BRB No. 00-0980 BLA

SHIRLEY ROWAN (Widow of DELMER B. ROWAN) Claimant-Respondent v. BETH ENERGY MINES, INCORPORATED and EMPLOYERS SERVICES CORPORATION Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

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

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (93-BLA-1435) of Administrative Law Judge Thomas M. Burke awarding benefits in 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 before the Board for a third time.[2] Based on the filing date of October 22, 1992, the administrative law judge adjudicated

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

[2] The miner died on September 30, 1992. Director's Exhibit 6. Claimant, the miner's surviving spouse, filed her application for benefits on October 22, 1992. Director's Exhibit 3. The district director awarded benefits which employer contested. Administrative Law Judge Robert S. Amery awarded benefits after finding the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and pneumoconiosis as a substantially contributing cause of the miner death. The Board affirmed the denial of benefits on appeal. *See Rowan v. BethEnergy Mines, Inc.*, 94-3987 BLA (Feb. 24, 1995) (unpub.). The United States Court for Appeals for the Fourth Circuit, within

this claim pursuant to 20 C.F.R. Part 718. The administrative law judge again reviewed and credited the medical opinion evidence of record. Based on the evidence he considered the most credible, the administrative law judge found that claimant met her burden of proving that pneumoconiosis was a contributing cause of the miner's death. *See* 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer challenges the rationale provided by the administrative law judge for crediting the medical opinion evidence regarding the role pneumoconiosis played in the miner's death. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

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whose this jurisdiction this case arises, vacated the Board's findings on the issue of the cause of the miner's death and remanded this case for further review. *See BethEnergy Mines, Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-291 (4th Cir. 1996).

On remand, Administrative Law Judge Thomas M. Burke (the administrative law judge) found the evidence of record sufficient to establish that pneumoconiosis was a contributing cause of the miner's death and awarded benefits. On appeal, the Board vacated the findings of the administrative law judge on the issue of causation and remanded this case for further consideration of the medical opinion evidence. *See Rowan v. BethEnergy Mines, Inc.*, 98-0676 BLA (Jun. 24, 1999)(unpub.).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao,* No 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 20, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[3] Based on the briefs submitted by employer and the Director and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a). In a survivor's claim filed after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death; if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death; if death was caused by complications of pneumoconiosis; or if the presumption set forth at Section718.304, relating to complicated pneumoconiosis, is applicable. *See* 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).

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on April 20, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

On remand, the administrative law judge identified the issue in this case as whether the miner's death was caused or significantly contributed to by the admittedly present pneumoconiosis. *See* Decision and Order at 3. The administrative law judge further concluded that this determination could be based on either the extent of the pneumoconiosis throughout the miner's lungs or on whether the emphysema present in the miner's lungs was caused in part by coal dust. *Id*. at 6. Concerning the extent of pneumoconiosis present in the miner's lungs, the administrative law judge noted that Dr. Franyutti, the autopsy prosector, characterized the pneumoconiosis present as diffuse and moderate based on his microscopic review and observations of the lungs, and that Drs. Kleinerman, Bush and Hutchins, reviewing pathologists, found only a few coal dust macules. The administrative law judge stated that these physicians agreed that fibrotic lesions were present, but disagreed over the magnitude of the fibrosis observed throughout the lungs.[4] In finding that claimant met her burden of proof based on the presence of pneumoconiosis, the administrative law judge found Dr. Franyutti's opinion more credible because he performed the autopsy, he prepared the slides, and he had the opportunity to observe the lung tissue in total. *Id*. at 7.

Employer does not specifically challenge the reasoning provided by the administrative law judge for crediting Dr. Franyutti's opinion on the cause of the miner's death; instead, employer contends that the administrative law judge did not resolve the material conflicts in this evidence. Initially, employer contends that Dr. Franyutti diagnosed complicated pneumoconiosis, a diagnosis which employer asserts undermines his opinion, and that Dr. Franyutti believes that all abnormalities in the lung tissue are related to coal dust. Employer's argument is rejected. In his deposition, Dr. Franyutti testified that complicated pneumoconiosis and progressive massive fibrosis are diagnosed where large areas of fibrosis tissue replace lung parenchyma as shown by measurements of 2 cm to 10 cm, and that in this case, he saw some changes close to 2cm, but not 10 cm. *See* Employer's Exhibit 7 at 18. Dr. Franyutti, however, never characterized these findings as complicated pneumoconiosis in his testimony. *Id*. Likewise, Dr. Franyutti did not testify that all abnormalities he found were related to coal dust as shown by his statement that not all areas of fibrosis seen by him were caused by coal dust exposure. *Id*. at 17.

Employer next argues that Dr. Franyutti's opinion is not reasoned because the physician did not consider the miner's history of coal mine employment and smoking or the facts surrounding the miner's medical treatment. Employer, however, has not explained how this information would clarify Dr. Franyutti's autopsy findings regarding the degree of

[4] Employer does not disagree with the administrative law judge's statement of the issue in this case.

pneumoconiosis present in the miner's lungs. In addition, we find no merit in employer's assertion that Dr. Franyutti's theory about "burn out," *i.e.*, that when a miner has been away from coal mine employment for ten or fifteen years, the black pigment works its way out of the lung tissue, Employer's Brief at 14, renders his opinion invalid in the instant case. Dr. Franyutti did testify to this theory generally in his deposition, but he did not relate the theory to the miner or the facts of this case. *Id*. at 26. Since we are not persuaded that the administrative law judge failed to resolve material conflicts in the medical opinion of Dr. Franyutti and employer does not actually allege any error in the administrative law judge's rationale for according determinative weight to Dr. Franyutti's opinion regarding the amount of pneumoconiosis present in the miner's lungs, we affirm his decision to credit the medical opinion of Dr. Franyutti as it is supported by substantial evidence. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer's final argument regarding the administrative law judge's decision to rely on the report of Dr. Franyutti is not persuasive as, contrary to employer's argument, the administrative law judge recognized that Drs. Kleinerman, Bush, and Hutchins are Board-certified pathologists. *See* Decision and Order at 3-4. Because Drs. Franyutti, Kleinerman, Bush, and Hutchins agreed on the presence of pneumoconiosis and disagreed only on the amount of pneumoconiosis present in the miner's lungs, the administrative law judge did not err when he declined to accord determinative weight to the medical opinions of the more qualified physicians since the qualifications of Drs. Kleinerman, Bush, and Hutchins would not necessarily provide them with a greater advantage over Dr. Franyutti in determining the amount of pneumoconiosis present in the miner's lungs.[5] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We, therefore, affirm the finding of the administrative law judge that the evidence of record was sufficient to support claimant's burden of proving that pneumoconiosis was a substantially contributing cause of the miner's death as it is supported by substantial evidence. *See* 20 C.F.R. §718.205(c); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Regarding the issue of the role coal dust played in causing centrilobular emphysema, the administrative law judge found the opinions of Drs. Franyutti and Rasmussen more persuasive than the opinions of Drs. Renn, Kleinerman, Fino, Hutchins and Bush. *See*

[5] As employer has raised no challenges to the decision of the administrative law judge not to accord any weight to the opinions of Drs. Renn and Fino on the issue of the amount of pneumoconiosis present in the miner's lung, we affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order at 7-9. Thus, the administrative law judge found the medical opinion evidence sufficient to support claimant's burden of proving that pneumoconiosis was a substantially contributing cause of the miner's death. *See* 20 C.F.R. §718.205(c).

In challenging this finding of the administrative law judge, employer generally contends that Drs. Renn, Fino and Kleinerman disagree with Dr. Rasmussen regarding coal dust as a causative factor in centrilobular emphysema. Employer contends that the criticisms articulated by these physicians against the medical evidence cited by Dr. Rasmussen in his report must be accepted as correct. Thus, employer asserts that because these physicians' criticisms are correct, Dr. Rasmussen's opinion must be rejected as not reasoned. In the instant case, the administrative law judge acted within his discretion when he declined to accept the criticisms of Drs. Kleinerman, Fino and Renn regarding the medical literature referenced by Dr. Rasmussen, and when he accepted this literature as credible underlying documentation supporting Dr. Rasmussen's opinion that the miner's centrilobular emphysema was related to his coal dust exposure. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Likewise, the administrative law judge permissibly found the opinions of Drs. Bush and Hutchins not well supported and documented as each physician failed to identify and explain the basis for their opinion that coal dust played no role in the miner's centrilobular emphysema. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203; BLR 2-(4th Cir. 2000); *Church*, *supra*; *Carson v. Westmoreland Coal Co.* 19 BLR 1-18 (1994). Furthermore, contrary to employer's assertion, Dr. Rasmussen did not base his opinion solely on the report of Dr. Franyutti, the prosector; rather, in rendering his opinion in the instant case, Dr. Rasmussen reviewed not only the autopsy report of Dr. Franyutti, but also the medical reports of Drs. Fino, Renn, and Gaziano as well as the x-rays reports. *Id*. 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). Consequently, we affirm the finding of the administrative law judge that the evidence of record was sufficient to support claimant's burden of proof on the issue of the cause of the miner's death and the award of benefits as it is supported by substantial evidence and is in accordance with law.[6]

[6] Employer contends that the administrative law judge failed to follow the Board's remand order as he did not discuss the medical opinions of Drs. Doyle and Harron. As employer does not offer any reasons for how this failure would impact the decision of the

administrative law judge and because the Board affirmed the finding of the administrative law judge that Dr. Harron's report was sufficient on the issue of pneumoconiosis as a contributing cause of the miner's death, we reject employer's argument.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge