BRB No. 03-0226 BLA

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| JUNE E. SALYERS<br>(Widow of ARNOLD B. SALYERS)<br><br>Claimant-Respondent<br><br>v.<br><br>JO-FLO COAL COMPANY, INCORPORATED<br><br>and<br><br>OLD REPUBLIC INSURANCE COMPANY<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 10/31/2003<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-BLA-00394) of Administrative Law Judge Jeffrey Tureck awarding benefits 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).[1] Based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718.[2] The administrative law judge credited the miner with twenty-three and one-half years of coal mine employment and noted employer=s stipulation that the miner had pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. ''718.202(a) and 718.203(b). The administrative law judge found that claimant met her burden of proof to establish that the miner=s death was due to pneumoconiosis under 20 C.F.R. '718.205(c)(2). Specifically, the administrative law judge found that the miner=s pneumoconiosis was a substantially contributing cause of the miner=s death by crediting the report of Dr. Perper, a reviewing pathologist, over the reports of Drs. Naeye and Castle, both reviewing pulmonologists. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in his weighing of the medical opinion evidence relevant to the cause of the miner=s death pursuant to 20 C.F.R. '718.205(c). Claimant has not filed a brief in this appeal. The Director, Office of Workers= Compensation Programs, has declined 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 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);

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, are to the amended regulations.

[2]The record indicates that the miner, Arnold B. Salyers, filed an applications for black lung benefits on December 2, 1982. This claim was finally denied by Administrative Law Judge Clement J. Kichuk on December 23, 1998 and is not at issue herein. Director=s Exhibit 26. The miner died on July 31, 1996, and claimant, June E. Salyers, the miner=s widow, filed a claim for survivor=s benefits on August 21, 2000. Director=s Exhibits 1, 7.

*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. '718.205(c), 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. ''718.201, 718.202, 718.203, 718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor=s 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 death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. '718.205(c)(1)-(3). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). 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).

After consideration of the administrative law judge=s Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Employer contends that Dr. Perper=s medical opinion, that the miner=s pneumoconiosis with associated centrilobular emphysema and chronic obstructive pulmonary disease produced hypoxemia and contributed to the miner=s death through a resultant terminal, cardiac arrhythmia on the background of cardiomegaly and arteriosclerotic coronary heart disease, is not credible because it is based on a theory unsubstantiated by the evidence. Employer asserts that the administrative law judge failed to recognize that Dr. Perper did not explain how hypoxemia caused the miner=s death or how the literature supported his medical conclusions. Employer also argues that the administrative law judge failed to determine whether the studies cited by Dr. Perper were applicable to this particular miner, and whether the physician=s opinion was reasoned, documented and satisfied minimum standards of scientific reliability. Employer=s contentions lack merit. The administrative law judge determined that Dr. Perper=s opinion was based on the physician=s review of the miner=s autopsy report and slides, and was supported by its underlying documentation and medical studies showing that patients with chronic obstructive pulmonary disease have a high incidence of cardiac arrhythmias. Decision and Order at 4; Director=s Exhibit 10. The administrative law judge further determined that Dr. Perper=s opinion was supported by additional studies establishing a link between coal mine employment and centrilobular emphysema, and consistent with the regulations which recognize that pneumoconiosis causes obstructive as well as restrictive impairments. *Id.; see* 20 C.F.R.

'718.201(a)(2). The administrative law judge then acted within his discretion in finding that Dr. Perper=s opinion was entitled to the greatest weight, as he concluded that this opinion was well reasoned and persuasive. Decision and Order at 4, 6; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, employer asserts for a variety of reasons that the administrative law judge should not have credited Dr. Perper=s opinion, but employer fails to demonstrate any fatal flaw in the administrative law judge=s analysis; employer=s arguments are rejected as they amount to a request that the Board reweigh the evidence. *See Anderson*, 12 BLR 1-111. Based on the foregoing, we reject employer=s assertion that the administrative law judge credited Dr. Perper=s opinion without properly evaluating it.

Employer next contends that the administrative law judge improperly discredited the opinions of Drs. Naeye and Castle that the miner=s coal workers= pneumoconiosis neither caused nor contributed to his death. In contrast to Dr. Perper, Drs. Naeye and Castle opined that the miner=s death was related solely to his cardiac disease. Decision and Order at 5-6; Employer=s Exhibits 1, 3, 5. Dr. Naeye stated that the miner=s death had a cardiac origin and was a direct consequence of coronary artery disease. Employer=s Exhibit 1. Dr. Castle stated that the miner Adied as a result of a sudden cardiac arrhythmia due to severe coronary artery disease which caused him to have a severe ischemic cardiomyopathy with cardiac arrhythmias and congestive heart failure.@ Employer=s Exhibit 3.

We disagree with employer=s contention that in rejecting the opinions of Drs. Naeye and Castle the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. '557(c)(3)(A), as incorporated into the Act by 5 U.S.C. '554(c)(2), 33 U.S.C. '919(d) and 30 U.S.C. '932(a). In evaluating the medical opinion evidence, the administrative law judge assessed Athe qualifications of the respective physicians,[3] the

[3]The administrative law judge discussed the relative qualifications of the physicians of record. *See* Decision and Order at 4-5. The administrative law judge noted that Dr. Perper was a highly qualified forensic pathologist, that Dr. Naeye was Chairman of the Department of Pathology at the Pennsylvania State University College of Medicine and that Dr. Castle was a well-qualified pulmonary specialist. *Id.* In so noting, the administrative law judge referenced the exhibits containing the curriculum vitae of each physician. Director=s Exhibit 10; Employer=s Exhibits 2, 4. In further analyzing the credibility of the evidence, the administrative law judge also recognized that Dr. Castle agreed with Dr. Naeye regarding the cause of the miner=s death. Decision and Order at 5. The administrative law judge=s consideration of the qualitative and quantitative nature of the evidence is consistent with the decisions of the United States Court of Appeals of the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.@ *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23 (4th Cir. 1997); *see* Decision and Order at 4-5.

Moreover, we reject employer=s assertion that the administrative law judge mischaracterized Dr. Naeye=s opinion in concluding that the physician believed the miner=s lung disease was not disabling and thus not related to his death. The administrative law judge rationally found Dr. Naeye=s conclusion problematic in light of his diagnoses of moderately severe pneumoconiosis and moderate to severe centrilobular emphysema coupled with his reliance on an apparently mistakenly identified 1985 blood gas study with a normal arterial $pO_2$ value of 85. Decision and Order at 5; Director=s Exhibit 26. Thus, the administrative law judge rationally determined that Dr. Naeye=s conclusion was entitled to little weight as it was based, in part, on the faulty premise that the miner=s objective studies established that he was not functionally affected by pneumoconiosis during his lifetime and, thus, that the miner=s pneumoconiosis was not severe enough to have contributed to or hastened the miner=s death. Decision and Order at 5; *see* Employer=s Exhibits 1. In so finding, the administrative law judge rationally determined that it was not reasonable to rely on the results of objective studies performed at least eight years prior to the miner=s death in 1996 to show that the miner was not incapacitated by pulmonary disease at the time of his death. Decision and Order at 5-6. Further, the administrative law judge determined that the record contained pulmonary function study and blood gas study evidence which demonstrated that the severity of the miner=s pulmonary disease increased over time, and, therefore, that the opinion expressed by Dr. Naeye was undermined by the record. We therefore hold that substantial evidence supports the administrative law judge=s determination that the opinion of Dr. Naeye was entitled to little weight. *Clark*, 12 BLR 1-149.

With respect to Dr. Castle=s opinion, employer asserts that the administrative law judge erred in giving little weight to the physician=s opinion, Asuggesting that Dr. Castle did not believe that pneumoconiosis could cause pulmonary obstruction and was, therefore, hostile to the Act.@ Employer=s Brief at 21-22. Employer=s argument is misplaced. The administrative law judge determined that in 1989, Dr. Castle concluded that the miner=s disabling pulmonary impairment was not related to coal mine employment because it was obstructive and not restrictive, while in 2001 Dr. Castle stated that when pneumoconiosis causes significant impairment it generally does so by causing a mixed obstructive and restrictive ventilatory impairment, and then in 2002 Dr. Castle agreed that pneumoconiosis can cause obstruction without a restrictive component. Decision and Order at 6; Director=s Exhibit 26-65 at 5; Employer=s Exhibit 3 at 7; Employer=s Exhibit 5 at 8. In view of Dr. Castle=s inconsistent explanations for ruling out pneumoconiosis as a cause of the miner=s

pulmonary impairment, the administrative law judge rationally found that Dr. Castle=s conclusions regarding the role of pneumoconiosis in the miner=s pulmonary impairment and death were undermined. Decision and Order at 6; *Shuff*, 967 F.2d 977, 16 BLR 2-90; *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). We therefore hold that substantial evidence supports the administrative law judge=s determination that the opinion of Dr. Castle was entitled to little weight. *Clark*, 12 BLR 1-149.

It is within the administrative law judge=s discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). An administrative law judge may give more weight to the physicians= opinions which he finds are based on a more thorough review of the evidence of record and better reasoned. *See Hall v. Director, OWCP*, 8 BLR 1-193 (1985). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge when his findings are supported by substantial evidence, *see Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In this case, the administrative law judge considered all of the relevant evidence and, according determinative weight to the opinion of Dr. Perper, concluded that coal workers= pneumoconiosis substantially contributed to the miner=s death. Decision and Order at 6; *Shuff*, 967 F.2d 977, 16 BLR 2-90. The administrative law judge=s findings pursuant to Section 718.205(c) are supported by substantial evidence, and thus are affirmed. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Worley*, 12 BLR 1-20.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL

Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge