BRB No. 97-0969 BLA

SARAH I. MOORE (Widow of FRED H. MOORE)	)	
Claimant	)	
v.	)	
GATEWAY COAL COMPANY	)	Date Issued:
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Raymond F. Keisling (Keisling & Associates), Carnegie, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1060) of Administrative Law Judge Michael P. Lesniak awarding 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 at least forty-two years of coal mine employment established and adjudicated the survivor's claim pursuant to 20 C.F.R. Part 718. The administrative law judge further found that the parties stipulated that the miner had

[1]Claimant is the surviving widow of the miner, Fred H. Moore, who died on August 17, 1994, Director's Exhibits 1, 12. The miner never filed a claim during his lifetime. Subsequent to the miner's death, claimant filed a survivor's claim on March 13, 1995, Director's Exhibit 1.

pneumoconiosis arising out of coal mine employment, *see* 20 C.F.R. §§718.202, 718.203; Hearing Transcript at 8-9. Finally, the administrative law judge found that death due to pneumoconiosis was established by the relevant medical opinion evidence of record pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding death due to pneumoconiosis established pursuant to Section 718.205(c). Neither claimant or the Director, Office of Workers' Compensation Programs, as a party-in-interest, have 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 on the basis of this survivor's claim, which was filed after January 1, 1982, and in which the miner had not been awarded benefits prior to his death on a claim filed prior to January 1, 1982, *see* 30 U.S.C. §§901, 932(1); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989), 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),[2] and that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.1; 718.205(c); *Neeley, supra; cf. Smith, supra*,

[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). The presumptions 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, 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 administrative law judge properly found that 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; Decision and Order at 8, n. 3.

which arose out of coal mine employment, *see* 20 C.F.R. §718.203; *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Moreover, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that, pursuant to Section 718.205(c)(2), pneumoconiosis substantially contributes to death if it hastens the miner's death, *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

The administrative law judge considered all of the relevant medical opinion evidence of record pursuant to Section 718.205(c), including the opinion of Dr. Sahai, one of the miner's treating physicians,[3] who completed the miner's death certificate listing the cause of the miner's death as cardiopulmonary arrest, atherosclerotic heart disease and cardiac arrhythmia, Director's Exhibit 12. In a subsequent opinion, Dr. Sahai stated that pneumoconiosis was a substantial contributing factor in the miner's death, Director's Exhibit 16.

The miner's autopsy examination was conducted by Dr. Rozin, who diagnosed coal workers' pneumoconiosis, Director's Exhibit 13. The autopsy report was also signed by Dr. Wect, who conducted a gross examination of the miner's organs and lungs, dissected the miner's lungs and prepared microscopic slides of the miner's lung tissue, Director's Exhibit 13; Claimant's Exhibit 1. Dr. Wect, a board-certified physician in anatomic, clinical and forensic pathology, opined that the miner died due to cirrhosis of the liver, but also found that coal workers' pneumoconiosis was a substantial contributing factor in the miner's death. On the other hand, both Drs. Oesterling and Naeye, board-certified physicians in anatomic and clinical pathology, reviewed the autopsy slides and found that the miner's coal workers' pneumoconiosis was in no way a contributing factor in or accelerated the miner's death and/or shortened his life, Director's Exhibits 25-26, 28; Employer's Exhibit 1.

The administrative law judge gave more weight to the opinion of Dr. Sahai as the miner's treating physician and to the opinion of Dr. Wect, as he was additionally board-certified in forensic pathology and had the best opportunity to examine the lung tissue grossly and microscopically. Decision and Order at 9-10. The administrative law judge found their opinions that pneumoconiosis was a substantial contributing factor in the miner's death were better reasoned than the contrary opinions of Drs. Oesterling and Naeye, neither of whom the administrative law judge noted had examined the miner while he was living or examined the miner's lung tissues. Thus, the administrative law judge gave their opinions less weight.

Initially, contrary to employer's contention that the record does not support the fact that Dr. Sahai provided any treatment for the miner's lungs, treatment records from Dr. Sahai dating from July, 1994, indicated that Dr. Sahai had prescribed breathing medication

[3]Treatment records from Dr. Sahai dating from July, 1994, indicated that Dr. Sahai had prescribed breathing medication to the miner for shortness of breath, Director's Exhibit 15.

to the miner for shortness of breath, *see* Director's Exhibit 15. In addition, although employer contends that Drs. Oesterling and Naeye are experts in occupational lung disease, the administrative law judge properly noted that Dr. Oesterling stated that he does not treat pulmonary diseases and is not an authority on the breathing medications that were prescribed to the miner, *see* Director's Exhibit 26, and Dr. Naeye also stated that he did not know the purpose of the breathing medications prescribed to the miner, *see* Employer's Exhibit 1; Decision and Order at 6, 7.

Next, although employer correctly notes that Dr. Wect did not conduct the actual autopsy, the administrative law judge could properly assign more weight to Dr. Wect's opinion inasmuch as he conducted both a gross examination and a microscopic examination of the miner's lungs and other organs, and thus was able to see the miner's entire respiratory system and other body systems, *see Fetterman v. Director, OWCP*, 7 BLR 1-688, 1-691 (1985); *Cantrell v. United States Steel Corp*., 6 BLR 1-13 (1984); *see also Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992). Finally, employer also contends that based on past experience, Dr. Wect picked out only the lung tissue with the greatest concentration of coal dust when preparing the microscopic slides. We reject employer's contention as opinions prepared in the course of litigation such as Dr. Wect's are probative evidence and are not presumptively biased, *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992), *citing Richardson v. Perales*, 401 U.S. 389 (1971); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984), and an administrative law judge is permitted to assign such a physician's report determinative weight, *Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906, 1-908 (1985); *see also Urgolites, supra* (the identity of party who hires a medical expert does not, by itself, demonstrate partiality on the part of the physician); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35 (1991) (*en banc*).

Thus, the administrative law judge, within his discretion, gave more weight to the opinion of Dr. Wect, inasmuch as he conducted both a gross and microscopic examination of the miner's lungs and other organs, than the opinions of Drs. Oesterling and Naeye, who merely reviewed the autopsy evidence, *see United States Steel Corp. v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982); *Gruller v. BethEnergy Mines, Inc.*, 16 BLR 1-3 (1991); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman, supra*, and in light of Dr. Wect's superior qualifications, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Moreover, the administrative law judge, within his discretion, gave more weight to Dr. Sahai's opinion inasmuch as he was the miner's treating physician, *see Onderko v. Director, OWCP*,, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see also Schaaf v. Matthews*, 574 F.2d 160 (3d Cir. 1978). In addition, although employer contends that the opinion of Dr. Wect is not as reasoned or documented as the opinions of Drs. Oesterling and Naeye, it is for the administrative law judge, as the trier-of-fact, to determine whether an opinion is documented and reasoned, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987)*; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if the administrative law judge's findings are supported by substantial evidence and in accordance with the law, *see 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 established pursuant to Section 718.205(c) as supported by substantial evidence and, therefore, affirm the administrative law judge's award of benefits in this survivor's claim, *see Neeley, supra; cf. Smith, supra*; *see also Lukosevicz, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge