BRB No. 99-0347 BLA

JESSIE F. POTTER (Widow of EUGENE POTTER)	)	
Claimant-Respondent	)	
v.	)	
COLEMAN & DAMRON COAL CORPORATION	)	DATE ISSUED:
Employer-Petitioner	)	
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 Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Herbert Deskins, Jr., Pikeville, Kentucky, for claimant.

Terri L. Bowman (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (98-BLA-0369) of Administrative Law Judge Robert L. Hillyard 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). The administrative law judge, adjudicating this claim pursuant to the permanent criteria set forth at 20 C.F.R. Part 718, credited the miner with "at least" thirty years of qualifying coal mine employment and found that claimant[1] established the existence of pneumoconiosis

[1] Claimant, Jessie F. Potter, is the widow of Eugene Potter, the miner, who died

arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b) and that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erroneously found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant has not filed a brief responding to employer's arguments. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he will not participate in this appeal.[2]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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on November 29, 1994. Director's Exhibits 9, 41. Claimant filed her application for benefits on June 22, 1995. Director's Exhibit 3. The miner's application for benefits, filed on February 16, 1989, was finally denied on August 15, 1989. Director's Exhibit 51.

[2] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) inasmuch as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983); Decision and Order at 3, 15-16.

In challenging the administrative law judge's findings under Section 718.205(c), employer argues that the administrative law judge irrationally accorded greater weight to the medical opinion of Dr. Dennis based solely on his status as the autopsy prosector over the contrary opinions of Drs. Caffrey and Hutchins.[3] Although the administrative law judge found Dr. Dennis's opinion entitled to substantial weight because he performed the autopsy, the administrative law judge did not rely on this factor as the sole reason for finding the opinion of Dr. Dennis entitled to substantial weight. The administrative law judge, within a proper exercise of his discretion, found Dr. Dennis's opinion bolstered by the opinions of Dr. Naeye, a consulting pathologist, and Dr. Nichols, the miner's treating physician. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997) (administrative law judge does need have to accept opinion or theory of any given medical expert); Decision and Order at 17-18. Furthermore, the administrative law judge permissibly found the opinions of Drs. Caffrey and Hutchins, who had reviewed autopsy slides, less persuasive because their opinions were based upon the assumption that the miner suffered from either mild or moderate coal workers' pneumoconiosis, contrary to the evidence of record establishing the presence of "severe" pneumoconiosis. Decision and Order at 18. Inasmuch as the administrative law judge rationally determined the relative credibility and weight of the reviewing pathologists' contrary opinions and provided an adequate rationale for his determination to accord substantial weight to the opinion of Dr. Dennis, we reject employer's argument. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992).

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[3] Dr. Dennis, the autopsy prosector, opined that the miner died as a result of pulmonary congestion, edema and myocarditis, and concluded, "While the anthracosilicosis did not cause the death primarily, it certainly contributed to the demise of the patient." Director's Exhibits 7, 9, 45.

Drs. Caffrey and Hutchins diagnosed mild and moderate simple coal workers' pneumoconiosis of insufficient severity to have contributed to the miner's death. Director's Exhibits 38, 44, 47.

Employer contends that the administrative law judge impermissibly accorded determinative weight to Dr. Nichols's opinion because he was the miner's treating physician since Dr. Nichols neither treated the decedent for a respiratory or pulmonary disease during his lifetime nor diagnosed the existence of pneumoconiosis during his treatment. In addition, employer asserts that the administrative law judge failed to consider Dr. Nichols's lack of pulmonary expertise in crediting his opinion.[4] Employer's arguments lack merit. Contrary to employer's argument, the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, has held that the opinions of treating physicians may be entitled to greater weight than those of non-treating physicians. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). After acknowledging that Dr. Nichols did not diagnose pneumoconiosis during his treatment of the miner prior to his death and that Dr. Nichols relied on a pulmonary function study that was not contained in the record, the administrative law judge reasonably found that Dr. Nichols's opinion was not entirely undermined in light of his status as the miner's treating physician and the fact that his diagnosis of severe coal workers' pneumoconiosis was consistent with the autopsy findings of Dr. Dennis. *See Griffith*, *supra*; *Tussey*, *supra*; Decision and Order at 17; Director's Exhibits 8, 9, 53; Employer's Exhibits 1, 2.[5] We, therefore, affirm the administrative law judge's crediting of Dr. Nichols's opinion.

Employer additionally avers that the administrative law judge erroneously credited Dr. Naeye's opinion because Dr. Naeye's opinion lacks a conclusion regarding the cause of the decedent's death and is equivocal. We disagree. The administrative law judge correctly found that Dr. Naeye diagnosed severe simple coal workers' pneumoconiosis in the lung sections and concluded that the miner's death was due to a combination of acute myocarditis and pulmonary insufficiency.

[4] Dr. Nichols is Board-certified in family medicine and treated the miner from July 1978 until the miner died on November 29, 1994. Director's Exhibit 53.

[5] In a report dated September 25, 1996, Dr. Nichols opined that the miner's "coal workers' pneumoconiosis was in itself severe enough to have contributed to his death, which was worsened by recurrent aspiration." Director's Exhibit 53; Employer's Exhibit 1. During his deposition on October 16, 1997, Dr. Nichols testified that he had not diagnosed the miner as suffering from pneumoconiosis during this lifetime, he nevertheless had "no doubt" that the miner had severe coal workers' pneumoconiosis, which contributed to his death. Director's Exhibit 53 at 4, 9.

Decision and Order at 12-13, 17; Director's Exhibits 10, 45; Employer's Exhibit 1. Moreover, although the administrative law judge noted the conditional nature of Dr. Naeye's statement,[6] he nonetheless credited Dr. Naeye's opinion and found it supportive of a finding of death due to pneumoconiosis as it was corroborated by the autopsy report of Dr. Dennis. Decision and Order at 17. Inasmuch as it is within the discretion of the administrative law judge to determine whether a physician's opinion is equivocal or qualified, we reject employer's argument. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987).

Employer additionally avers that the administrative law judge impermissibly discounted the opinions of Drs. Lane and Branscomb because Dr. Lane failed to diagnose the existence of pneumoconiosis and Dr. Branscomb neither examined the miner nor reviewed the autopsy slides. Similarly, employer argues that the administrative law judge improperly failed to consider all of the other medical evidence of record, consisting of x-ray interpretations, blood gas studies, and hospital records. Employer's arguments lack merit. The Sixth Circuit has held that an administrative law judge may permissibly accord less weight to a physician's opinion whose underlying premise – that the miner did not have pneumoconiosis – is inaccurate. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *accord Toler v. Eastern Associated Coal Corp.*, 43 F.3d

[6] Dr. Naeye diagnosed the existence of severe coal workers' pneumoconiosis (CWP) and stated, "if the lung tissues available for examination are representative of the lungs as a whole, the CWP is severe enough to have produced significant abnormalities in lung function that would have prevented this man from undertaking hard physical work. If severe simple CWP was present throughout the lungs it likely also shorted [sic] this man's life." Director's Exhibits 10, 45; Employer's Exhibit 1. Therefore, the conditional nature of Dr. Naeye's statement speaks not to the severity of the miner's pneumoconiosis, but rather to the representative tissue sample.

109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge summarized all of the x-ray interpretations, pulmonary function studies, blood gas studies, and hospitalization records taken before the miner's death. While relevant to the presence or absence of pneumoconiosis and total respiratory disability, these records are not determinative of the cause of the miner's death. *See generally Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984).

Citing *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997), employer asserts that the evidence of record establishes that pneumoconiosis was only a *de minimis* contributor in the miner's demise, therefore, claimant did not satisfy her burden of establishing death due to pneumoconiosis as a matter of law. *Smith* involved the requisite standard to be applied in living miner's claims where claimants must establish total disability due to pneumoconiosis pursuant to Section 718.204(b). *Smith*, 127 at 507, 21 BLR at 2-185. Moreover, the Sixth Circuit court held that, pursuant to Section 718.205(c), pneumoconiosis will be found to be a "substantially contributing cause or factor" of a miner's death where it has actually hastened the miner's death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 816, 17 BLR 2-135, 2-140 (6th Cir. 1993); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). Inasmuch as the administrative law judge's determination, that the preponderance of the evidence established that pneumoconiosis was a substantially contributing cause to the miner's death, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's Section 718.205(c) finding. *See Rowe*, *supra*; *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

Accordingly, the Decision and Order - Award of Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY J. HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge