BRB No. 09-0460 BLA

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| DREAMA ADKINS<br>(Widow of CECIL ADKINS) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | DATE ISSUED: 03/16/2010 |
| CEDAR COAL COMPANY | ) | |
| Employer-Petitioner | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

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

Robert M. Williams (Maroney, Williams, Weaver & Pancake, PLLC) Charleston, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-5345) of Administrative Law Judge Thomas M. Burke with respect to a survivor's claim[1] filed on February 13, 2006, 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). After crediting the miner with 20.07 years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge concluded that, in light of employer's stipulation in the miner's claim, the existence of pneumoconiosis arising out of coal mine employment was established at 20 C.F.R. §§718.202(a) and 718.203. In addition, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge impermissibly determined that employer's stipulation to the existence of pneumoconiosis in the miner's claim was binding in the survivor's claim. In addition, employer states that the administrative law judge erred in relying on unreasoned opinions in finding death due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. In its reply brief, employer reiterates its arguments and requests that the case be remanded for consideration of the record as a whole. In his limited brief, the Director, Office of Workers' Compensation Programs (the Director), states that the administrative law judge correctly determined that the issue of whether the miner had pneumoconiosis was not before him. In addition, the Director maintains that any error by the administrative law judge regarding the existence of pneumoconiosis was harmless because employer is collaterally estopped from raising the issue.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

[1] Claimant is the surviving spouse of the miner, Cecil Adkins, who died on December 27, 2005. Director's Exhibit 9. During his lifetime, the miner was awarded and received benefits under the Act. *See Adkins v. Cedar Coal Company*, BRB No. 89-0308 BLA (July 5, 1991) (unpub.).

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his finding that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[3] 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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 Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-901 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

## I. Procedural Issue

The administrative law judge, relying on the decision of the United States Court of Appeals for the Fourth Circuit in *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), found that employer's stipulation to the existence of pneumoconiosis in the miner's claim was binding on employer in the survivor's claim.[4] Decision and Order at 2-3. In addition, the administrative law judge noted that employer did not raise the issue of whether claimant established the existence of pneumoconiosis at the hearing and it was not listed on Form CM-1025, the document on which the district director identifies the contested issues. *Id*. at 3. Therefore, the administrative law judge

[3] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] In *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), the Fourth Circuit held that the stipulation and concession by the Director, Office of Workers' Compensation, at the hearing and in his response brief, to the contents of the award of benefits in the miner's claim, provided the causal link between the diagnosis of chronic obstructive pulmonary disease on the death certificate and the diagnoses of legal pneumoconiosis in two medical reports.

determined that employer was bound by its stipulation in the miner's claim and had waived its right to object to the application of the stipulation in the survivor's claim by not acting to alter Form CM-1025. *Id*. Consequently, the administrative law judge concluded that claimant established that the miner had pneumoconiosis arising out of coal mine employment. *Id*.

Employer argues, on appeal, that because the transcript of the hearing in the miner's claim, reflecting employer's stipulation to the existence of pneumoconiosis, is not in the record, the administrative law judge could not permissibly rely on it. In addition, employer asserts that, contrary to the administrative law judge's statement, it did object at the hearing in the survivor's claim to the fact that pneumoconiosis was not listed as a contested issue when it stated that it was contesting "the remaining issues." Employer's Brief at 6; *see* Hearing Transcript at 6.

Claimant responds, arguing that employer is collaterally estopped from asserting that the miner did not suffer from coal workers' pneumoconiosis. The Director also asserts that the administrative law judge properly determined that whether the miner had pneumoconiosis was not an issue before him pursuant to 20 C.F.R. §§725.450 and 725.421(b)(7) and that employer made no effort to amend Form CM-1025.[5] Further, the Director argues that although the administrative law judge misread *Richardson*, this error is harmless, as employer is collaterally estopped from raising the existence of pneumoconiosis in the survivor's claim.

In its reply brief, employer reiterates its arguments and asserts that remand is required so that the record can be corrected to include relevant material from the miner's claim. Employer argues that the contents of Director's Exhibit 1, provided to the administrative law judge, which included documents from the miner's claim, is not the same as the exhibit provided to it and claimant. Therefore, employer states that it is unable to offer an assessment of the stipulation contained in the hearing transcript for the miner's claim and that its physicians were unable to respond to the x-ray interpretations contained in the miner's claim and referenced by the administrative law judge in his decision.

[5] Under 20 C.F.R. §725.450, "[a]ny party to a claim . . . shall have a right to a hearing concerning any contested issue of fact or law unresolved by the district director." 20 C.F.R. §725.450. The terms of 20 C.F.R. §725.421(b)(7) provide that when a claim is referred to the Office of Administrative Law Judges for hearing, the district director must transmit "[t]he statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7).

An administrative law judge is granted broad discretion in resolving procedural issues. *See Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149 (1989) (en banc); *Morgan v. Director*, OWCP, 8 BLR 1-491 (1986). In accordance with this principle, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *Clark*, 12 BLR at 1-153. Upon consideration of the circumstances of this case, we hold that employer has not met this burden.

Pursuant to 20 C.F.R. §725.463(a), the hearing must "be confined to those contested issues which have been identified by the district director ([*see* 20 C.F.R.] § 725.421) or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a); *see also* 20 C.F.R. §725.455(a) ("The purpose of any hearing conducted under this subpart shall be to resolve contested issues of fact or law"). In addition, the Board has held that a party's failure to check an issue on Form CM-1025, or raise it in writing before the district director, constitutes a concession of the issue. *See Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985).

In this case, the following issues were identified by the district director as contested on Form CM-1025: Whether claimant's deceased spouse was a miner; whether the miner had post-1969 coal mine employment; the length of the miner's coal mine employment; whether there was a causal relationship between coal dust exposure and the miner's pneumoconiosis; whether the miner's death was due to pneumoconiosis; and whether claimant is an eligible survivor. Director's Exhibit 23. The district director did not list, therefore, the existence of pneumoconiosis as a contested issue on Form CM-1025. At the hearing, the following exchange took place between the administrative law judge and employer's counsel:

> Judge Burke: Mr. Yaussy, I call your attention to the Director's Exhibits at Director's Exhibit Number 23. I would ask if you could concur that [Form CM-1025] is a correct statement of the issues being contested.
>
> Mr. Yaussy: Your Honor, we are not taking the position that the person upon whose death the claim was made was not a miner. So, we resolve that. We agree that he had post-1969 employment. We are still contesting regarding the length of employment until [claimant] testifies. We're still contesting the remaining issues.

Hearing Transcript at 5-6. The administrative law judge rationally determined that employer's statement, "we're still contesting the remaining issues," referred to the other issues identified as contested on Form CM-1025, rather than the entire set of issues listed on Form CM-1025. *See Clark*, 12 BLR at 1-153. Accordingly, we affirm the

administrative law judge's finding that employer conceded the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Kott*, 17 BLR at 1-13; *Thornton*, 8 BLR at 1-279.

## II. 20 C.F.R. §718.205(c)

In determining whether death causation was established at 20 C.F.R. §718.205(c), the administrative law judge considered the death certificate prepared by Dr. Bembalkar and the medical opinions of Drs. Bellotte, Zaldivar, Bembalkar, Gaziano, and Rasmussen. The administrative law judge stated that the major point of disagreement among the physicians as to the cause of the miner's pulmonary condition, and thus his death, was whether the miner had pneumoconiosis. Decision and Order at 8. The administrative law judge gave the opinions of Drs. Bellotte and Zaldivar, that the miner's coal dust exposure was not a contributing factor in the miner's death, less weight because he found that their conclusions regarding the existence of pneumoconiosis were internally contradictory and unreasoned. *Id*.; *see* Employer's Exhibits 11, 12, 17 The administrative law judge also determined that Dr. Zaldivar's report lacked persuasive reasoning because he stated that the miner had pneumoconiosis in a consultation report sent to the miner's treating physician but then denied its existence in a supplemental report. Decision and Order at 8-9; *see* Employer's Exhibits 11, 12. The administrative law judge further gave less weight to Dr. Bellotte's opinion regarding death causation because it was based on his finding that the x-ray interpretations did not support a diagnosis of pneumoconiosis. *Id*. at 9. In addition, since the qualifications of Dr. Bellotte are not of record, the administrative law judge found that his opinion was entitled to less weight than the opinions of Drs. Bembalkar, Gaziano, and Rasmussen.[6] *Id*. at 10.

The administrative law judge stated that the finding of Dr. Gaziano, that the miner's pneumoconiosis was a significant contributing factor in his death, was well reasoned and documented by the evidence of record. Decision and Order at 8; *see* Claimant's Exhibit 1; Employer's Exhibit 13. In addition, the administrative law judge determined that Dr. Rasmussen's finding, that the miner's coal dust exposure contributed to his death, corroborated the opinion of Dr. Gaziano. Decision and Order at 8; *see* Claimant's Exhibit 2; Employer's Exhibit 10. Further, the administrative law judge credited the opinions of Drs. Bembalkar, Gaziano, and Rasmussen over the contrary opinions of Drs. Bellotte and Zaldivar because Drs. Bellotte and Zaldivar based their

[6] Drs. Bembalkar, Gaziano, and Rasmussen are Board-certified in internal medicine. Claimant's Exhibits 1, 2; Employer's Exhibits 13 at 20, 18 at 4. In addition, Dr. Gaziano is Board-certified in pulmonary medicine. Claimant's Exhibit 1; Employer's Exhibit 13 at 20.

opinions on the absence of pneumoconiosis. Decision and Order at 10. Therefore, the administrative law judge concluded that claimant established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *Id*. at 11.

On appeal, employer argues that the administrative law judge did not address the absence of an explanation from Drs. Bembalkar, Gaziano, and Rasmussen for their respective opinions, that pneumoconiosis contributed to the miner's death, but rather accepted their conclusions without determining whether medical evidence established a detectable hastening of the miner's death. In addition, employer asserts that the administrative law judge erred in rejecting the opinions of Drs. Bellotte and Zaldivar because they did not diagnose coal workers' pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. In its reply brief, employer reiterates its arguments and states that Drs. Bembalkar, Gaziano, and Rasmussen did not describe how the effects of pneumoconiosis could be distinguished from the effects of other, non-dust related conditions.

Upon consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we affirm the administrative law judge's finding at 20 C.F.R. §718.205(c), as it is rational and supported by substantial evidence. The Fourth Circuit, within whose jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). *See Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93. Further, the Board has held that an administrative law judge is not required to determine the relative contributions of smoking and coal mine employment to claimant's respiratory impairment in order to credit a physician's opinion that claimant's impairment was due to both smoking and coal mine employment. *See Gross v. Dominion Coal Corp*., 23 BLR 1-8 (2003); *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). Similarly, in the context of 20 C.F.R. §718.205(c), the administrative law judge was not required to treat the opinions of Drs. Bembalkar, Gaziano, and Rasmussen as unreasoned because they acknowledged that they could not identify the precise degree of contribution from pneumoconiosis. The administrative law judge properly found that each of these physicians nevertheless opined that pneumoconiosis was a major, significant or material contributing cause of the miner's death.[7] Decision and Order at 4-5, 11; Claimant's Exhibit 1, 2; Employer's Exhibits 13, 18.

[7] We reject employer's assertion that the administrative law judge did not address the bases for Drs. Bembalkar, Gaziano, and Rasmussen respective conclusions that pneumoconiosis contributed to the miner's death. At his deposition, Dr. Bembalkar stated that coal workers' pneumoconiosis was a major contributing factor to the miner's death, based on his treatment of the miner, his clinical findings, and the objective testing and x-rays. Employer's Exhibit 18 at 6-8, 27-28, 31-32. Dr. Gaziano diagnosed chronic

It is within the purview of the administrative law judge to make credibility determinations and resolve inconsistencies in the evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). In the present case, the administrative law judge acted within his discretion as fact-finder in discrediting the opinions of Drs. Bellotte and Zaldivar regarding death causation because the existence of pneumoconiosis arising out of coal mine employment was established and

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obstructive pulmonary disease (COPD), fibrosis, and coal workers' pneumoconiosis. Claimant's Exhibit 1. Dr. Gaziano concluded that pneumoconiosis was a significant contributing factor to the miner's death and stated that because the miner "had significant coal workers' pneumoconiosis and . . . his death was a respiratory death primarily . . . [all] those . . . diseases that we alluded to . . . would have been important in his respiratory failure." Employer's Exhibit 13 at 17. Dr. Rasmussen diagnosed COPD/emphysema due to both cigarette smoking and coal mine dust exposure and stated that this led to the miner's respiratory failure and death. Claimant's Exhibit 2. Dr. Rasmussen further indicated that although he was unable to distinguish between the effects of cigarette smoking and coal dust exposure, pneumoconiosis was a material contributing factor in the miner's death. *Id*.; Employer's Exhibit 10 at 22.

neither physician diagnosed the presence of clinical or legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 8. The administrative law judge further permissibly accorded less weight to the opinion of Dr. Bellotte, as compared to the opinions of Drs. Bembalkar, Gaziano, and Rasmussen, because his qualifications were not of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). The administrative law judge also acted rationally in according greater weight to the opinions of Drs. Bembalkar, Gaziano, and Rasmussen under 20 C.F.R. §718.205(c), on the ground that they were better supported by the evidence of record.[8] *See Hicks*, 138 F.3d at 536, 21 BLR 2-341. We affirm, therefore, the administrative law judge's determination that claimant established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) and the award of benefits.

[8] While employer raised the issue of whether the miner's pneumoconiosis arose out of his coal mine employment on Form CM-1025, any error by the administrative law judge in not making a specific finding on this issue is harmless in light of his crediting, pursuant to 20 C.F.R. §718.205(c), the opinions in which Drs. Bembalkar, Gaziano and Rasmussen diagnosed coal workers' pneumoconiosis arising out of coal mine employment. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge