BRB No. 98-1294 BLA

DOROTHY L. COMPTON (Widow of ASHLAND P. COMPTON)	)	
Claimant-Petitioner	)	
v.	)	
CONSOLIDATION 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 Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Gary B. Nelson (Feirich, Mager, Green & Ryan), Carbondale, Illinois, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1722) of Administrative Law Judge Edward J. Murty, Jr., denying benefits 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).[1] The administrative law judge found over thirty years of

[1] Claimant is the surviving widow of the miner, Ashland R. Compton, who had been awarded benefits on April 23, 1993, on a living miner's claim filed April 11, 1984, *see* Director's Exhibit 18. The miner died on January 30, 1996, Director's Exhibits 1, 4, and claimant subsequently filed a survivor's claim on February 20, 1996, Director's Exhibit 1.

coal mine employment established and adjudicated the survivor's claim pursuant to 20 C.F.R. Part 718. The administrative law judge found death due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that death due to pneumoconiosis was not established pursuant to Section 718.205(c). Employer responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to 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 into the Act 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 in this survivor's claim filed after January 1, 1982, in which the miner had not been awarded benefits on a claim filed prior to January 1, 1982, *see* 30 U.S.C. §§901; 932(1), claimant must establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988), and that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §§718.1; 718.205(c); *Neeley, supra*; *cf. Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989), which arose out of coal mine employment, *see* 20 C.F.R. §718.203; *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).[2] Moreover, the United States Court of Appeals for the Seventh Circuit, wherein this case arises, has held that a survivor may demonstrate that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to 20 C.F.R. §718.205(c)(2) by demonstrating that the miner's pneumoconiosis resulted in hastening the miner's death to any degree, *see Peabody*

[2] None of the available presumptions pursuant to 20 C.F.R. §718.303-306 are applicable, *see* 20 C.F.R. §718.202(a)(3). These presumptions are set forth as follows: at Section 411(c)(2) of the Act, 30 U.S.C. §921(c)(2), as implemented by 20 C.F.R. §718.303; at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305; and at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306. They are inapplicable to this survivor's claim filed after January 1, 1982, *see* 20 C.F.R. §§718.303(c), 718.305(a), (e), 20 C.F.R. §718.306(a); Director's Exhibit 1. Finally, inasmuch as there is no evidence of complicated pneumoconiosis in the record, the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, is inapplicable, *see* 20 C.F.R. §§718.205(c)(3), 718.304.

Coal Co. v. Director, OWCP [Railey], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).[3]

[3] Although claimant properly notes that the administrative law judge erroneously cited the standard for demonstrating that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to Section 718.205(c)(2) as enunciated by the United States Court of Appeals for the Sixth Circuit in *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993), *see* Decision and Order at 2, inasmuch as the standard enunciated by the Sixth Circuit Court in *Brown* is the same as adopted by the Seventh Circuit Court in *Railey*, any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Initially, the administrative law judge noted that the miner had been receiving benefits at the time of his death and that "there is no serious issue as to the existence of pneumoconiosis," Decision and Order at 2.[4] Next, the administrative law judge considered the five physicians who provided relevant opinions pursuant to Section 718.205(c), including Dr. Oza, a board-certified physician in internal medicine and oncology who treated the miner for non-Hodgkins lymphoma and completed the miner's death certificate, noting the cause of death to be malignant lymphoma, Director's Exhibit 4. While Dr. Oza noted that he was aware that the miner had pneumoconiosis, he found that it was not a contributing factor in the miner's death and that it did not hasten his death, Claimant's Exhibit 3; Employer's Exhibit 3. In addition, Dr. Oza testified that no treatment for the miner's lymphoma was withheld in light of his pulmonary condition, Employer's Exhibit 3. Dr. Adkins, a board-certified physician in internal medicine and oncology who also treated the miner for non-Hodgkins lymphoma, found that pneumoconiosis was a factor leading to the miner's death, in addition to his lymphoma, Director's Exhibit 8, that the miner's death was hastened as a direct contributing result of his pneumoconiosis and that the miner's ability to tolerate certain therapy for his lymphoma was limited by his pneumoconiosis, Claimant's Exhibit 1.[5] In

[4] Claimant contends that the administrative law judge erred in not making a specific finding as to the existence of pneumoconiosis arising out of coal mine employment. The doctrine of collateral estoppel is applicable in this case regarding the existence of pneumoconiosis arising out of coal mine employment, in light of the finding made in the miner's previously awarded living miner's claim, *see* Director's Exhibit 18, and the fact that the record in the survivor's claim does not contain any autopsy evidence which was not available and could not have been adduced at the time of the adjudication of the miner's claim, *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999). Nevertheless, employer conceded the existence of pneumoconiosis in its post-hearing brief and every physician who provided a relevant opinion under Section 715.205(c) noted that the miner had pneumoconiosis. Thus, any error by the administrative law judge in not making a specific finding as to the existence of pneumoconiosis arising out of coal mine employment was harmless, *see Larioni*, *supra*.

[5] Contrary to claimant's contention, the administrative law judge did not mischaracterize the record by stating that when Dr. Oza completed the miner's initial chemotherapy, his lymphoma was in remission, but correctly noted that "there was still some trace of lymphoma evident in [the miner's] bone marrow biopsy," Decision and Order at 2; *see also* Employer's Exhibit 3 at 14-15. In addition, the administrative law judge did not necessarily indicate that the miner's lymphoma had spread to his brain at the time that Dr. Adkins first examined the miner, as claimant asserts.

In addition, although the parties agreed to the administering and submission of a post-hearing deposition from Dr. Oza, *see* Employer's Exhibit 3, claimant objected to the

addition, after a review of Dr. Adkins' opinion, Dr. Long initially found that coal workers' pneumoconiosis contributed to the miner's death, Director's Exhibit 9, but subsequently , after a review of the medical evidence of record, found that pneumoconiosis did not cause, contribute to or hasten the miner's death, Employer's Exhibit 1. Finally, Dr. Jones, a board-certified pathologist, reviewed the evidence and found that coal workers' pneumoconiosis was a substantial contributing and aggravating factor that hastened the miner's death, noting that Dr. Adkins had told him that the miner could not be treated with cisplatinum, the appropriate therapy for his lymphoma, due to his coal workers' pneumoconiosis, Claimant's Exhibits 2, 3, whereas Dr. Graham, another board-certified pathologist who reviewed the evidence, found that the miner's death was not caused, contributed to or aggravated by his pneumoconiosis, Employer's Exhibit 2.

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additional post-hearing submission by employer, along with the deposition, of treatment records from Dr. Oza and other hospital treatment records regarding the miner which were not part of the original record. Inasmuch as the administrative law judge did not refer to and/or rely on the post-hearing evidence submitted by employer, any error by the administrative law judge in not specifically addressing claimant's objection is harmless, *see Larioni*, *supra*.

Contrary to claimant's contention, the administrative law judge, within his discretion, gave greater weight to the opinions of the internists rather than the pathologists in light of their superior relative qualifications in the subspecialties of oncology and pulmonary diseases, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); *see also Cadwallader v. Director, OWCP*, 7 BLR 1-879 (1985).[6] Decision and Order at 2-3. In

[6] While noting that "hearsay is acceptable in a proceeding such as this," the administrative law judge also indicated his reluctance to "accept" the hearsay contained in Dr. Jones' opinion, who related a conversation he had with Dr. Adkins in which Dr. Adkins indicated that the miner was treated for his lymphoma with carboplatinum, but could not be treated with cisplatinum, a more effective treatment, due to his pneumoconiosis, *see* Claimant's Exhibits 2, 3. Decision and Order at 3. The administrative law judge noted that Dr. Oza had stated that cistoplatinum and carboplatinum were analogs, *see* Employer's Exhibit 3. Although claimant correctly contends that hearsay evidence is "admissible" in administrative hearings, the administrative law judge is not required to accept or credit such evidence, *see Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986).

addition, the administrative law judge specifically found Dr. Oza's opinion that pneumoconiosis was not a contributing factor in the miner's death to be "quite definite," whereas Dr. Adkins did not adequately explain his opinion that pneumoconiosis hastened the miner's death, other than that the miner's ability to tolerate certain therapy for his lymphoma was limited by his pneumoconiosis, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). Thus, the administrative law judge found that death due to pneumoconiosis was not established by a preponderance of the evidence.

It is for the administrative law judge, as the trier-of-fact, to determine whether an opinion is documented and reasoned, *see Clark, supra; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, inasmuch as the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, but may only inquire into whether there is substantial evidence in the record considered as a whole to support the findings of the administrative law judge, the administrative law judge has great leeway in evaluating the

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In addition, claimant contends that the administrative law judge erred in noting that Dr. Jones' credibility had been questioned by another administrative law judge in a different case, which was not a part of the record in this case, *see generally Hall v. Director, OWCP*, 12 BLR 1-80 (1988). However, the administrative law judge, within his discretion, ultimately gave more weight to the internists' opinions over the pathologists' opinions, such as Dr. Jones, in light of their superior relative qualifications in the subspecialties of oncology and pulmonary diseases, *see Scott*, *supra*; *Wetzel*, *supra*; *Massey*, *supra*; *see also Cadwallader*, *supra*. Thus, inasmuch as the administrative law judge provided other valid, alternative reasons for giving less weight to Dr. Jones' opinion, any potential error by the administrative law judge in this regard is harmless, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983); *see also Larioni*, *supra*.

record evidence, 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that death due to pneumoconiosis was not established pursuant to Section 718.205(c) as supported by substantial evidence and, therefore, affirm the administrative law judge's denial of benefits in this survivor's claim, *see Shuff, supra*; *Neeley, supra*; *cf. Smith, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge