unless requested to do so by the Board.³

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

³ The parties do not challenge the administrative law judge's findings that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a change in conditions pursuant to 20 C.F.R. §725.310, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. In addition, the parties do not challenge the administrative law judge's findings that the medical evidence established the existence of pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), as well as total respiratory disability pursuant to 20 C.F.R. §718.204(b). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.⁴ 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner suffered from pneumoconiosis, that the miner’s pneumoconiosis arose out of coal mine employment, that the miner was totally disabled by a respiratory or pulmonary impairment, and that the miner’s total disability was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). 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 a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Miner’s Claim

Pursuant to Section 718.204(c), the administrative law judge considered the medical opinions of Drs. Perper, Pineda, Tuteur, Oesterling, and Fino. The administrative law judge determined that only Drs. Perper and Pineda provided opinions supportive of a finding that the miner’s total disability was due to his pneumoconiosis. Decision and Order at 23-24; Claimant’s Exhibits 1, 3, 5. Nevertheless, after noting the underlying documentation and rationale supporting the opinions of Drs. Perper and Pineda, the administrative law judge found that these opinions were not well-reasoned and, thus, found them entitled to little probative weight. *Id.* However, the administrative law judge credited the opinions of Drs. Tuteur, Oesterling, and Fino, that the miner’s coal

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner’s coal mining employment was in Illinois. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 4.

dust exposure did not cause his total respiratory disability, but rather, that it was due to his congestive heart failure and idiopathic pulmonary fibrosis, finding these opinions to be reasoned and documented. Decision and Order at 23-24. Consequently, the administrative law judge found the weight of the medical evidence insufficient to establish that the miner's total disability was due to pneumoconiosis. *Id.* at 24.

In particular, the administrative law judge stated that he was not persuaded by Dr. Perper's opinion that the miner's disabling impairment was due to his coal dust exposure because Dr. Perper did not adequately explain the rationale for his opinion. Decision and Order at 23. Specifically, the administrative law judge found that Dr. Perper opined that the miner had diffuse interstitial fibrosis, which Dr. Perper described as being a third type of pneumoconiosis not included in the ILO classification of pneumoconiosis, Claimant's Exhibit 3 at 43-44, 69-70, and Dr. Perper also stated that the other physicians in this case were probably not aware of this type of pneumoconiosis. Decision and Order at 23; Claimant's Exhibits 1, 3 at 69-70. The administrative law judge found it unlikely that the other physicians would not have considered the diagnosis of diffuse interstitial fibrosis, and that Dr. Perper's explanation on this issue was unconvincing. Decision and Order at 23. Moreover, the administrative law judge found that Dr. Perper's finding that the miner did not suffer from congestive heart failure is contrary to the weight of the medical evidence, including the miner's medical records and the opinions of all of the other physicians, including the miner's treating physician. Decision and Order at 23; Claimant's Exhibits 1, 3. The administrative law judge therefore accorded less probative weight to Dr. Perper's opinion, finding that Dr. Perper failed to provide an adequate rationale for his conclusions, in light of the underlying documentation and the opinions of the other physicians. *Id.*

In addition, the administrative law judge accord little weight to the opinion of Dr. Pineda, the miner's treating physician, because Dr. Pineda provided conflicting opinions on the issue of the miner's total disability, and did not attempt to reconcile these separate opinions. Decision and Order at 23; Claimant's Exhibit 5 at p. 59-60, 62-64. Moreover, the administrative law judge found that Dr. Pineda did not attempt to reconcile his conclusions with his statement that the level of the disability that the miner suffered from would probably have been the same if he had not worked in the coal mines. *Id.* The administrative law judge, therefore, found Dr. Pineda's opinion to be unpersuasive as it was inconsistent and equivocal. *Id.* Consequently, the administrative law judge found that while Dr. Pineda's status as the miner's treating physician, as well as a Board-certified pulmonologist, gives his opinion additional relevance, nonetheless, it is entitled to little weight because of the equivocal nature of his opinion.

In challenging the administrative law judge's denial of the miner's claim, claimant generally contends that the administrative law judge erred in finding the evidence insufficient to establish disability causation. However, as employer asserts, claimant has

failed to allege any specific error made by the administrative law judge in his consideration of the medical opinion evidence relevant to disability causation. Rather, claimant only states that:

[t]here is no dispute that prior to his death [the miner] was totally disabled from working in the coal mines due to a pulmonary impairment. The only dispute is whether this impairment was the result of exposure to coal dust. Dr. Pineda testified that the impairment existed from the day that he first treated [the miner] on January 28, 2002. Dr. Perper concluded that [the miner] was disabled in 2001.

Claimant's Brief at 14. Because claimant has not raised a specific error with regard to the administrative law judge's disability causation finding, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's total disability is due to pneumoconiosis pursuant to Section 718.204(c). 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984). Consequently, since claimant has not established disability causation, a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits in the miner's claim. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Survivor's Claim

With respect to the survivor's claim, the administrative law judge found that the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis, or that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c). In determining whether the miner's death was due to pneumoconiosis, the administrative law judge considered the miner's death certificate and the reports by Drs. Perper, Pineda, Oesterling, and Tuteur. The administrative law judge noted that on the miner's death certificate, Dr. Pineda, the miner's treating physician, did not list coal workers' pneumoconiosis as a cause of the miner's death, but listed the immediate causes of death as acute myocardial infarction, hypoxemia and renal failure. In addition, the death certificate listed coronary artery disease, pulmonary fibrosis and end stage chronic obstructive pulmonary disease (COPD), as other significant conditions. Decision and Order at 24; Director's Exhibit 3A. Dr. Pineda, in his deposition testimony, stated that the miner's death was due to multiple organ failure precipitated by a myocardial infarction, and that he believed that the miner's coal workers' pneumoconiosis (CWP) and COPD contributed to his death, but did not hasten it. Claimant's Exhibit 5 at 26-28, 86-87. However, the administrative law judge accorded little weight to Dr. Pineda's deposition testimony that CWP contributed to the miner's death because Dr. Pineda did

not clearly explain his rationale, but only summarily concluded that CWP contributed to the miner's death. Decision and Order at 24.

The administrative law judge also found that Dr. Perper's opinion, the only other opinion supportive of claimant's burden, was not well-reasoned and, therefore, entitled to little weight. Specifically, the administrative law judge again found that Dr. Perper's opinion that the miner did not have congestive heart failure, or that there was no underlying cardiac condition and that the miner did not have a myocardial infarction, was not supported by the evidence of record. In so finding, the administrative law judge noted that Dr. Perper's conclusions are contrary to the medical evidence of record, including the treating physician's opinion that the miner's severe cardiac condition was a major factor in the miner's death. Decision and Order at 25. The administrative law judge therefore found that Dr. Perper's opinion was entitled to little weight regarding the cause of the miner's death.

In challenging the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis, claimant generally contends that the administrative law judge erred in weighing the medical opinions of record. Specifically, claimant contends that the administrative law judge erred in not crediting the opinion of Dr. Perper, that pneumoconiosis contributed to and hastened the miner's death, arguing that Dr. Perper's opinion is well-reasoned and that it is entitled to greater weight than the contrary opinion of Dr. Oesterling, because Dr. Perper cited scientific literature in support of his conclusions and Dr. Oesterling did not provide similar support.

After consideration of claimant's arguments, the administrative law judge's decision, and the evidence of record, we affirm the administrative law judge's findings at 20 C.F.R. §718.205(c), as they are rational and supported by substantial evidence. Claimant's argument relates to the administrative law judge's weighing of the conflicting medical opinion evidence. However, the Seventh Circuit has held that it is the duty of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988). The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*).

Contrary to claimant's contention, the administrative law judge determined that the opinion of Dr. Perper was not well-reasoned because it was not supported by the underlying medical evidence of record. The administrative law judge specifically found that Dr. Perper's opinion, that the miner did not have an underlying cardiac condition or that the miner's death was not due to a cardiac condition, was inconsistent with the medical treatment records, the opinion of Dr. Heidingsfelder, the autopsy prosector, and the deposition testimony of Dr. Pineda, the miner's treating physician, which the

administrative law judge credited as corroborative of a finding that the miner suffered from congestive heart failure. *Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 16 BLR 2-74 (7th Cir. 1992); *Burns*, 855 F.2d at 501; Decision and Order at 25; Director's Exhibit 48; Claimant's Exhibits 1, 3,5; Employer's Exhibits C, D, E, H, J, K, N, U, V, W, X. Consequently, the administrative law judge reasonably found that Dr. Perper's opinion was not credible and, therefore, was entitled to no weight. In addition, the administrative law judge found that the opinion of Dr. Pineda, that CWP contributed to the miner's death, was not credible, a finding not challenged by claimant. *Sarf*, 10 BLR at 1-121; *Fish*, 6 BLR at 1-109. Because the administrative law judge rationally found that the only opinions supportive of claimant's position were not persuasive, error, if any, in the administrative law judge's weighing of the contrary evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, we affirm the administrative law judge's finding that evidence of record is insufficient to establish that claimant established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and affirm the administrative law judge's denial of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge