

BRB No. 09-0162 BLA

LENA CASEBOLT)	
(Widow of JAMES CASEBOLT))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KENTLAND ELKHORN COAL)	
CORPORATION)	DATE ISSUED: 11/19/2009
)	
Employer-Respondent)	
)	
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denying Benefits (2006-BLA-05332) of Administrative Law Judge Alan L. Bergstrom with respect to a survivor’s claim filed on January 13, 2005, pursuant to the provisions of Title IV of the Federal Coal Mine

¹ Claimant is the surviving spouse of the miner, James Casebolt, who died on December 7, 2004. Director’s Exhibits 10, 20-6.

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). After crediting the miner with thirty years of coal mine employment, as stipulated by the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that, while claimant established that the miner had pneumoconiosis arising from coal mine employment, she did not invoke the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304, or establish that pneumoconiosis caused, hastened, or contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge did not give appropriate weight to the opinions of the miner's treating physicians when considering the evidence relevant to 20 C.F.R. §§718.205(c) and 718.304. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.²

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.³ 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.205(a), but did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), (c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170, 1-711 (1983); Decision and Order at 24.

³ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

I. Complicated Pneumoconiosis

A. The Relevant Evidence

In making his findings at 20 C.F.R. §718.304(b), the administrative law judge considered the autopsy evidence submitted by Drs. Dennis, DeLara, and Oesterling, the medical opinions of Drs. Rosenberg and Johnson, and a letter written by Advanced Registered Nurse Practitioner (ARNP) Kramer.

Dr. Dennis, a Board-certified pathologist and the autopsy prosector, diagnosed coal workers' pneumoconiosis with progressive massive fibrosis, as evidenced by macules measuring 1.0 to 1.5 cm in diameter. Director's Exhibit 11 at 11-2. Dr. Dennis also noted that "[s]ilica particles greater than 1.0 cm diameter were hiding in most of the hilar nodes." *Id.*

Dr. DeLara reviewed the tissue slides and diagnosed "[c]oal [w]orkers' [p]neumoconiosis with progressive massive fibrosis[,] which was compromised and worsened by the development of chronic and acute bronchitis and bronchopneumonia." Claimant's Exhibit 3. Dr. DeLara identified himself as a pathologist, but his qualifications are not of record. *Id.*

Dr. Oesterling, who is Board-certified in clinical and anatomical pathology, examined the slides prepared from the miner's autopsy and disagreed with Dr. Dennis's diagnosis of progressive massive fibrosis, as he was unable to find evidence of the disease in the tissue sections he observed. Director's Exhibit 16; Employer's Exhibit 4. Dr. Oesterling further indicated, "[o]bviously the prosector . . . has misinterpreted hilar lymph nodes as being areas of [coal workers'] pneumoconiosis." *Id.* In his deposition, Dr. Oesterling commented that Dr. Dennis "[e]ither . . . doesn't understand the terminology, or he is misusing it to try to accentuate the level of the disease process," as progressive massive fibrosis is unrelated to macular disease. Employer's Exhibit 5 at 17. In response to Dr. DeLara's report, Dr. Oesterling submitted a supplemental report, dated October 22, 2007, in which he stated that Dr. DeLara's findings did not alter his initial opinion. Employer's Exhibit 6.

Dr. Johnson, whose qualifications are not of record, was the miner's treating physician from 1973 until his death in 2004. Claimant's Exhibit 1. In a letter, Dr. Johnson stated that there was "autopsy evidence of progressive massive fibrosis and anthrosilicosis and [c]oal [w]orkers' pneumoconiosis." Claimant's Exhibit 1.

Dr. Rosenberg, who is Board-certified in pulmonary disease, internal medicine, and occupational medicine, reviewed the medical evidence and submitted a report, in which he stated, the miner "clearly . . . did not have roentgenographic findings of progressive massive fibrosis [] with large opacity formation." Director's Exhibit 18. In his deposition, Dr. Rosenberg reiterated his belief "that Dr. Oesterling's conclusions are more valid and probably represent what was occurring with respect to [the miner]," because Dr. Dennis relied on terminology and definitions that are not standard for coal workers' pneumoconiosis and the x-ray evidence did not reveal any findings of progressive massive fibrosis. *Id.* at 24-25. In his supplemental report, Dr. Rosenberg stated that his initial opinion was not altered by his review of the opinions of Dr. Johnson and ARNP Kramer.⁴ Employer's Exhibit 7.

ARNP Kramer cared for the miner while he was in a nursing home from February 28, 2004, until his death on December 7, 2004. Claimant's Exhibit 1. ARNP Kramer noted in a letter that the miner was on oxygen and received breathing treatments while at the nursing home. She further indicated that anthrocosilicosis and pneumoconiosis hastened, or contributed to, the miner's death. *Id.*

B. The Administrative Law Judge's Findings

The administrative law judge determined that Dr. Johnson's diagnosis of progressive massive fibrosis was "not entitled to much weight," because he relied on the prosector's autopsy report and did not provide any independent rationale for his diagnosis.⁵ Decision and Order at 29. Similarly, the administrative law judge gave no weight to ARNP Kramer's opinion because her comments on the miner's condition were unsupported by any rationale and, therefore, were not well reasoned. *Id.*

⁴ In his report, Dr. Rosenberg mistakenly referred to Advanced Registered Nurse Practitioner (ARNP) Kramer as Nurse Practitioner Betty J. Karner. Employer's Exhibit 7; Claimant's Exhibit 1.

⁵ The Department of Labor has stated that the term "progressive massive fibrosis" is generally considered to be equivalent to the term "complicated pneumoconiosis." *See* 65 Fed. Reg. 79,951 (Dec. 20, 2000).

With respect to Dr. Oesterling's⁶ opinion, the administrative law judge found that his professional credentials "demonstrate a strong medical history related to pulmonary disease including coal mine dust induced respiratory disease, its development, treatment and pathology." Decision and Order at 30. In contrast, the administrative law judge determined that the credentials of Drs. Dennis and DeLara did not reflect the same level of expertise. *Id.* Therefore, the administrative law judge accorded greater weight to Dr. Oesterling's opinion and concluded:

Since the record has failed to establish the existence of coal dust with reactive fibrotic tissue in a conglomerate mass of at least 2.0 cm on autopsy and ha[s] failed to establish the presence of a mass on autopsy that would create a 1.0 cm opacity upon qualifying chest x-ray, the [c]laimant has failed to establish the existence of complicated pneumoconiosis and failed to establish that the miner's death was due to pneumoconiosis under 20 [C.F.R.] §718.304(b).

Id.

C. Arguments on Appeal

Claimant argues that the reports of Drs. Dennis and Johnson provide sufficient evidence to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Claimant specifically cites to Dr. Dennis's diagnosis of progressive massive fibrosis and his determination that the miner's pulmonary function was impaired due to coal workers' pneumoconiosis. Claimant further argues that the administrative law judge failed to give proper weight to the opinions of the miner's treating physicians and the pathologist who performed the miner's autopsy, in contrast to the physicians who only reviewed medical evidence.

Upon consideration of the administrative law judge's findings, the evidence of record, and claimant's arguments on appeal, we affirm the administrative law judge's finding that the existence of complicated pneumoconiosis was not established at 20 C.F.R. §718.304(b), as it is rational and supported by substantial evidence. Contrary to claimant's contention, the administrative law judge was not required to accord greater weight to the opinion of Dr. Johnson, based upon his status as a treating physician.⁷

⁶ The administrative law judge misspelled Dr. Oesterling's last name as "Osterling." Decision and Order at 6-8, 14, 16, 23, 27-33.

⁷ Claimant appears to include ARNP Kramer in her reference to the miner's treating physicians. However, the term "treating physician" in 20 C.F.R. §718.104(d) does not include nurse practitioners. Even assuming that ARNP Kramer's status was

Rather, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that “the opinions of treating physicians get the deference they deserve based on their power to persuade.” *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Although the administrative law judge did not specifically reference the applicable regulation at 20 C.F.R. §718.104(d), which sets forth the factors for considering the weight to accord to the opinion of the miner’s treating physician, he acknowledged the nature and duration of the relationship and the frequency and extent of treatment provided by Dr. Johnson. Decision and Order at 29, 32.

In addition, the administrative law judge acted within his discretion, as fact-finder, in according little weight to Dr. Johnson’s diagnosis of progressive massive fibrosis because he did not provide an explanation for his conclusion. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002) *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Similarly, the administrative law judge acted within his discretion in giving no weight to ARNP Kramer’s opinion since her general comments on the miner’s condition were not supported by any rationale. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-552.

The administrative law judge also permissibly found that the opinion of Dr. Oesterling, that the miner did not have progressive massive fibrosis, was entitled to greater weight than the contrary opinions of Drs. Dennis and DeLara, based on Dr. Oesterling’s superior credentials. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, contrary to claimant’s argument, the administrative law judge was not required to give greater weight to the prosector’s opinion than to the opinion of a physician who reviewed the autopsy slides. *See Urgolites v. BethEnergy Mines*, 17 BLR 1-20 (1992). The administrative law judge also determined correctly that “no physician equated the various sized coal dust reactive fibrotic nodules to a mass that would produce at least a 1.0 cm opacity upon a qualifying chest x-ray.” Decision and Order at 30. Thus, the administrative law judge properly

analogous to that of a treating physician, the administrative law judge rationally found that her opinion was unreasoned, as she did not identify the basis for her conclusions and did not provide any rationale. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 32.

found that there was no evidence sufficient to invoke the irrebuttable presumption at 20 C.F.R. §718.304(b). *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999). We affirm, therefore, the administrative law judge's finding that claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304(b) and his determination that the evidence of record, when considered together, is insufficient to invoke the irrebuttable presumption of death due to pneumoconiosis.

II. 20 C.F.R. §718.205(c)

A. The Relevant Evidence

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the miner's death certificate, the autopsy reports submitted by Drs. Dennis, DeLara, and Oesterling, the medical opinions of Drs. Rosenberg and Johnson, and the letter of ARNP Kramer.

Dr. Dennis diagnosed anthrocosilicosis and coal workers' pneumoconiosis with progressive massive fibrosis but did not set forth a conclusion as to the cause of the miner's death. Director's Exhibit 11. Similarly, Dr. DeLara diagnosed coal workers' pneumoconiosis, with progressive massive fibrosis, but did not offer an opinion regarding the cause of the miner's death. Claimant's Exhibit 3.

Dr. Johnson prepared the death certificate and identified the cause of the miner's death as bronchopneumonia due to, or as a consequence of, insulin dependent diabetes mellitus, Alzheimer's dementia, arteriosclerotic heart disease, and old myocardial infarction. Director's Exhibit 10. Under other significant conditions contributing to, but not resulting in, the miner's death, Dr. Johnson listed methicillin-resistant staphylococcus aureus (MRSA) in the mediport and malnutrition. *Id.* In a subsequent letter, Dr. Johnson opined that coal mine dust exposure caused the miner's lung diseases, which contributed to his death. Claimant's Exhibit 1. Dr. Johnson stated that he based this finding on the autopsy evidence, which indicated the presence of progressive massive fibrosis, anthrocosilicosis, and coal workers' pneumoconiosis. *Id.* Dr. Johnson's treatment records reflect that the miner experienced increased difficulty in breathing and include diagnoses of pneumonia and chronic obstructive pulmonary disease (COPD). Director's Exhibit 15.

Dr. Oesterling determined that the miner had "very mild micronodular [coal workers'] pneumoconiosis with minimal macular change[.]" that was insufficient to have hastened, contributed to, or caused the miner's death. Director's Exhibit 16, Employer's Exhibit 4. In his deposition, Dr. Oesterling reiterated his conclusion, that the miner's mild coal workers' pneumoconiosis played no role in his death. Employer's Exhibit 5.

Dr. Rosenberg opined that the miner's death was due to conditions experienced by the general public and was not caused, or contributed to, by coal dust exposure or the presence of coal workers' pneumoconiosis. Director's Exhibit 18. In his deposition, Dr. Rosenberg noted that the miner had a significant smoking history of two cartons of cigarettes per week for most of his life. Employer's Exhibit 8 at 22. Dr. Rosenberg also concluded that the miner would have died as he did even if he had never been exposed to coal dust. *Id.* at 29. In his supplemental report, Dr. Rosenberg stated that his initial opinion was unchanged by his review of the opinions of Dr. Johnson and ARNP Kramer. Employer's Exhibit 7.

ARNP Kramer stated that the miner required 100% oxygen to breathe and received daily breathing treatments at the nursing home. ARNP Kramer also concluded that anthrocosilicosis and coal workers' pneumoconiosis hastened, or contributed to, the miner's death. Claimant's Exhibit 1.

B. The Administrative Law Judge's Findings

The administrative law judge determined that Dr. Dennis's opinion, that the miner's "pulmonary pathology was compromised and made worse by the presence of coal workers' pneumoconiosis with fibrotic masses of 1.0 to 1.5 cm[.]" was relevant to 20 C.F.R. §718.205(c) and entitled to "some weight." Decision and Order at 31. The administrative law judge also found that Dr. Johnson did not provide any basis for his conclusion, that lung diseases related to coal dust exposure contributed to the miner's death. *Id.* Further, the administrative law judge noted that Dr. Johnson's medical records, indicating that the COPD and chronic fibrotic interstitial lung changes seen on the miner's x-rays in 1984 had cleared by 2004, were inconsistent with the permanent and progressive nature of coal workers' pneumoconiosis. *Id.* at 32.

The administrative law judge again gave no weight to ARNP Kramer's opinion because he found it lacked medical reasoning. Decision and Order at 32. As to Dr. Rosenberg's opinion,⁸ the administrative law judge noted that he was unaware of the miner's employment history and the fact that the miner stopped smoking approximately twenty years before he died. *Id.* at 32-33. With respect to Dr. DeLara's opinion, the administrative law judge determined that he made "a contradictory statement by his report that the coal workers' pneumoconiosis was made worse by the development of bronchitis and bronchopneumonia." *Id.* at 33. The administrative law judge concluded that claimant "failed to establish by a preponderance of the evidence that the miner's pneumoconiosis was the cause of the miner's death or was a substantially contributing cause or factor leading to the miner's death[.]" *Id.* at 33.

⁸ In his discussion at 20 C.F.R. §718.205(c), the administrative law judge erroneously referred to Dr. Rosenberg as Dr. Robinson. *See* Decision and Order at 32-33.

C. Arguments on Appeal

Pursuant to 20 C.F.R. §718.205(c), claimant reiterates her contention that the administrative law judge failed to give proper weight to the statements of the miner's treating physicians, and the reports of Drs. Dennis and DeLara. Claimant's allegations of error are without merit. Although the administrative law judge did not explicitly resolve the conflict between the opinion of Dr. Johnson and the opinions of Drs. Oesterling and Rosenberg, his determination that claimant did not satisfy her burden of proof under 20 C.F.R. §718.205(c) is rational and supported by substantial evidence.

As indicated previously, the administrative law judge was not required to accord greater weight to the opinion of Dr. Johnson, based upon his status as a treating physician.⁹ *Odom*, 342 F.3d at 486, 22 BLR at 2-622; *Williams*, 338 F.3d at 513, 22 BLR at 2-646; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Further, the administrative law judge rationally determined that Dr. Johnson's opinion, regarding the cause of the miner's death, was entitled to little weight because he did not provide any explanation of his conclusions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984); Decision and Order at 32-33.

We also reject claimant's contention that the administrative law judge did not give proper weight to the opinions of Drs. Dennis and DeLara, as supporting Dr. Johnson's determination that coal dust related lung diseases contributed to the miner's death. In light of the administrative law judge's accurate finding, that these physicians did not offer an opinion as to the cause of the miner's death, and his rational determination, that Dr. Johnson's opinion is entitled to little weight because he did not explain his opinion regarding the cause of the miner's death, claimant's argument is unavailing. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-552; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325.

Consequently, the administrative law judge permissibly weighed the medical opinion evidence as to death causation and rationally found that claimant failed to prove, by a preponderance of the evidence, that pneumoconiosis caused, contributed to, or hastened the miner's death.¹⁰ *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-552; *Island*

⁹ The administrative law judge acted within his discretion in finding that ARNP Kramer's statement regarding the cause of the miner's death was entitled to no weight under 20 C.F.R. §718.205(c), as it "lack[ed] medical reasoning." Decision and Order at 32; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-552; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Groves*, 277 F.3d at 836, 22 BLR at 2-325..

¹⁰ Contrary to claimant's suggestion, lay testimony could not satisfy claimant's burden of proof under 20 C.F.R. §718.205(c), because the administrative law judge

Creek Coal Co. v. Holdman, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000). As a result, we affirm the administrative law judge's finding at 20 C.F.R. §718.205(c).

Because claimant failed to invoke the irrebuttable presumption at 20 C.F.R. §718.304(b), or to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement, we also affirm the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

JUDITH S. BOGGS
Administrative Appeals Judge

permissibly found that the medical evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).