

BRB No. 04-0613 BLA

GERALDINE THACKER)
(Widow of ZACK THACKER))
)
 Claimant-Petitioner)
)
 v.)
)
 SCOTTS BRANCH COAL COMPANY) DATE ISSUED: 05/04/2005
)
 and)
)
 MAPCO, INCORPORATED)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer and carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Second Remand (1999-BLA-1036) of Administrative Law Judge Thomas F. Phalen, 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 full procedural history of this case was set forth in *Thacker v. Scotts Branch Coal Co.*, BRB No. 02-0664 BLA (June 25, 2003)(unpub.). In that appeal, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), 718.205(c), and remanded this case for further consideration. *Id.* On remand, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (2), 718.203, but insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

In the present appeal, claimant challenges the administrative law judge's determination that the weight of the evidence is insufficient to establish that pneumoconiosis was a substantial contributing cause of the miner's death pursuant to Section 718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim filed on or after January 1, 1982, only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established, and the evidence establishes the existence of pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.1, 718.202(a), 718.203, 718.205(c)(1)-(3); *Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a substantially contributing cause of a 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,

¹ Claimant is Geraldine Thacker, the widow of the miner, Zack Thacker, who died on April 6, 1998. Director's Exhibit 9. Claimant filed her survivor's claim with the Department of Labor on June 8, 1998. Director's Exhibit 1.

19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).²

Claimant contends that the administrative law judge erred in weighing the conflicting medical opinions of record and finding this evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Specifically, claimant maintains that because employer's medical experts, particularly Dr. Naeye, utilized a more restrictive definition of pneumoconiosis than that recognized by the regulations and the Sixth Circuit, these physicians only determined whether the miner had clinical pneumoconiosis and failed to adequately address whether the severe interstitial pulmonary fibrosis which caused the miner's death constituted legal pneumoconiosis consistent with 20 C.F.R. §718.201(a)(2), (b). Claimant asserts that the opinions of Drs. Perper and Dennis are sufficient to establish that the miner's death was due to legal pneumoconiosis, and that the administrative law judge should have discounted the contrary opinions of employer's experts as unreasoned. Claimant also contends that the administrative law judge erred in failing to address both Dr. Naeye's bias against Dr. Perper and his supporting scientific literature, and Dr. Perper's criticisms of Dr. Naeye's opinion. Further, claimant argues that it was irrational and inconsistent for the administrative law judge to credit the opinion of the autopsy prosector, Dr. Dennis, to find the existence of pneumoconiosis established, and yet to discount the opinion on the issue of the cause of the miner's death. Claimant's arguments are without merit.

Although the administrative law judge found the existence of clinical pneumoconiosis established by x-ray and autopsy evidence, he determined that the miner's interstitial pulmonary fibrosis was a separate and distinct condition. Decision and Order at 4, 13. The administrative law judge accurately reviewed the conflicting medical opinions of record, including the areas of disagreement between the experts and the specific criticisms leveled by and against the various physicians, and determined that Drs. Naeye, Caffrey, Kleinerman and Hutchins opined that the interstitial pulmonary fibrosis was idiopathic and unrelated to any occupational exposure, while Dr. Perper attributed the condition to silicosis and mixed-dust pneumoconiosis, and identified scientific literature to substantiate his opinion that diffuse interstitial fibrosis may be associated with non-asbestos pneumoconiosis.³ Decision and Order at 5-13. In

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

³ We reject claimant's argument that Dr. Naeye exhibited undue bias towards Dr. Perper and the scientific literature he relied upon, and that Dr. Naeye's opinion is

evaluating these conflicting opinions regarding the etiology of the miner's interstitial pulmonary fibrosis, the administrative law judge determined that all of the physicians set forth pathological and clinical observations and findings, and that their reasoning was supported by adequate data, thus their opinions were reasoned, documented, and entitled to probative weight. Decision and Order at 6-13; *see generally Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge concluded, however, that Dr. Naeye's reports and deposition testimony constituted the most compelling evidence on the issue, in view of the physician's persuasive analysis concerning the requisite conditions underlying a diagnosis of silicotic interstitial fibrosis, and his extensive experience in evaluating lung diseases suffered by coal miners, particularly regarding the etiology of pulmonary fibrosis. Decision and Order at 6, 10-11, 13; *see generally Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, the administrative law judge acted within his discretion in finding that the opinions of Drs. Naeye, Caffrey, Kleinerman and Hutchins outweighed the contrary opinion of Dr. Perper, and established that any occupational exposure was not a contributing cause of the miner's interstitial pulmonary fibrosis, which was idiopathic. Decision and Order at 13; *see generally Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 167, 18 BLR 2A-1 (1994).

The administrative law judge then reviewed the evidence relevant to the cause of the miner's death, and the basis for each physician's conclusions. Decision and Order at 15-18. The administrative law judge determined that although the autopsy prosector, Dr. Dennis, described the miner's pathology, opined that the miner died a pulmonary death, and diagnosed pneumoconiosis, interstitial fibrosis and granulomatous inflammation, his report failed to identify either the cause of the pulmonary death or what role pneumoconiosis played in it. Consequently, the administrative law judge reasonably found Dr. Dennis's opinion to be of limited probative value. Decision and Order at 16; Director's Exhibit 10; *see generally Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

essentially hostile to the premises of the Act and regulations. Claimant's Brief at 14-19. The record reflects merely that Dr. Naeye disagreed with Dr. Perper's conclusions, to wit: Dr. Naeye testified that most of the literature cited by Dr. Perper generally was not relevant to the case in question; that in the present case, Dr. Perper failed to distinguish between free silica and silicates in attributing the miner's interstitial lung disease to occupational exposure to silica; and that, contrary to Dr. Perper's findings, toxic free silica was not present pathologically in any significant amount; rather, the non-toxic silicates visible on autopsy did not cause the miner's interstitial fibrosis, and neither did free silica, which causes a completely different pattern in the lungs than that present in the miner. *See Employer's Exhibit 5 at 27-31.*

The administrative law judge properly accorded little weight to the opinions of Drs. Caffrey, Hutchins and Kleinerman, that coal mine employment exposure did not cause, contribute to, or hasten the miner's death from the effects of severe interstitial pulmonary fibrosis, because the physicians premised their opinions in part on the erroneous assumption that there was no evidence of pneumoconiosis, which was contrary to the administrative law judge's finding that the miner suffered from simple pneumoconiosis at the time of his death. Decision and Order at 17-18; *see generally Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Similarly, the administrative law judge permissibly gave little weight to Dr. Perper's opinion that pneumoconiosis was a substantially contributing cause of death, as the physician's conclusion that the miner's interstitial pulmonary fibrosis was caused by coal dust inhalation and silica was contrary to the administrative law judge's finding that the condition was unrelated to the miner's occupational exposures, and Dr. Perper did not specify how the miner's simple clinical pneumoconiosis hastened death. Decision and Order at 18; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

By contrast, the administrative law judge determined that the opinion of Dr. Naeye, that the miner's death was unrelated to any occupational exposure, was well-reasoned and documented, as the physician diagnosed both simple pneumoconiosis and interstitial pulmonary fibrosis; he set forth the pathological and clinical observations relied upon; and he persuasively explained that the miner's pneumoconiosis was too mild to have hastened death or to have contributed to the condition which caused his death, *i.e.*, respiratory failure secondary to idiopathic pulmonary fibrosis. Decision and Order at 18-19; *see generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Based on "the strength of Dr. Naeye's credentials and the reasoning he employed," the administrative law judge, within his discretion as fact-finder, rationally accorded Dr. Naeye's opinion determinative weight. Decision and Order at 19; *see Wetzel*, 8 BLR 1-139. The administrative law judge's findings and inferences are supported by substantial evidence, and we may not substitute our judgment. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). Consequently, we affirm his finding that the weight of the evidence was insufficient to establish the pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c), and affirm his denial of survivor's benefits. *See Griffith*, 49 F.3d 184, 19 BLR 2-111; *Brown*, 996 F.2d 812, 17 BLR 2-135.

Accordingly, the administrative law judge's Decision and Order on Second Remand – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge