

BRB No. 09-0320 BLA

PATRICIA KNORR )  
(Widow of LEROY KNORR) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 BARREN COAL COMPANY )  
 )  
 and )  
 )  
 INTERNATIONAL BUSINESS & )  
 MERCANTILE REASSURANCE ) DATE ISSUED: 11/12/2009  
 COMPANY )  
 )  
 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 Ralph A. Romano,  
Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals  
Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (08-BLA-5749) of  
Administrative Law Judge Ralph A. Romano on a 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).<sup>1</sup> This case involves a survivor's claim filed on July 26, 2007.<sup>2</sup> The administrative law judge credited the miner with twenty years of coal mine employment<sup>3</sup> in accordance with the parties' stipulation. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. He found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and accordingly, awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the evidence in determining that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal. Employer filed a reply brief, reiterating its contentions.

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'Keefe 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, 718.203, 718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially

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<sup>1</sup> Claimant is the surviving spouse of the deceased miner, who died on July 17, 2007. Director's Exhibit 5.

<sup>2</sup> At the time of his death, the miner was receiving black lung benefits on a claim that he filed on August 31, 1987. In a Decision and Order dated June 16, 1989, Administrative Law Judge Robert D. Kaplan awarded benefits to the miner. Pursuant to employer's appeal, the Board affirmed Judge Kaplan's award of benefits. *Knorr v. Barren Coal Co.*, BRB No. 89-2358 BLA (Apr. 28, 1992) (unpub.).

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

contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 205, 22 BLR 2-467, 2-471 (3d Cir. 2002); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In evaluating the medical evidence relevant to the cause of the miner's death, the administrative law judge noted that the hospital records indicated that the miner had been hospitalized five times between May 3, 2005 and July 17, 2007 for, *inter alia*: coal workers' pneumoconiosis, chronic obstructive pulmonary disease (COPD), acute respiratory failure, chronic respiratory failure, chronic obstructive bronchitis, tachycardia, atrial fibrillation, pneumonia, congestive heart failure, and coronary artery disease. Decision and Order at 5-7.

The record relating to the miner's terminal hospitalization indicates that the miner presented to the emergency room on June 26, 2007, complaining of shortness of breath and chest pain. He was admitted to the hospital and came under the care of Dr. Tavaría, who is an associate of the miner's treating physician. Dr. Tavaría, who is Board-certified in Internal Medicine, with a subspecialty in echocardiography and who is a registered vascular technician, indicated that the miner had a "longstanding history of respiratory failure, COPD, coal workers' pneumoconiosis, and he chronically uses oxygen at home." Director's Exhibit 9. During his hospital course, the miner developed a complete heart block and required resuscitation to revive him. Attempts to wean him from the ventilator failed, and he developed an upper gastrointestinal bleed, requiring transfusion. The miner's condition continued to deteriorate until July 17, 2007, when he expired. Dr. Tavaría listed the final discharge diagnoses as: acute chronic respiratory failure, acute renal failure, pneumonia, COPD, atrial fibrillation, AV block, hematemesis, chronic blood loss anemia, acute necrosis of the liver, and congestive heart failure. No autopsy was performed. Director's Exhibit 9.

The miner's death certificate, signed by Dr. Tavaría, listed the immediate causes of death as "Coal Worker's Pneumoconiosis Respiratory Failure" and "Renal Failure." Director's Exhibit 5. In a report dated January 17, 2008, Dr. Tavaría stated that the miner had been a patient of his practice since March 1997, when the miner began treatment with Dr. Tavaría's associate, Dr. Mishra, for acute bronchitis and black lung. Dr. Tavaría noted that the miner had a history of working in the coal mining industry for more than twenty years, and was receiving black lung compensation at the time of his death. The physician also noted that the miner was a lifelong smoker, and continued to smoke a few cigarettes a day close to his death. Dr. Tavaría stated that the miner had a history of

multiple admissions secondary to respiratory failure, and that he also had a history of supraventricular tachycardia, secondary to Proventil, a bronchodilator medication. Dr. Tavaría concluded, taking into consideration the miner's long history of coal mine employment, documented coal workers' pneumoconiosis, for which he was receiving compensation benefits, his progressive shortness of breath and his death from respiratory failure, that the miner's occupation of working in the coal mines "was the main contributing factor to his death." Director's Exhibit 12.

In his deposition taken on February 14, 2008, Dr. Tavaría reiterated his conclusion that the miner's terminal episode of respiratory failure, for which he was hospitalized on June 26, 2007, was primarily caused by the miner's occupation in the coal mining industry. Director's Exhibit 14 at 13. Dr. Tavaría again acknowledged the miner's longstanding smoking history, and stated that he was "sure" it contributed to the miner's respiratory problems, including his COPD, specifically his emphysema and chronic bronchitis. Director's Exhibit 14 at 15, 16, 22. However, Dr. Tavaría concluded:

[The miner] had worked 20 or more years in [the] coal industry, and he has documented black lung. He was receiving compensation since 1987, approximately. And this is a progressive disease regardless of whether you stop working or you have no other exposure. And I believe that his disease continued to progress till his death and the coal workers' pneumoconiosis was a major contributor to his demise.

Director's Exhibit 14 at 16.

By contrast, Dr. Hippensteel, who is Board-certified in Internal Medicine, with subspecialties in Pulmonary Disease and Critical Care Medicine, opined that pneumoconiosis did not contribute to the miner's death in any way. Specifically, in his January 24, 2008 report, based on review of the death certificate, hospital and physician records, and 30 year smoking history, Dr. Hippensteel opined that the miner had not suffered from clinical or legal pneumoconiosis and that, therefore, "pneumoconiosis was not a substantial contributing cause of this miner's death and did not hasten his death." Director's Exhibit 11 at 10. Rather, Dr. Hippensteel opined, the miner suffered "impairments from his long-term cigarette smoking which continued long after he left work in the mines, associated with bullous emphysema and increasingly severe chronic obstructive pulmonary disease from this combination of problems, possibly added to by allergies as well for which he was being treated." *Id.* After reviewing additional evidence, Dr. Hippensteel completed a second report, dated March 11, 2008 report, in which he stated that the records he reviewed did not support "causation of death from coal workers' pneumoconiosis and at most, would show no more than a very marginal amount of evidence consistent with coal workers' pneumoconiosis radiographically, which with a reasonable amount of medical certainty would have no clinical significance

regarding the respiratory failure, worsening general status and eventual unfortunate death of this man.” Employer’s Exhibit 2 at 5.

Finally, Dr. Dittman, who is Board-certified in Internal Medicine, reviewed the medical records<sup>4</sup> and opined in a report dated March 23, 2008, that the miner had simple pneumoconiosis, but that it was not a substantial contributing cause of, and did not hasten, the miner’s death. Rather, Dr. Dittman concluded that the miner died as a result of acute renal failure, due to hypoperfusion, due to anemia and cardiac arrest, unrelated to his pneumoconiosis. Employer’s Exhibit 1 at 13. In his deposition, Dr. Dittman reiterated his opinion that pneumoconiosis did not contribute to the miner’s death. Employer’s Exhibit 3 at 12, 21, 22.

The administrative law judge considered the conflicting medical opinions and credited Dr. Tavaría’s opinion, that pneumoconiosis hastened the miner’s death, over the contrary opinions of Drs. Hippensteel and Dittman. Decision and Order at 13-14. Employer contends that this was error. We disagree.

The administrative law judge accorded little weight to Dr. Hippensteel’s opinion, that pneumoconiosis did not cause or hasten the miner’s death, as the physician “continually questions whether or not the Miner has pneumoconiosis, even though it has already been established in Judge Kaplan’s June 16, 1989 Decision and Order” and affirmed by the Board, that the miner suffered from pneumoconiosis. Decision and Order at 14; Director’s Exhibits 1, 11; Employer’s Exhibit 2. Employer contends that the administrative law judge mischaracterized Dr. Hippensteel’s opinion. Employer asserts that while Dr. Hippensteel initially opined that the miner did not suffer from pneumoconiosis, after further review of the medical records, Dr. Hippensteel “agreed that the miner had the disease.” Employer’s Brief at 17. Contrary to employer’s contentions, however, in his most recent report dated March 11, 2008 report, Dr. Hippensteel acknowledged that the miner had “a risk factor for coal workers’ pneumoconiosis” but again concluded that “the evidence in this case does not show that he developed coal workers’ pneumoconiosis with a reasonable degree of medical certainty.” Employer’s Exhibit 2 at 5. Thus, the administrative law judge properly characterized Dr. Hippensteel’s opinion, and reasonably took into account the fact that the miner established entitlement to benefits during his lifetime by establishing, through medical evidence, that he was totally disabled due to pneumoconiosis. *See Hill v. Director, OWCP*, 562 F.3d 264, BLR (3d Cir. 2009); *Soubik v. Director, OWCP*, 366 F.3d 226,

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<sup>4</sup> The administrative law judge noted, correctly, that Dr. Dittman had also examined the miner on one occasion in 1988, in connection with the miner’s lifetime claim. Decision and Order at 11.

23 BLR 2-82 (3d Cir. 2004). Thus, the administrative law judge's determination to accord little weight to Dr. Hippensteel's opinion is supported by substantial evidence.

Employer also asserts that the administrative law judge erred in discrediting the opinion of Dr. Dittman. Employer's Brief at 17-19. The administrative law judge noted, correctly, that Dr. Dittman opined that the miner had pneumoconiosis and that it contributed to the miner's pulmonary problems. Decision and Order at 14. In addition, the administrative law judge noted Dr. Dittman's agreement that pneumoconiosis is a "progressive and degenerative disease." Decision and Order at 14; Employer's Exhibit 3 at 22-23. However, Dr. Dittman ultimately concluded that the miner's death was caused by his cardiac problems, and the subsequent renal and liver failure which resulted, with no contribution from any type of lung disease, including pneumoconiosis. Employer's Brief at 17-19; Employer's Exhibit 3 at 21-22. Dr. Dittman further opined that, even assuming the miner's pulmonary condition contributed in any way to his death, any pulmonary contribution would be from the miner's smoking-related obstructive lung disease. Decision and Order at 14; Employer's Exhibit 3 at 22-23. The administrative law judge noted, correctly, that Dr. Dittman based his conclusion on the fact that the miner had not been exposed to coal dust for many years, but had continued to smoke until his death. Decision and Order at 14; Employer's Exhibit 3 at 22-23.

Employer asserts that, in discrediting Dr. Dittman's opinion as not-well reasoned, the administrative law judge impermissibly shifted the burden of proof to employer, by requiring Dr. Dittman to rule out coal mine employment or coal dust exposure as a potential factor in the miner's death. Employer's Brief at 17. Contrary to employer's arguments, in light of Dr. Dittman's acknowledgment that pneumoconiosis is a progressive disease that contributed in part to the miner's pulmonary problems, and in light of the fact that the miner was hospitalized repeatedly for acute chronic respiratory failure between May 3, 2005 and his death on July 17, 2007, the administrative law judge acted within his discretion in finding that Dr. Dittman failed to adequately explain his opinion that the miner's pneumoconiosis did not progress, and that neither the miner's twenty years of coal mine employment, nor his respiratory condition, had any impact on his death. *See Hill*, 562 F.3d at 272, BLR at ; *Soubik*, 366 F.3d at 233, 23 BLR at 2-97; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 14. Whether a physician's opinion is reasoned and documented is a finding within the discretion of the administrative law judge. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002). Thus, we affirm the administrative law judge's determination to discredit Dr. Dittman as supported by substantial evidence and in accordance with law.

We further reject employer's assertion that the administrative law judge erred in crediting the opinion of Dr. Tavarria, that the miner's pneumoconiosis was a "major contributor to his demise." Employer's Brief at 14-15; Director's Exhibit 14 at 16. The

administrative law judge found that Dr. Tavaría's opinion, as expressed in his medical report and deposition testimony, was well-documented, reasoned and entitled to substantial weight, as it was based on the miner's progressive shortness of breath, the miner's smoking and coal mine employment histories, and further, because Dr. Tavaría attended to the miner during his terminal hospitalization from June 26, 2007 to July 17, 2007. Decision and Order at 13-14. In addition, contrary to employer's assertion, Dr. Tavaría did not fail to explain why claimant's acute respiratory distress and eventual death were "influenced by his remote coal mine employment rather than his continued cigarette smoking." Employer's Brief at 15. Rather, in concluding that the miner's pneumoconiosis had contributed to his death from acute chronic respiratory failure, Dr. Tavaría specifically testified that he was "sure" that the miner's smoking history had also contributed to the miner's respiratory problems. Director's Exhibit 14 at 16. Consequently, the administrative law judge permissibly found that Dr. Tavaría's opinion was based on the extensive evidence of record, and thus, was sufficiently reasoned to support a finding that miner's death was due to pneumoconiosis. See *Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 13, 14.

Nor is there any merit to employer's contention that the administrative law acted inconsistently by initially stating that he would not accord additional weight to Dr. Tavaría's opinion as that of a treating physician, and then subsequently crediting the physician, in part, because he "treated" the miner during his last hospitalization. Employer's Brief at 15; Decision and Order at 13. As employer asserts, the administrative law judge initially considered the factors set forth at 20 C.F.R. §718.104(d)(1)-(4), relevant to the nature and duration of the miner's relationship with the treating physician, and the frequency and extent of the treatment, and permissibly determined that Dr. Tavaría was not the miner's regular treating physician, and that, therefore, his opinion was not entitled to any additional weight on that basis. Decision and Order at 13. Contrary to employer's argument, however, the administrative law judge did not subsequently credit Dr. Tavaría based on his treating status. Rather, the administrative law judge permissibly considered the fact that Dr. Tavaría had attended to the miner during his final hospitalization, and had authored the final discharge summary explaining the course of the miner's last days, as one factor in considering the credibility of the physician's opinion as to the cause of the miner's death. See *Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Anderson*, 12 BLR at 1-113; Decision and Order at 13.

Finally, we reject employer's contention that the administrative law judge erred in crediting Dr. Tavaría's opinion, as expressed on the miner's death certificate. Employer's Brief at 12. As employer contends, a listing of pneumoconiosis on a death certificate, without any explanation, does not constitute a reasoned medical finding. *Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR at 2-12, 2-21 (3d Cir. 1997).

However, the administrative law judge noted, correctly, that in this case, the death certificate was completed by Dr. Tavaría, who attended the miner during his week-long terminal hospitalization. Thus, the administrative law judge permissibly found that because Dr. Tavaría's statement on the death certificate, that the immediate causes of death were "Coal Worker's Pneumoconiosis Respiratory Failure" and "Renal Failure," was not inconsistent with Dr. Tavaría's final hospital treatment notes listing "acute chronic respiratory failure" and "acute renal failure" as the two primary causes of death, the death certificate was entitled to "some" weight. *Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-149, 1-155; *Fields*, 10 BLR at 1-19; Decision and Order at 13, 14.

It is the function of the administrative law judge to evaluate the physicians' opinions, *see Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8, and the Board will not substitute its inferences for those of the administrative law judge. *Clark*, 12 BLR at 1-155. As substantial evidence supports the administrative law judge's permissible credibility determinations, we affirm the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).



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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge