BRB No. 98-1532 BLA

DORIS L. GOWEN (Widow of JAMES A. GOWEN)	)	
Claimant-Petitioner	)	
v.	)	
OLD BEN COAL COMPANY	)	DATE ISSUED:
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 of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Paul (Rick) Rauch (McNamar, Fearnow & McSharar, P.C.), Indianapolis, Indiana, for claimant.

Mark E. Solomons (Arter & Hadden LLP), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (97-BLA-1592) of Administrative Law Judge Rudolf L. Jansen denying benefits on a miner's request for modification and 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 miner's claim, filed on October 22, 1992, was denied by the Office of Worker's Compensation Programs (OWCP) on January 14, 1993. Director's Exhbits 1, 17. The miner died on March 30, 1993. Director's Exhibit 19. On May 21, 1993, claimant filed an application for survivor's benefits. Director's Exhibit 22. The district director considered this application as an independent survivor's claim as well as a request for modification

[1]Claimant is Doris L. Gowen, widow of James A. Gowen, the miner, whose application for benefits, filed on October 22, 1992 was pending when he died on June 8, 1995. Director's Exhibits 1, 17, 19.

of the denial of the miner's claim. On July 26, 1994 OWCP denied the miner's claim, but found that claimant is entitled to survivor's benefits. Director's Exhibits 36, 43.

After accepting the parties' stipulation to twenty-nine years of coal mine employment, the administrative law judge found that claimant's application for benefits constituted a timely request for modification in the miner's claim. In addition, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R §§718.202(a)(2) and 718.203(b). However, the administrative law judge found that claimant did not establish that the miner suffered from total disability pursuant to 20 C.F.R. §718.204(c), or 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 claim and the survivor's claim.

On appeal, claimant argues that the administrative law judge based his decision on medical opinions that were supported, at least in part, on medical records contained in Offer of Proof 1 that were excluded by the administrative law judge pursuant to 20 C.F.R. §725.456. Thus, claimant challenges the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1), 718.204(c) and 718.205(c). Employer responds, urging the Board to affirm the administrative law judge's decision. Claimant replies, reiterating her arguments requesting the Board to vacate the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

[2]Inasmuch as the parties on appeal do not challenge the administrative law judge's finding of twenty-nine years of coal mine employment and the existence of pneumoconiosis arising out of

coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Under 20 C.F.R. §718.202(a)(1), claimant argues that the administrative law judge erred in determining that Drs. Becker and Poulos were Board-certified radiologists and B readers when the parties stipulated that they were only B readers. Claimant notes that the administrative law judge relied on the negative interpretations of Drs. Becker and Poulos in finding that pneumoconiosis was not established by a preponderance of the x-ray evidence and questions whether a positive finding for pneumoconiosis under Section 718.202(a)(1) would have affected the administrative law judge's negative finding under 20 C.F.R. §§718.204(c) and 718.205(c). Any alleged mischaracterization of the qualifications of Drs. Becker and Poulos by the administrative law judge is harmless. The administrative law judge only refers to the physicians' qualifications in his analysis of the conflicting evidence. Referring to the only positive x-ray reading of record of a film taken on November 23, 1992, read as positive for pneumoconiosis by Dr. Tarver and negative for pneumoconiosis by Dr. Sargent, the administrative law judge noted: "Because Drs. Tarver and Sargent both are 'B' readers and board-certified radiologists, I find they warrant equal weight in their interpretations." Decision and Order at 16. Regarding the x-ray readings of Drs. Becker and Poulos, the administrative law judge properly found, without referring to their qualifications, that "Drs. Becker and Poulos do not include findings of pneumoconiosis." *Id.*

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 benefits under 20 C.F.R Part 718 in a living miner's claim, a miner must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718,202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. *See Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*).

In order to establish entitlement to survivor's benefits under 20 C.F.R Part 718, in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR, 11 BLR 1-39 (1988); *Neeley v. Director, OWCP,* 11 BLR 1-85 (1988); *Boyd v. Director, OWCP,* 11 BLR 1-39 (1988). The administrative law judge correctly noted that the requirements of Section 718.205(c) are satisfied if claimant proves that pneumoconiosis hastened the miner's death in any way. *Peabody Coal Co. v. Director, OWCP* [Railey], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Claimant argues that the administrative law judge improperly relied on the medical opinions of Drs. Tuteur, Naeye, Caffrey and Fino because they were supported, at least in part, on medical records in Offer of Proof 1 that were excluded pursuant to 20 C.F.R. §725.456. Claimant argues that Offer of Proof 1 cannot be "bootstrapped in" by being referred to or summarized by Drs. Tuteur, Naeye, Caffrey and Fino. Claimant also argues that without the underlying evidence, the administrative law judge cannot weigh the accuracy and/or quality of the opinions, and therefore, any portion of the respective opinions which lacks foundation should have no probative weight or value. We disagree. The administrative law judge found, and claimant did not dispute, that the medical records in Offer of Proof 1 relied upon by Drs. Tuteur, Fino, Caffrey and Naeye included hospital records, physician notes and treatment records regarding the deceased miner. The administrative law judge properly found that the records found in Offer of Proof 1 are records of a type reasonably relied upon by experts in forming opinions or inferences about the subject pursuant to 29 C.F.R. §18.703. Moreover, the United States Court of Appeals for Seventh Circuit, within whose jurisdiction this case arises, in *Peabody Coal Co. v. Director, OWCP* [*Durbin*], 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999), determined regarding Rule 703 of the Federal Rules of Evidence, which forms the basis for 29 C.F.R. §18.703, "that the materials on which an expert witness bases an opinion need not be admissible, let alone admitted, in evidence, provided that they are the sort of thing on which a responsible expert draws in formulating a professional opinion...provided also that the

opposing party has had a chance to review the materials before trial. *Fed. R. Civ.P. 26(a)(2)(B)*...to prepare for rebuttal." *Durbin, supra* at 165 F.3d 1128, 21 BLR 2-543.

Claimant never contended that Offer of Proof 1 did not consist of hospital records, physician notes and treatment records regarding the deceased miner, or that they were unreliable. Moreover, claimant never contended that Drs. Fino, Tuteur, Caffrey or Naeye, "irresponsibly"relied on these excluded treatment records in formulating their own opinions about the miner's disability or cause of death. Claimant's general contention that the opinions of Drs. Naeye, Fino, Tuteur and Caffrey should be assigned no weight because these physicians relied on data outside the record is insufficient to vacate the administrative law judge's weighing of the evidence.[3] *See Durbin, supra.* Additionally, the administrative law judge properly found that the claimant participated in the cross-examination of Drs. Caffrey, Naeye and Tuteur and had the opportunity to test the factual basis upon which the physicians relied. Administrative Law Judge's Order of May 28, 1998, Case No. 97-BLA-1592 at 2; Employer's Exhibits 10, 11,12. Claimant's allegation that she could not "test the factual basis" during cross-examination because claimant's counsel did not receive Offer of Proof 1 until the date of the hearing is unpersuasive. Before Drs. Naeye, Caffrey, and Tuteur were deposed, claimant received their written reports containing a complete statement of all the opinions to be expressed, basis, reasons, data relied on and information considered in forming their opinions at least 20 days before the hearing pursuant to 20 C.F.R. §725.456 and Fed. R. Civ.P. 26(a)(2)(B). *See Durbin, supra;* Employer's Exhibits 1, 3, 5, 7. Claimant actively proceeded with cross-examination of the deposed physicians. Assuming that claimant did not have the opportunity to prepare for rebuttal, claimant never requested the administrative law judge to leave the record open to submit rebuttal evidence. Consequently, we hold that the administrative law judge properly considered the medical opinions of Drs. Tuteur, Naeye, Caffrey and Fino under Sections 718.204(c) and 718.205(c).

[3] Relevant to the quality of the opinions, claimant only noted that Dr. Naeye erred in stating that the miner died in 1995 instead of 1993 and in making reference to a pulmonary function study and blood gas study performed in 1993 when the last study was performed in 1992 according to the evidence of record. Dr. Naeye permissibly relied on a blood gas study excluded from the record under 20 C.F.R. §725.4. 28 U.S.C.A. Rule 703; 29 C.F.R §18.703; *Durbin.* Dr. Naeye's mistake regarding the miner's date of death is insufficient to give no weight to his opinion.

We affirm, as unchallenged, the administrative law judge's finding that total disability is not established pursuant to Section 718.204(c)(1) and (c)(2), as all the pulmonary function studies and blood gas studies of record are non-qualifying.[4] *Skrack, supra;* Decision and Order at 17. Under Section 718.204(c)(3), the administrative law judge properly found that only Dr. Jones diagnosed cor pulmonale with right sided congestive heart failure, while the autopsy report and the other medical evidence of record, *inter alia,* the opinions by Drs. Caffrey, Naeye, Fino and Tuteur, does not contained a finding of cor pulmonale. Decision and Order at 18; Director's Exhibit 23; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 5, 7, 10-12. The administrative law judge specifically credited the opinion of Drs. Naeye and Caffrey in finding that Dr. Jones did not comply with the accepted method for diagnosing cor pulmonale as he did not exclude other heart conditions before making his diagnosis, and did not consider that the "medical record" does not contain a finding of pulmonary hypertension, a prerequisite for a diagnosis of cor pulmonale.[5] Decision and Order at 18. Therefore, we hold that the administrative law judge permissibly found that the contrary opinions of Drs. Caffrey, Naeye, Fino and Tuteur entitled to more weight than the opinion of Dr. Jones, as these opinions were better reasoned and supported by the medical evidence. *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-49 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

[4]A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those in the tables. 20 C.F.R. §718.204(c)(1), (c)(2).

[5]The administrative law judge found that both Dr. Naeye and Caffrey agreed that the measurements of the miner's heart at autopsy were not made in a way that would support a finding of cor pulmonale. Decision and Order at 18.

Under Section 718.204(c)(4), the administrative law judge properly found that Dr. Combs made no findings of a pulmonary or respiratory impairment and his conclusion that mine work would "aggravate" the miner's breathing capability does not support a finding of total disability. *See Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); Decision and Order at 19; Director's Exhibit 12. Dr. Combs failed to address the severity of claimant's impairment in such a way as to permit the administrative law judge to infer total disability pursuant to Section 718.204(c)(4). *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1- 104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Similarly, the administrative law judge properly found that Dr. Gray's cursory statement that the miner "was constantly having difficulties associated with his pneumoconiosis" is not a finding of total disability, and properly found that it is undocumented and unreasoned. *Id.;* Decision and Order at 19; Director's Exhibit 35.[6] In addition, the administrative law judge properly gave less weight to Dr. Jones' opinion that the miner suffered from a totally disabling respiratory impairment because he relied on Dr. Combs opinion, *see* discussion *supra* at 5*,* Director's Exhibit 12, and failed to explained his conclusion that the miner's pulmonary function studies document a "moderate airway obstruction" in light of the contrary objective evidence in Dr. Combs' opinion. *Fields, supra;* Decision and Order at 19, 20; Claimant's Exhibit 1. Finally, the administrative law judge properly relied on the opinions of Drs. Naeye, Tuteur, Fino and Caffrey that agreed that the medical evidence of record did not "reflect any significant abnormality in lung function" as their opinions are supported by the evidence of record, *i.e.* non-qualifying pulmonary function studies and blood gas studies, in finding that claimant failed to establish total disability under Section 718.204(c)(4). *Fields,*

[6]We reject claimant's suggestion that the administrative law judge should have found Dr. Gray's opinion documented and supported based on the records contained in Offer of Proof 1. In contrast to Drs. Fino, Caffrey, Tuteur, and Naeye, Dr. Gray made no reference to any medical records to support his one paragraph letter. Director's Exhibit 35.

supra; Decision and Order at 19; Employer's Exhibits 7, 11, 12.[7]

In the survivor's claim, claimant argues that the administrative law judge erred in his treatment of the opinions of Drs. Gray, Kremzar and Fino and in implying that "PFT values above the total disability standards produce no pulmonary or respiratory impairment." Claimant's Brief at 16. Contrary to claimant's assertion, the administrative law judge properly found that "Dr. Gray summarily concluded that pneumoconiosis was 'a major cause for [the miner's] death.'" Decision and Order at 20; Director's Exhibit 35. Therefore, the administrative law judge properly found his opinion insufficient to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c)(1). Similarly, the administrative law judge properly found Dr. Kremzar's conclusion that pneumoconiosis with chronic obstructive pulmonary disease "may have" been a contributory factor in the miner's death equivocal and not supported by any objective evidence of record, including his autopsy report. 20 C.F.R. 718.205(c)(2); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Fields, supra;* Decision and Order at 21; Director's Exhibit 23, 39. Claimant's comment that the administrative law judge erred in relying on Dr. Fino's opinion that pneumoconiosis did not cause the miner's death because Dr. Fino concluded that the miner did not suffer from pneumoconiosis is factually incorrect as Dr. Fino diagnosed simple pneumoconiosis based on autopsy, *see* Employer's Exhibit 8, Decision and Order at 13. Finally, under Section 718.205(c)(2), the administrative law judge permissibly found, *inter alia,* that the non-qualifying pulmonary function studies and blood gas studies of record do not support Dr. Jones' diagnosis of "severe coal workers' pneumoconiosis and

[7]Claimant alleges that the opinions of Drs. Naeye, Tuteur, Caffrey and Fino are not reliable because they relied on Dr. Combs' reported sixty year smoking history. The administrative law judge noted claimant's alleged sixteen pack years of smoking history, claimant's testimony that the miner quit smoking over fifty years ago and that the miner"never smoked a lot." Decision and Order at 3. Contrary to claimant's suggestion, the administrative law judge was not required to rely on the smoking history reported in Offer of Proof 1 which is not part of the record. Consequently, the administrative law judge, as well as Drs. Naeye, Caffrey, Tuteur and Fino, permissibly relied on Dr. Combs' reported smoking history.

significant pulmonary deficits" *Fields, supra;* Decision and Order at 21, 22; Claimant's Exhibit 1. Inasmuch as claimant does not otherwise challenged the administrative law judges finding that the contrary opinions of Drs. Tuteur, Naeye, Caffrey and Fino are better explained and are more consistent with the evidence of record, than the opinions of Drs. Jones, Gray or Kremzar, we affirm his finding that the evidence does not establish death due to pneumoconiosis pursuant to Section 718.205(c). *Skrack, supra.*

Inasmuch as claimant failed to establish total disability under Section 718.204(c), and that pneumoconiosis caused, substantially contributed to or hastened the miner's death pursuant to Section 718.205(c), an award of benefits under Part 718 is precluded in both the miner's claim and the survivor's claim.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge