

BRB No. 99-0242 BLA

PEGGY MOSLEY)
(Widow of JAMES E. MOSLEY))
)
 Claimant-Respondent)
)
 v.)
)
 M & H COAL COMPANY) DATE ISSUED:
 INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 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 Survivor's Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Stephen E. Crist (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits (98-BLA-0543) of Administrative Law Judge Daniel F. Sutton 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge initially credited the parties' stipulations that the miner worked nineteen and one-quarter years in qualifying coal mine employment and that the miner established the existence of pneumoconiosis. The administrative law judge then found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Claimant¹ responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

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 the 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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.205(c), employer challenges the administrative law judge's discrediting of Dr. Fino's opinion because he failed to analyze this opinion under the standard set forth in *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Specifically, employer argues that the administrative law judge erred in discrediting Dr. Fino's opinion that the miner did not have pneumoconiosis because it was contrary to the determination in the miner's claim that the miner did, in fact, suffer from pneumoconiosis. Employer contends that, pursuant to *Hobbs*, Dr. Fino's finding that claimant did not have clinical coal workers' pneumoconiosis without ruling out pneumoconiosis as defined by the Act, did not justify the administrative law judge's discrediting of Dr. Fino's opinion. We

¹ Claimant, Peggy Mosley, filed a survivor's claim for benefits on March 28, 1997. Director's Exhibit 1. Mrs. Mosley is the widow of James E. Mosley, the miner, who died on March 6, 1997. Director's Exhibit 16. As a result of his duplicate claim filed on August 24, 1994, the miner was awarded benefits by Administrative Law Judge Edward J. Murty, Jr. on April 22, 1998. Employer did not appeal this award.

disagree. Contrary to employer's contention, the administrative law judge was aware of the broader definition of pneumoconiosis under the Act, *see* 20 C.F.R. §718.201, and appropriately considered Dr. Fino's opinion pursuant to this definition. *See* Decision and Order at 10.

In a report dated May 18, 1998, Dr. Fino opined, "I previously reviewed medical records and felt that this man had asthma and did not have a coal mine dust related pulmonary condition. My opinions are the same. I do not feel that he had any respiratory impairment arising out of a coal mine dust related pulmonary condition." Employer's Exhibit 1. The administrative law judge gave diminished weight to the opinion of Dr. Fino because employer conceded the presence of pneumoconiosis in the instant case and did not challenge the previous finding of pneumoconiosis in the miner's claim. Decision and Order at 9. Consequently, the administrative law judge rationally determined that because employer conceded the existence of pneumoconiosis and had not challenged Administrative Law Judge Murty's prior finding that the miner had established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the opinions of Drs. Fino and Hansbarger² were entitled to less weight inasmuch as both physicians' opinions were contrary to an established fact -- that the miner suffered from pneumoconiosis. *See Hobbs, supra*; Decision and Order at 9-10; Hearing Transcript at 10.

² Employer does not challenge the administrative law judge's discrediting of Dr. Hansbarger's opinion. *See* Decision and Order at 9-10; Director's Exhibit 32.

Employer also contends that the administrative law judge impermissibly rejected Dr. Fino's opinion because Dr. Fino failed to diagnose emphysema. Employer's argument lacks merit. The administrative law judge found that Dr. Fino's opinion was "not only eroded by his non-diagnosis of pneumoconiosis but by his surprising conclusion that Mr. Mosley's only respiratory condition was non-occupational asthma, which is directly contradicted by the unanimous histological finding of all three pathologists (namely, Drs. Dy, Hansbarger, and Green) that he suffered from emphysema." Decision and Order at 10. Thus, contrary to employer's contention, the administrative law judge did not reject Dr. Fino's opinion because Dr. Fino failed to diagnose emphysema, but rather because Dr. Fino diagnosed, as the only respiratory condition claimant had, nonoccupational asthma, a diagnosis which was unsupported by the unanimous histological findings by all three pathologists of record.³ *See*

³ Relevant to Section 718.205(c), the record consists of six physicians' opinions. Dr. Green opined that, although the miner died as a result of an acute myocardial infarction, his chronic obstructive lung disease and simple pneumoconiosis contributed to his death by reducing the oxygen supply to the damaged heart muscle. Claimant's Exhibit 1. Dr. Dy, the autopsy prosector, diagnosed the following conditions: mild to moderate micromacular anthracotic pneumoconiosis; emphysema; acute congestion and recent hemorrhages in lower lobes of both lungs; confluent circular anthracosis, visceral pleurae; and marked anthracosis, hilar and regional lymph nodes. Director's Exhibit 19. Dr. Srichai completed the death

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989).

certificate, opining that the immediate causes of death were acute myocardial infarction, atherosclerotic heart disease, and past coronary bypass, and other significant conditions were hypertension, chronic obstructive pulmonary disease, and chronic low back pain. Director's Exhibit 16.

On the contrary, Dr. Fino opined that the miner's death was due to sudden cardiac arrest which had nothing to do with the inhalation of coal mine dust. Employer's Exhibit 1. Dr. Hansbarger opined that since the miner did not suffer from "coal workers' pneumoconiosis or any other occupational pneumoconiosis of the lung, this disease could obviously not have contributed to his demise," and instead, attributed the miner's death to atherosclerotic coronary heart disease. Director's Exhibit 32. Dr. Gaziano concluded that although the miner had pneumoconiosis, he also had "ASHD and died suddenly of a heart attack." Director's Exhibit 20.

Finally, employer argues that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis as all of the physicians of record agreed that the cause of the miner's death was not due to pneumoconiosis,⁴ with the exception of Dr. Green, who, without any supporting objective medical evidence, diagnosed a condition completely unrelated to coal dust exposure and linked it to the miner's death and to pneumoconiosis. We disagree. The administrative law judge, within a proper exercise of his discretion, found that Dr. Green's opinion, that the miner's chronic obstructive lung disease and simple coal workers' pneumoconiosis contributed to his death by reducing the oxygen supply to his damaged heart muscle, was reasoned and supported by the objective medical evidence of record. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 10; Claimant's Exhibit 1. Inasmuch as the administrative law judge does not have to accept the opinion or theory of any given witness and may weigh the medical evidence and draw his own conclusions, we affirm the administrative law judge's crediting of Dr. Green's opinion inasmuch as he rationally found this physician's opinion entitled to dispositive weight. See *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Consequently, we affirm the administrative law judge's rational determination that the preponderance of the credible and probative evidence of record establishes that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c)(2). See *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-589, 2-604 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

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

SO ORDERED.

⁴ The issue under consideration here is Section 718.205(c)(2), which states, in pertinent part, that the miner's death will be considered due to pneumoconiosis "where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death." 20 C.F.R. §718.205(c)(2). Because a physician finds that a miner's death was "due to" some other cause does not preclude that physician from finding that pneumoconiosis substantially contributed to the miner's death. See 20 C.F.R. §718.205(c)(1), (2); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Shuff v. Cedar Coal Co.*, 67 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge