

BRB Nos. 05-1015 BLA
and 05-1015 BLA-A

BETTY JO SHAW)
(Widow of PAUL J. SHAW, SR.))
)
Claimant-Petitioner)
)
v.)
)
CONSOLIDATION COAL COMPANY) DATE ISSUED: 05/25/2006
)
Employer-Respondent)
Cross-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Betty Jo Shaw, Wallace, West Virginia, *pro se*.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley and Michael J. Rutledge (Howard M. Radzely, Solicitor of Labor; 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals, and employer cross-appeals, the Decision and Order (2004-BLA-5042) of Administrative Law Judge Gerald M. Tierney 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). The administrative law judge credited the miner with at least thirty-one years of qualifying coal mine employment, and adjudicated this claim, filed on December 27, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence was sufficient to establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but insufficient to support a finding of complicated pneumoconiosis and thus establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304, or to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of survivor's benefits. Employer responds, urging affirmance, and cross-appeals, contending that the administrative law judge should have admitted into the record, without limitation, all medical evidence developed in conjunction with the living miner's claims. Employer also challenges the administrative law judge's exclusion from consideration those portions of the medical opinions of record in the survivor's claim which were based on inadmissible evidence pursuant to 20 C.F.R. §725.414. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments on cross-appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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 to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite 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 also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).¹

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge properly found that Dr. Barcinas's reporting of "massive fibrosis" and "complicated pneumoconiosis" upon review of the autopsy findings, *see* Director's Exhibit 42, was insufficient to invoke the irrebuttable presumption of death due to pneumoconiosis at Section 718.304, since Dr. Barcinas testified that he was unfamiliar with the classification of pneumoconiosis and was not a specialist; he was not sure what the autopsy prosector meant by finding "simple" pneumoconiosis; and he used the term "complicated" to mean "complication to the lung itself as the process through the years and then complicated by other medical problems that [the miner] has." Director's Exhibit 45 at 8; Decision and Order at 3; *see generally Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). As substantial evidence supports the administrative law judge's determination that the record contained no x-ray evidence of large opacities greater than one centimeter in diameter, no autopsy evidence of massive lesions, and no other proof that would yield the same result, we affirm his finding that invocation was not established pursuant to Section 718.304(a)-(c). Decision and Order at 3; *see Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Eastern Associated Coal Corp v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003) (Gabauer, J., concurring).

In finding the evidence of record insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), the administrative law judge accurately reviewed the relevant medical opinions and determined that only Dr. Barcinas concluded that pneumoconiosis was a substantially contributing factor in the miner's death. Decision and Order at 4-7; Director's Exhibits 42, 45. The administrative law judge noted that Dr. Barcinas was a family practitioner and general surgeon who had treated the miner every three to four months over a period of approximately two years, and whose opinion was based on his clinical evaluation of the miner and the autopsy findings. *Id.* The administrative law judge further determined, however, that while Dr. Ducatman, the autopsy prosector, diagnosed moderate to severe simple pneumoconiosis, she attributed the miner's death solely to severe coronary atherosclerotic disease

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mine industry in West Virginia. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

involving all three major coronary arteries, and Drs. Oesterling, Tomashefski and Rosenberg affirmatively ruled out pneumoconiosis as a contributing cause of death.² Decision and Order at 4-7; Director's Exhibits 39, 44; Employer's Exhibits 1-3, 6-7. The administrative law judge permissibly accorded less weight to Dr. Barcinas's opinion on multiple grounds, *i.e.*: the physician's lack of expertise and unfamiliarity with the classification and characteristics of pneumoconiosis; his very general rationale as to how the miner's lung disease contributed to death; his admission that the clinical signs supporting his conclusions were also consistent with heart disease, and that it was extremely difficult to distinguish between the effects of heart disease and lung disease in determining the cause of the miner's problems; his admission that he did not recall the extent of the miner's smoking history or know how much of the miner's lung condition could have been due to smoking; his acknowledgment that the opinion of a pulmonary specialist would be of value; his failure to administer any pulmonary function tests to measure the miner's ventilatory capacity; and his testimony that the miner would still have died when he did even if he had not suffered from pneumoconiosis. Decision and Order at 4-7; *see Akers*, 121 F.3d 438, 21 BLR 2-269; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Shuff*, 967 F.2d 977, 16 BLR 2-90. The administrative law judge acted within his discretion in finding that the contrary opinions of the pathologists, Drs. Tomashefski and Oesterling, as supported by the opinion of a pulmonary specialist, Dr. Rosenberg, were more persuasive and entitled to greater weight, as these physicians possessed superior qualifications and demonstrated a more detailed knowledge of the disease process of pneumoconiosis; they agreed that the degree of pneumoconiosis found on autopsy was insufficient to have impacted the miner's lung function; and they provided detailed explanations of how the miner's heart disease caused death and why they concluded that pneumoconiosis did not cause, contribute to or hasten death in any way. *Id.* The administrative law judge's findings pursuant to Section 718.205(c) are supported by substantial evidence and are affirmed. Consequently, we affirm his denial of survivor's benefits, and do not reach employer's arguments on cross-appeal.

² The administrative law judge additionally determined that Dr. Abdulnabi, a cardiologist who attended the miner, completed the death certificate before the autopsy was conducted and attributed the miner's death to "acute myocardial infarction/cardiac arrest." Decision and Order at 4; Director's Exhibit 38.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge