

BRB No. 09-0337 BLA

ROBBIE O. LEFLER)
(Widow of LEON LEFLER))
)
 Claimant-Respondent)
)
 v.)
)
 ALPINE CONSTRUCTION COMPANY)
)
 and)
)
 LIBERTY MUTUAL INSURANCE) DATE ISSUED: 01/13/2010
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Scott M. Busser (Moseley, Busser & Appleton, P.C.), Denver, Colorado, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (04-BLA-5707) of Administrative Law Judge Alice M. Craft 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). This case is before the Board for the second time. In her initial decision, the administrative law judge credited the parties'

stipulation that the miner worked in qualifying coal mine employment for twenty-three years and, adjudicating this survivor's claim¹ pursuant to 20 C.F.R. Part 718, found that the evidence was sufficient to establish the existence of pneumoconiosis 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), (5). Accordingly, benefits were awarded.

On appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that the evidence was sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b). Relevant to Section 718.205(c), the Board affirmed the administrative law judge's discounting of Dr. Repsher's opinion, that the miner's death was caused by conditions unrelated to pneumoconiosis or coal dust exposure, as this determination was supported by substantial evidence. The Board, however, vacated the administrative law judge's crediting of Dr. Kirk's opinion, that pneumoconiosis contributed to the miner's death, because she failed to adequately explain why she concluded that it was well-reasoned, and did not set forth the relative weight she applied to the various factors at 20 C.F.R. §718.104(d). Consequently, the Board vacated the administrative law judge's finding that pneumoconiosis was a substantially contributing cause of the miner's death at Section 718.205(c), and remanded the case for further consideration. *R.L. [Lefler] v. Alpine Construction Co.*, BRB No. 07-0243 BLA (Nov. 30, 2007) (unpub.).

On remand, in light of claimant's *pro se* status, the award of benefits in the living miner's claim, and the decision in *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006), the administrative law judge determined that the doctrine of offensive nonmutual collateral estoppel was applicable under the facts of this case. As the award of benefits in the miner's claim was based on a determination that the miner had legal pneumoconiosis, *i.e.*, chronic obstructive pulmonary disease (COPD) due to coal dust exposure, the administrative law judge accorded preclusive effect to the finding of legal pneumoconiosis, and amended her prior findings accordingly.² The

¹ Claimant, the widow of the miner, filed a survivor's claim for benefits on November 8, 2002. Director's Exhibit 3.

² Since the existence of pneumoconiosis is a threshold issue in a survivor's claim, the administrative law judge initially noted that the Board affirmed, as unchallenged, her previous determination that the weight of the evidence established the existence of clinical pneumoconiosis. Decision and Order on Remand at 3. In addition, the administrative law judge acknowledged her failure to mention, in her original decision, that employer did not contest the issue of whether the miner had pneumoconiosis. Decision and Order on Remand at 3; Director's Exhibit 18.

administrative law judge then assessed the credibility of the opinion of Dr. Kirk, the miner's treating physician, in light of the factors set forth in Section 718.104(d), and concluded that the opinion was well-reasoned and sufficient to establish that pneumoconiosis contributed to or hastened the miner's death at Section 718.205(c)(2), (5). Accordingly, benefits were awarded.

In the present appeal, employer argues that the administrative law judge again erred in finding the medical opinion evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death at Section 718.205(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, is not participating 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 applicable law, they are binding upon this Board and may not be disturbed.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, 363 (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. *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); *see also Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that the doctrine of offensive nonmutual collateral estoppel is applicable to establish that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 5.

⁴ The Board will apply the law of the United States Court of Appeals for the Tenth Circuit, as the miner was last employed in the coal mining industry in Oklahoma. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Employer contends that the administrative law judge erred in relying on the opinion of Dr. Kirk, the miner's treating physician, to support her finding that claimant established that pneumoconiosis was a substantially contributing cause of the miner's death at Section 718.205(c). Employer argues that, in evaluating the probative value of Dr. Kirk's opinion, the administrative law judge misapplied the factors set forth in Section 718.104(d)(1)-(4).⁵ Specifically, employer asserts that the administrative law judge erred by failing to: (1) address whether Dr. Kirk actually treated the miner for respiratory or pulmonary conditions pursuant to Section 718.104(d)(1); (2) explain how Dr. Kirk's treatment of the miner for four years, as opposed to a much longer duration, placed Dr. Kirk in a superior position to assess the cause of death pursuant to Section 718.104(d)(2); (3) reconcile her conclusion that Dr. Kirk saw the miner "several times" with her determination that Dr. Kirk's report was silent on the frequency of the miner's visits pursuant to Section 718.104(d)(3); and (4) discredit Dr. Kirk's opinion pursuant to Section 718.104(d)(4) in light of her determination that the record was devoid of any diagnostic tests or examinations conducted by Dr. Kirk. Employer's Brief at 5-7.

We reject employer's argument that the administrative law judge's credibility determinations at Section 718.104(d) were not adequately supported by the evidence of record, and affirm the administrative law judge's crediting of Dr. Kirk's opinion. Pursuant to the Board's remand instructions, the administrative law judge addressed the various factors set forth at Section 718.104(d)(1)-(5), and permissibly accorded controlling weight to Dr. Kirk's opinion.⁶ Pursuant to Section 718.104(d)(1), the

⁵ Section 718.104(d) provides, "In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically 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...; and (4) extent of treatment...." 20 C.F.R. §718.104(d)(1)-(4).

⁶ Dr. Kirk indicated on the death certificate that the immediate cause of the miner's death was "aspiration pneumonia, due to (or as a consequence of) cerebral vascular accident." Director's Exhibit 4. In a subsequent letter dated December 27, 2002, Dr. Kirk stated that the miner's "aspiration pneumonia(s), in addition to his pneumoconiosis and chronic obstructive pulmonary disease, presented an overwhelming loss of respiratory functions....[t]his inability to breathe adequately led to his cardiac failure and eventual death....I cannot say that pneumoconiosis was the cause of [the miner's] death, but I do believe it contributed to his compromised respiratory status that was a direct cause for his death." Director's Exhibit 6.

administrative law judge found that Dr. Kirk treated the miner for “various ailments,” including vascular disease, an abdominal aortic aneurysm, post-operative care, and multiple resultant episodes of aspiration pneumonia. Director’s Exhibit 6. While the administrative law judge determined that Dr. Repsher was Board-certified in pulmonary diseases, and thus, his relevant qualifications were superior to those of Dr. Kirk, she found that Dr. Kirk’s opinion was more persuasive because, as the miner’s treating physician and surgeon, Dr. Kirk’s treatment of the miner during multiple hospitalizations for aspiration pneumonia “at the end of his life” provided Dr. Kirk with a superior understanding of the miner’s pulmonary condition. *See generally Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003) (the report of a treating physician must be weighed “against all other evidence in the record”); Decision and Order on Remand at 7. Similarly, pursuant to Section 718.104(d)(2), the administrative law judge determined that Dr. Repsher neither observed the miner, nor had any information about his condition after 1990, except for Dr. Conklin’s 2002 diagnosis of pneumoconiosis and the death certificate and report prepared by Dr. Kirk. Because Dr. Kirk treated the miner “during the last four years of [his] life,” the administrative law judge concluded that Dr. Kirk was “in a superior position to Dr. Repsher to evaluate the miner’s condition,” and that therefore, Dr. Kirk’s opinion was entitled to enhanced weight. Decision and Order on Remand at 7. The administrative law judge further determined that, even though Dr. Kirk neither specified the actual frequency of his treatment of the miner nor the types of testing and examinations he conducted, the probative value of Dr. Kirk’s opinion was not diminished because the death certificate reflected that he attended the miner during his last illness, and the December 27, 2002 report supported “the inference that he saw the Miner at least several times. . . .” Decision and Order on Remand at 7; *see* 20 C.F.R. §718.104(d)(3)-(4); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); Director’s Exhibits 4, 6. Pursuant to Section 718.104(d), the administrative law judge properly examined the medical opinion of Dr. Kirk on its merits, and rationally accorded it dispositive weight based on the reasoning and documentation contained in Dr. Kirk’s opinion, other relevant evidence, and the record as a whole. *See Nat’l Mining Ass’n v. Dep’t of Labor*, 292 F.3d 849, 861, 23 BLR 2-124, 2-159 (D.C. Cir. 2002), *aff’g in part and rev’g in part Nat’l Mining Ass’n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 709, 22 BLR 2-537, 2-545-546 (6th Cir. 2002); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Because employer has not shown, and the record does not reflect, that the administrative law judge’s application of the factors enumerated at Section 718.104(d)(1)-(4) was either unreasonable or unsupported by substantial evidence of record, we affirm the administrative law judge’s determinations thereunder and her assessment of the credibility of Dr. Kirk’s opinion. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Anderson v. Valley Camp of Utah*, 12 BLR 1-111, 1-113 (1989).

Lastly, we reject employer's assertion that the administrative law judge erroneously credited Dr. Kirk's opinion pursuant to Section 718.104(d)(5) based on a lack of contrary probative evidence in the record, rather than critically examining and assessing the reasoning and documentation upon which the opinion was based.

Section 718.104(d)(5) provides:

In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of the miner's treating physician shall also be based on the credibility of the 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 applying this regulatory provision, the administrative law judge stated, "As to the fifth factor, I find that there is no contrary probative evidence which would cause me to question Dr. Kirk's statements about his treatment of the [miner] or the cause of his death." Decision and Order on Remand at 7. Noting that Dr. Repsher agreed that the miner died due to aspiration pneumonia resulting from a stroke, and conceded that the miner probably had a significant loss of respiratory function which could have contributed to his death because the loss of lung function made the miner less likely to tolerate the pneumonia, the administrative law judge rationally found that Dr. Repsher's opinion provided some support for Dr. Kirk's conclusions, despite Dr. Repsher's failure to attribute the miner's COPD to coal dust exposure. Decision and Order on Remand at 8-9; Employer's Exhibit 1 at 16-17. The administrative law judge ascertained, therefore, that the "reasoning and documentation" underlying Dr. Kirk's opinion, that aspiration pneumonia, pneumoconiosis and COPD together presented an overwhelming loss of respiratory function that hastened the miner's death, as well as "other relevant evidence and the record as a whole," was sufficient to support a finding that Dr. Kirk's opinion was entitled to preferential weight, based on his treating physician status pursuant to Section 718.104(d)(5). As this determination is within the purview of the administrative law judge, is rational, and contains no reversible error, it is affirmed. *See Napier*, 301 F.3d at 709, 22 BLR at 2-546; *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997).

Based on the forgoing, therefore, we affirm the administrative law judge's determination that claimant satisfied her burden of establishing that the miner's death was due to pneumoconiosis at Section 718.205(c). *See* 20 C.F.R. §718.205(c); *Pickup*, 100

F.3d 871, 20 BLR 2-334; *Trumbo*, 17 BLR at 1-88, 1-89; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Consequently, we affirm the administrative law judge's finding that claimant is entitled to survivor's benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge