

BRB No. 04-0103 BLA

RUTH L. BOWERSOX )  
(Widow of KENNETH BOWERSOX) )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 MARK MINING II, INCORPORATED )  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY ) DATE ISSUED: 11/18/2004  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 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 Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski, (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order – Awarding Benefits (02-BLA-0389) of Administrative Law Judge Robert J. Lesnick, on a survivor’s claim for benefits 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 twenty-eight years of coal mine employment and noted that employer had stipulated to the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge found the evidence sufficient to establish that the miner’s pneumoconiosis substantially contributed to and hastened the miner’s death, pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge has not properly weighed the medical opinion evidence regarding the cause of the miner’s death. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers’ Compensation Programs, has not submitted a brief in this appeal. Employer has filed a reply brief, reiterating its position.

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, and in accordance with applicable law. 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor’s claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death.<sup>1</sup> 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203,

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<sup>1</sup> 20 C.F.R. §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 establishes that pneumoconiosis was the cause of the miner’s death, 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.

718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. See 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's finding at Section 718.205, that the evidence establishes that the miner's death was due to pneumoconiosis, is supported by substantial evidence and is in accordance with law.<sup>2</sup> As an initial matter, we reject employer's contention that Drs.

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(5) 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)(1)-(3), (5).

<sup>2</sup> Dr. Schaaf opined that the miner's coal workers' pneumoconiosis substantially contributed to and accelerated his death. Director's Exhibits 39, 51. Dr. Rizkalla opined that coal workers' pneumoconiosis is a substantial contributing factor in the miner's demise. Director's Exhibit 41; Claimant's Exhibit 1. Dr. Perper stated that coal workers' pneumoconiosis contributed to the miner's death and hastened his demise. Director's Exhibits 23, 39; Claimant's Exhibit 2. Dr. Michos stated that there was insufficient evidence to document that coal workers' pneumoconiosis led to or hastened the miner's death. Director's Exhibits 7, 9. Dr. Oesterling determined that coal workers' pneumoconiosis was not a factor in the miner's death. Dr. Oesterling believed that the miner's death was due to his cigarette smoke induced emphysema, aspiration pneumonia and microinfarction. Director's Exhibits 18, 26; Employer's Exhibits 4, 5. Dr. Tuteur stated that coal workers' pneumoconiosis did not cause, contribute to or hasten the miner's death. Director's Exhibits 23, 25; Employer's Exhibit 3. Dr. Jacobs signed the miner's death certificate. He stated that the immediate cause of death was renal failure, and he identified paralysis agitatoris, aspiration pneumonia, Alzheimer's disease and chronic obstructive pulmonary disease as "other significant conditions contributing to death but not related to the underlying cause." Director's Exhibit 4. Dr. Bhaskar performed the autopsy, but he did not provide an opinion regarding the cause of the miner's death. Director's Exhibit 5.

Perper, Schaff and Rizkalla “could not say for sure” that the miner’s pneumoconiosis contributed to his death. *See* Employer’s Brief at 21. Each of these physicians clearly and definitively stated their opinion that coal workers’ pneumoconiosis contributed to the miner’s death. *See* Director’s Exhibits 23, 39, 41, 51; Claimant’s Exhibits 1, 2. We hold that the administrative law judge permissibly accorded less weight to Dr. Oesterling’s opinion because he found that much of Dr. Oesterling’s opinion was based on his findings regarding aspirations, findings that the administrative law judge found were neither diagnosed by autopsy nor corroborated by the other pathologists’ opinions. Decision and Order at 12. *See Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). We also affirm the administrative law judge’s finding that the opinions of Drs. Perper and Rizkalla are better reasoned than the contrary opinion of Dr. Tutuer, because the opinions of Drs. Perper and Rizkalla are better analyzed and better supported by the data of record. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Consequently, we hold that the administrative law judge, within a proper exercise of his discretion, as the finder-of-fact, determined that the opinions of Drs. Perper and Rizkalla are entitled to greater weight. Because the Board is not empowered to reweigh the evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), and since the administrative law judge’s findings are supported by substantial evidence, we affirm the administrative law judge’s weighing of the medical opinion evidence and his finding that the evidence establishes that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c).<sup>3</sup>

Finally, we note employer’s comment, in summarizing its challenge to the administrative law judge’s weighing of the medical opinion evidence, that the administrative law judge’s reasoning “simply reflect[s] the ALJ’s preference for an award.” Employer’s Brief at 22. This statement may be construed as an allegation that the administrative law judge was biased. Because this comment is not supported by concrete evidence of bias by the administrative law judge, nor does a review of the record indicate any prejudice by the administrative law judge, we reject any assertion that the administrative law judge demonstrated bias in his consideration of this case. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

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<sup>3</sup> The United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, has not adopted or discussed the holdings of *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384 , 21 BLR 2-639 (4th Cir. 1999) or *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7<sup>th</sup> Cir. 2001). We therefore decline employer’s request to apply the holdings of these cases to the instant case.

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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BETTY JEAN HALL  
Administrative Appeals Judge