

BRB No. 03-0450 BLA
and 03-0450 BLA-A

ZELMA BELCHER)
(Widow of WILLIAM BELCHER))

Claimant-Petitioner)

v.)

BELCHER & MULLINS COAL COMPANY)

and)

KENTUCKY COAL PRODUCERS' SELF-)
INSURANCE FUND)

Employer/Carrier-)
Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 03/19/2004

DECISION and ORDER

Appeal of the Decision and Order - Granting Request for Modification, Awarding Living Miner Benefits, and Denying Survivor Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

John T. Chafin (Chafin & Davis, P.S.C.), Prestonsburg, Kentucky, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer and claimant, the widow of the miner, appeal, the Decision and Order - Granting Request for Modification, Awarding Living Miner Benefits, and Denying Survivor Benefits (2002-BLA-115 and 2002-BLA-131) of Administrative Law Judge Thomas F. Phalen, Jr. on miner's and survivor's claims 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 lengthy history of these consolidated claims is set forth in the administrative law judge's Decision and Order. The administrative law judge noted that the miner had previously established thirty-five years of coal mine employment and that employer had stipulated to thirty-five years of coal mine employment. The administrative law judge adjudicated the claims pursuant to 20 C.F.R. Part 718, based on the dates of filing. Decision and Order at 4. Considering the newly submitted evidence, in conjunction with the evidence previously submitted in the miner's claim, the administrative law judge concluded that the existence of pneumoconiosis, an element of entitlement previously adjudicated against the miner, was established, and that claimant had therefore established a change in conditions sufficient to justify modification of the prior denial of benefits in the miner's claim. Considering all of the relevant evidence, the administrative law judge found that the evidence established that the miner's pneumoconiosis arose out of coal mine employment, and that he was totally disabled due to pneumoconiosis. Accordingly, benefits in the miner's claim were awarded. Turning to the survivor's claim, the administrative law judge found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied in the survivor's claim.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis in the miner's claim. Claimant responds, urging affirmance of the award of benefits in the miner's claim. On appeal, claimant contends that the administrative law judge erred in finding that the miner's death was not due to pneumoconiosis and in denying benefits in the survivor's claim. Employer responds, urging affirmance of the denial of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), is not participating in either appeal.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the

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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

pneumoconiosis was totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); see *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). In a survivor's claim filed on or after January 1, 1982, death will be considered to be 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, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). 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); see *Griffith v. Director, OWCP*, 49 F.3d 184, 186 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis in the miner's claim on the basis of autopsy evidence. Specifically, employer contends that the administrative law judge erred in according greater weight to the opinion of Dr. Dennis, the autopsy prosecutor, than to the opinions of Drs. Caffrey and Naeye.² In his autopsy report, Dr. Dennis stated that he had found black pigmentation in the miner's lymph nodes and significant anthracosilicosis, Director's Exhibit 209. Drs. Naeye and Caffrey reviewed the autopsy report and slides. Dr. Naeye detected the presence of black pigment in the lungs, but did not find any tissue damage, and concluded that there was no pneumoconiosis, Employer's Exhibit 1. Dr. Caffrey detected moderate amounts of black pigment and, although he

² The administrative law judge also noted that Dr. Dennis's opinion was supported by Dr. Siddiqui's opinion. Dr. Siddiqui reviewed the autopsy report and concluded that it proved that the miner was suffering from pneumoconiosis/anthracosilicosis. Director's Exhibit 221.

noted that the miner's lungs indicated exposure to coal dust, found that there was insufficient evidence of lesions to diagnose the existence of pneumoconiosis, Employer's Exhibit 5.

Contrary to employer's contention, the diagnosis of anthracosilicosis made by Dr. Dennis is a diagnosis of pneumoconiosis under the Act. 20 C.F.R. §718.201(a)(1); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001)(*en banc*)(Smith and Dolder, Administrative Appeals Judges, dissenting in part and concurring in part); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Fetterman v. Director, OWCP*, 7 BLR 1-688, 1-690 n.2 (1985). Thus, contrary to employer's contention, the administrative law judge did not substitute his judgment for that of the medical expert when he found that the opinion of Dr. Dennis diagnosing anthracosilicosis established the existence of pneumoconiosis. Further, the administrative law judge properly credited the opinion of Dr. Dennis over the opinions of Drs. Naeye and Caffrey because he found, *inter alia*, that Dr. Dennis's description of his microscopic analysis of the autopsy slides was more thorough and detailed. This was rational. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, the administrative law judge rationally found that the existence of pneumoconiosis was established by autopsy evidence.³

Employer next contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis. Employer contends that the administrative law judge erred in his weighing of the medical opinions of record. Considering the evidence relevant to disability causation, the administrative law judge found that Drs. Sundaram, Rasmussen, and Siddiqui diagnosed pneumoconiosis and found that the miner was totally disabled by pneumoconiosis, while Drs. Fino, Caffrey, Naeye, and Dahhan found that claimant was not totally disabled by pneumoconiosis.

The administrative law judge accorded little weight to the opinions of Drs. Fino, Caffrey, Naeye and Dahhan, that disability was not due to pneumoconiosis, because their findings of no pneumoconiosis were contrary to the administrative law judge's finding of pneumoconiosis. This was rational. *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidation Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Clark*, 12 BLR at 1-155; *Trujillo v. Kaiser Steel Corp.*, 11 BLR 1-472, 1-473 (1986).

³ The administrative law judge's findings pursuant to Section 718.202(a)(1), (3), (4) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Further, contrary to employer's argument, the administrative law judge also correctly found that Dr. Sundaram had examined the miner, obtained an accurate account of the miner's smoking and coal mine employment history, noted the miner's symptoms, and set forth his clinical observations and findings.⁴ The administrative law judge, therefore, found that Dr. Sundaram's opinion was well-reasoned and documented and entitled to probative weight on the issue of causation. *See Clark*, 12 BLR at 1-155. In addition, the administrative law judge found that the opinions of Drs. Rasmussen and Siddiqui also established that the miner was totally disabled due to pneumoconiosis, findings which employer has not challenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We therefore affirm the administrative law judge's finding that the evidence established that the miner was totally disabled due to pneumoconiosis and affirm the administrative law judge's finding of modification and award of living miner's benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Regarding the denial of benefits in the survivor's claim, claimant cross-appeals, contending that the administrative law judge erred in his weighing of the evidence relevant to the cause of the miner's death. Claimant specifically contends that the opinion of Dr. Valera, the miner's treating physician, is sufficient to establish that pneumoconiosis contributed to the miner's death.

⁴ Employer contends that Dr. Sundaram did not set forth any smoking history in his March 8, 1999 report. That report, however, shows that Dr. Sundaram noted that the miner quit smoking in February 1997, although the duration and rate of claimant's smoking history was not recorded. Director's Exhibit 167. Based on other evidence in the record, however, the administrative law judge found that the miner smoked one pack of cigarettes a day from 1938 until 1997, a 59 pack year smoking history. Decision and Order at 22.

In addition, employer contends that the administrative law judge's treatment of Dr. Sundaram's opinion is inconsistent because he found it both well-reasoned and documented and not well-reasoned and documented. Decision and Order at 19, 23, 26. The administrative law judge, however, found the opinion not well-reasoned and documented on the issue of the existence of pneumoconiosis because, although Dr. Sundaram set forth his clinical findings and observations, he did not provide any reasoning to support his diagnosis of coal workers' pneumoconiosis. Decision and Order at 19. Regarding Dr. Sundaram's opinion on the issue of causation, however, the administrative law judge stated that Dr. Sundaram's opinion was well-reasoned and documented on the issue of disability and disability causation. Decision and Order at 23, 26. This is permissible. *See Jarrell v. C & H Coal Co.*, 9 BLR 1-53, 1-54 (1986)(Brown, J., concurring and dissenting).

In his report dated December 18, 2001 report, Dr. Valera found that the miner died of acute respiratory arrest secondary to pulmonary edema and chronic heart failure due to advanced coronary artery disease and significant anthracosilicosis. Employer's Exhibit 1. In his deposition, however, Dr. Valera stated that respiratory arrest was the cause of death and that pneumoconiosis did not contribute to death, Employer's Exhibit 5. Further, Dr. Valera stated that he was unaware of the miner's significant (59 pack year) smoking history. Thus, the administrative law judge accorded Dr. Valera's opinion little weight due to the inconsistencies between his written report and deposition testimony and because of his failure to consider the miner's smoking history. This was rational. *Peabody Coal Co. v. Groves*, 271 F.3d 829, BLR (6th Cir. 2002); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolfe Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR (6th Cir. 2002); see *Bobick*, 13 BLR at 1-54; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984). We, therefore, affirm the administrative law judge's finding that death due to pneumoconiosis was not established and we affirm the denial of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order – Granting Request for Modification, Awarding Living Miner Benefits, And Denying Survivor Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge