BRB No. 99-1010 BLA

JOYCE FAYE NAPIER (On Behalf Of and Widow of JESSE NAPIER) Claimant-Respondent v. E.A. WHITAKER TRUCKING COMPANY and AMERICAN RESOURCES INSURANCE COMPANY, INCORPORATED 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 - Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

H. Brett Stoneciper (Ferreri, Fogle & Picklesimer), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (1998-BLA-0966 and 1998-BLA-0967) of Administrative Law Judge Joseph E. Kane awarding benefits on a miner's claim and 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 filed his duplicate claim for black lung benefits on April 7, 1995 and subsequently on January 11, 1997, while the claim was pending, the miner died. Decision and Order at 4; Director's

Exhibit 30. On April 10, 1997, the miner's widow, claimant herein, filed a survivor's claim. Decision and Order at 4; Director's Exhibit 30. Subsequently, both claims were consolidated. The district director awarded benefits on both claims, employer requested a formal hearing and the case was referred to the Office of Administrative Law Judges. The administrative law judge credited the miner with at least thirty years of coal mine employment and adjudicated the claims pursuant to 20 C.F.R. Part 718. Employer conceded that the miner suffered from pneumoconiosis arising out of coal mine employment and that he was totally disabled from a respiratory or pulmonary standpoint. *See* 20 C.F.R. §§718.202(a), 718.203(c), 718.204(c). The administrative law judge thus found that a material change in conditions was established since the previous denial pursuant to 20 C.F.R. §725.309(d). *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). With regard to the miner's claim, the administrative law judge found that the evidence was sufficient to establish total disability due at least in part to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). With respect to the survivor's claim, the administrative law judge found that the evidence was sufficient to establish that pneumoconiosis was a contributing cause of death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded on both claims. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's total disability and death were due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b) and 718.205(c). Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[1]

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

[1] Inasmuch as the administrative law judge's length of coal mine employment finding and his findings that the miner suffered from pneumoconiosis arising out of coal mine employment and a totally disabling respiratory or pulmonary impairment, are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner's total disability is due "at least in part" to pneumoconiosis. *See* 20 C.F.R. §718.204(b); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[2] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Sixth Circuit, wherein jurisdiction of this case lies, adopted the standard whereby pneumoconiosis will be considered a contributing cause of the miner's death if it actually hastened the miner's death. *See* 20 C.F.R. §§718.1, 718.205, 725.201; *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's total disability and death were due to pneumoconiosis at 20 C.F.R. §§718.204(b) and 718.205(c). Specifically, employer asserts that the

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[2] Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

administrative law judge erred in relying on the opinion of Dr. Chaney and rejecting the opinions of Drs. Kleinerman and Naeye regarding the role pneumoconiosis played in the miner's totally disabling respiratory impairment and his death.

The administrative law judge primarily considered the opinions of Drs. Chaney, Masi, Baker, Broudy, Kleinerman and Naeye in determining whether the miner's total disability and death were due, at least in part, to pneumoconiosis. Dr. Chaney was the miner's treating physician and examined the miner several times during 1995 and 1996 while Dr. Masi was the miner's attending physician during several hospitalizations before the miner died and both physicians treated the miner for, *inter alia*, his respiratory problems. The death certificate, signed by Dr. Chaney, lists pneumonia and coal workers' pneumoconiosis as the causes of death. Drs. Baker and Broudy performed pulmonary evaluations in association with the miner's claim for black lung benefits and Drs. Kleinerman and Naeye reviewed the medical records and autopsy slides. Although Drs. Kleinerman and Naeye opined that the miner suffered from pneumoconiosis, they concluded that it did not contribute to the miner's disabling pulmonary impairment or his death. The administrative law judge accorded greatest weight to the opinions of Drs. Chaney, Masi and Baker to find that the miner suffered a total disability due to pneumoconiosis and relied on Dr. Chaney's opinion to find that pneumoconiosis contributed to the miner's death because the opinions were reasoned and documented. The administrative law judge found that the contrary opinions of Drs. Kleinerman and Naeye were flawed.

Contrary to employer's assertion, the administrative law judge noted that in a letter dated December 30, 1997, Dr. Chaney wrote:

> [a]s you know, this patient died from respiratory failure contributed by coal worker's pneumoconiosis. Certainly, this condition did contribute and hasten his death. Postoperative exam was performed demonstrating coal worker's pneumoconiosis on this patient at the time of death.

Decision and Order at 13; Director's Exhibit 30. The administrative law judge discussed the fact that Dr. Chaney's opinion was supported by his office records which showed that Dr. Chaney diagnosed and treated the miner for his chronic obstructive pulmonary disease (COPD), bronchitis and cor pulmonale and had prescribed medications. In addition, the administrative law judge noted that Dr. Chaney had indicated in his opinion that he had reviewed the autopsy results. Decision and Order at 19. Thus, we reject employer's assertions that Dr. Chaney's opinion was undocumented and that the administrative law judge failed to provide a valid basis for according dispositive weight to the opinion of Chaney, along with Drs. Baker and Masi, whose opinions the administrative law judge also relied on in finding that the miner's total disability and death were due at least in part to

pneumoconiosis.[3] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 19-23. *Id*.

Moreover, the administrative law judge rationally accorded diminished weight to the opinions of Drs. Kleinerman and Naeye. The administrative law judge discussed a "flaw" in Dr. Kleinerman's opinion regarding his statement that the miner had a minimal impairment at the time of retirement and simple pneumoconiosis does not progress in the absence of further exposure, along with Dr. Kleinerman's agreement with Dr. Broudy that the obstruction was due solely to smoking. Decision and Order at 20. The administrative law judge observed that "there is no basis for the position that any contribution coal dust exposure/pneumoconiosis made to the initial impairment is immaterial simply because the impairment progressed, even if that progression was due entirely to smoking." *Id*. The administrative law judge noted that "[t]he fact that the impairment was not totally disabling at the time of retirement is not a rational basis for finding that pneumoconiosis did not contribute to it." *Id*. The administrative law judge found that Dr. Naeye's opinion was similarly flawed. Decision and Order at 20, n. 7. Moreover, the administrative law judge discussed the fact that Dr. Kleinerman incorrectly stated that the October 10, 1995, blood gas study did not show hypoxemia whereas Dr. Broudy, the examining physician, found that it did show some hypoxemia. Decision and Order at 14, 21; Director's Exhibit 25; Employer's Exhibit 1. The administrative law judge also did not accept Dr. Naeye's conclusion that the tissue slides were not representative of the miner's respiratory condition as well as his opinion that the pneumoconiosis was mild, not severe since the slides accompanied the autopsy report and Dr. Kleinerman instead diagnosed a severe degree of simple pneumoconiosis. Decision and Order at 21-22. The administrative law judge thus rationally found that "[a]s such, [Dr. Naeye's] conclusion that the pneumoconiosis was too mild to have caused any impairment or contributed to death must also be rejected as unsupported by the evidence." Decision and Order at 22; *see Clark*, *supra*; *Fields*, *supra*; *Lucostic*, *supra*; *Fuller*; *supra*. Thus, we reject employer's assertions that the administrative law judge failed to provide a valid basis for according dispositive weight to the opinion Dr. Chaney and that

[3] The administrative law judge stated that "[w]hile Dr. Abalos, the autopsy prosector, did not render an opinion on the cause of death, his report indicates findings of coal workers' pneumoconiosis and acute bronchitis. The only emphysema he identified was focal emphysema." Decision and Order at 19. The administrative law judge observed that "Dr. Masi stated in 1995 that the miner's COPD was secondary to heavy smoking in the past and mining exposure." (emphasis added). *Id*. Further, the administrative law judge stated that "Dr. Baker related the COPD, chronic bronchitis, and hypoxemia to both coal dust exposure and cigarette smoking, even in the face of negative x-ray readings." *Id*.

the administrative law judge erred in discounting the medical opinions of Drs. Kleinerman and Naeye.[4]

The administrative law judge is charged with the evaluation and weighing of the medical evidence and may draw appropriate inferences therefrom, *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962)("fact-finders are not bound to decide according to doctors' opinions if rational inferences lead in the other direction"); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Because the administrative law judge's findings of disability causation and death due to pneumoconiosis are neither patently unreasonable nor inherently incredible, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1335, 8 BRBS 744 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979), and, further, because the administrative law judge's findings of both disability causation and death due to pneumoconiosis are supported by substantial evidence based on the record as a whole with no reversible error, they are affirmed. 20 C.F.R. §§718.204(b), 718.205(c).

Accordingly, the Decision and Order of the administrative law judge awarding benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[4] We also reject employer's implication that the administrative law judge erred by failing to accorded determinative weight to the opinions of Drs. Kleinerman and Naeye in view of their superior qualifications. An administrative law judge is not required to defer to a doctor with superior qualifications. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge