BRB No. 98-1165 BLA

GENEVIEVE TICHENOR (Widow of EDWIN C. TICHENOR) Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Fairmont, West Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-1198) of Administrative Law Judge Michael P. Lesniak 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). This case is before the Board for the second time. In the original Decision and Order, the administrative law judge, based on employer's concession, credited the miner with at least thirty-eight years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge, based on the parties' stipulation, found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. The administrative law judge also found the evidence sufficient to establish the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board accepted employer's length of coal mine employment concession, but vacated the administrative law judge's finding at 20 C.F.R. §718.304, and remanded the case to the administrative law judge to reweigh the evidence consistent with *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). The Board also instructed the administrative law judge to reopen the record on remand and allow employer to submit evidence responsive to the untimely submitted report by Dr. Gaziano, consistent with 20 C.F.R. §725.456(b) and in compliance with the demands of procedural due process. Further, the Board instructed the administrative law judge that if he does not find the existence of complicated pneumoconiosis established on remand, he must determine whether the miner's pneumoconiosis substantially contributed to his death pursuant to *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). *Tichenor v. Eastern Associated Coal Corp.*, BRB No. 95-1838 BLA (June 30, 1997)(unpub.). On remand, the administrative law judge found the evidence sufficient to establish the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge also found the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish that the

miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).[1] Claimant[2] responds, urging affirmance of the administrative law judge's Decision and Order on Remand. Alternatively, claimant contends that if the Board reverses the administrative law judge's award of benefits, the Board should also reverse the administrative law judge's decisions to admit the four additional medical reports submitted by employer and to exclude the two additional medical reports submitted by claimant. The Director, Office of Workers' Compensation Programs, contends that the administrative law judge erred in weighing the conflicting medical evidence with respect to complicated pneumoconiosis at 20 C.F.R. §718.304.

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).

[1]Employer filed a brief in reply to claimant's response brief, which reiterates its prior contentions.

[2]Claimant is the widow of the miner, Edwin C. Tichenor, who died on March 16, 1993. Director's Exhibits 1, 14.

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). We disagree. Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[3] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case arises, adopted the standard whereby pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Shuff, supra*.[4] The administrative law judge considered the medical opinions of Drs. Gaziano, Green, Kleinerman, Naeye and Renn.[5] Whereas Drs.

---

[3]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

[4]We reject employer's assertion that the medical opinions of Drs. Gaziano and Green are not sufficient to satisfy the standard adopted in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). In a report dated November 17, 1993, Dr. Gaziano opined that the miner died of pneumonia but had underlying coal workers' pneumoconiosis and chronic obstructive pulmonary disease which contributed to his death. Director's Exhibit 17. Dr. Gaziano also responded "Yes" to the question, "Was pneumoconiosis a substantially contributing cause of death?" *Id*. In a subsequent report dated January 27, 1995, Dr. Gaziano opined that the miner "had chronic lung disease due to emphysema and pneumoconiosis and as the result, developed a fatal pneumonia; that the underlying lung disease, both the emphysema and the coal workers' pneumoconiosis contributed to his demise." Claimant's Exhibit 3. Although Dr. Green opined that the immediate cause of the miner's death was an acute necrotizing pseudomonas pneumonia, Dr. Green opined that the underlying cause of the miner's death was pneumoconiosis as a result of exposure to coal mine dust. Claimant's Exhibit 1.

Gaziano and Green opined that the miner's death was due to pneumoconiosis, Director's Exhibit 17; Claimant's Exhibits 1, 3, Drs. Kleinerman, Naeye and Renn opined that coal workers' pneumoconiosis did not contribute to the miner's death, Employer's Exhibits 1, 5. The administrative law judge properly accorded

---

[5]Employer does not raise the administrative law judge's failure to consider the death certificate signed by Dr. Nuss, the autopsy report by Drs. Boyd and Mujeeb and the death summary by Dr. Halbritter in his weighing of the conflicting medical evidence under 20 C.F.R. §718.205(c). The death certificate listed pseudomonas pneumonia and chronic obstructive pulmonary disease as causes of the miner's death. Director's Exhibit 14. Further, Drs. Boyd and Mujeeb, in an autopsy report, found bronchopneumonia, atherosclerotic coronary artery disease, myocardial fibrosis and cardiomegaly to be major diseases and causes of the miner's death, and coal workers' pneumoconiosis and emphysema to be other diagnoses relating to the miner's respiratory system. Director's Exhibit 15. Dr. Halbritter, in a death summary, opined that pseudomonas pneumonia complicated by acute renal failure and chronic obstructive pulmonary disease was the cause of the miner's death. Director's Exhibit 16.

determinative weight to the opinions of Drs. Gaziano and Green over the contrary opinions of Drs. Kleinerman, Naeye and Renn because he found their opinions to be better reasoned.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also properly accorded greater weight to the opinions of Drs. Gaziano and Green over the contrary opinions of Drs. Kleinerman, Naeye and Renn because he found the opinions of Drs. Gaziano and Green to be supported by the autopsy report which found that the miner suffered from pneumoconiosis, an issue which is not in dispute. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, we reject employer's assertion that the administrative law judge substituted his opinion for that of Drs. Kleinerman, Naeye and Renn.

Employer, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), asserts that the administrative law judge erroneously based his conclusion that the miner's death was due to pneumoconiosis on the fact that the miner worked for many years in coal mine employment. In *Hicks*, the administrative law judge inferred that Dr. Rasmussen's opinion, that claimant's disability was due to a respiratory condition arising from both coal mine work and cigarette smoking, was more persuasive than Dr. Zaldivar's contrary opinion that claimant was disabled due to his heart condition, because Dr. Rasmussen's opinion was more consistent

[6]The administrative law judge observed that "[t]he reasoned opinions of Drs. Gaziano and Green...are sufficient to show that pneumoconiosis hastened the Miner's death." Decision and Order on Remand at 7. In contrast, the administrative law judge observed that "Drs. Kleinerman, Naeye, and Renn...failed to adequately explain how the death of a Miner whose autopsy slides show lesions of 1.3 to 1.5 cm, was not hastened by pneumoconiosis." *Id*. The administrative law judge stated that "[s]imply attributing the Miner's health problems to smoking alone is not sufficient given the Miner's extensive coal mining history." *Id*.

with non-medical evidence of claimant's coal mine employment and claimant's own lay testimony as to his symptoms. The United States Court of Appeals for the Fourth Circuit held that while this evidence is relevant to the issue of whether there is a totally disabling respiratory impairment, a miner's own statements about his history of coal mine employment or symptoms of pneumoconiosis are not conclusive in resolving conflicting medical opinion evidence. The court reasoned that to hold otherwise would be tantamount to allowing the administrative law judge to substitute his untrained opinion for that of qualified experts, which is not allowed. The court further held that the length of a miner's coal mine employment does not compel the conclusion that the miner's disability was solely respiratory. *See Hicks, supra*.

The facts in the instant case are distinguishable from the facts in *Hicks*. Here, contrary to employer's assertion, the administrative law judge did not base his conclusion that the miner's death was due to pneumoconiosis on the fact that the miner worked for many years in coal mine employment. Rather, the administrative law judge properly discounted the opinions of Drs. Kleinerman, Naeye and Renn because they did not adequately explain how the miner's death was not hastened by pneumoconiosis in light of the autopsy evidence and the miner's coal mine employment history. *See Clark, supra*; *Fields, supra*; *Fuller, supra*. As previously noted, the administrative law judge stated that "[s]imply attributing the Miner's health problems to smoking alone is not sufficient given the Miner's extensive coal mining history." Decision and Order on Remand at 7. Therefore, we reject employer's assertion that the administrative law judge erroneously based his conclusion that the miner's death was due to pneumoconiosis on the fact that the miner worked for many years in coal mine employment.

In addition, employer asserts that the administrative law judge's weighing of the conflicting medical opinion evidence with respect to the issue of whether the miner's death was due to pneumoconiosis is not in accordance with *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In *Akers*, the administrative law judge concluded that claimant established that pneumoconiosis contributed to the miner's death based on the testimony of Drs. Bembalkar and Hamdan, who had examined or treated the miner for only a month. The administrative law judge credited the testimony of Drs. Bembalkar and Hamdan over the testimony of all other doctors for no reason except that Drs. Bembalkar and Hamdan treated the miner. The United States Court of Appeals for the Fourth Circuit observed that in reaching his conclusion, the administrative law judge ignored entirely the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. Hence, the court held that the administrative law judge's invocation of a rule of absolute deference to treating and

examining physicians relieved the administrative law judge of his statutory obligation to consider all of the relevant evidence of record. *See Akers, supra*.

In the case at hand, the administrative law judge did not mechanically accord greater weight to the opinions of Drs. Gaziano and Green because they examined or treated the miner. To the contrary, as previously noted, the administrative law judge properly accorded determinative weight to the opinions of Drs. Gaziano and Green over the contrary opinions of Drs. Kleinerman, Naeye and Renn because he found their opinions to be better reasoned. *See Clark, supra*; *Fields, supra*; *Fuller, supra*. Thus, since the administrative law judge properly considered the explanations provided by the physicians, we reject employer's assertion that the administrative law judge's weighing of the conflicting medical opinion evidence with respect to the issue of whether the miner's death was due to pneumoconiosis is not in accordance with *Akers*. Moreover, we hold that substantial evidence supports the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).[7]

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[7]In view of our disposition of this case at 20 C.F.R. §718.205(c), we decline to address employer's contention with regard to the administrative law judge's finding at 20 C.F.R. §718.304.

JAMES F. BROWN
Administrative Appeals Judge