BRB No. 99-0161 BLA

GLADYS A. CLENDENIN (Widow of UTAH CLENDENIN)	)	
Claimant-Petitioner	)	
v.	)	
HAWKS NEST MINING COMPANY	)	DATE ISSUED: 10/15/99
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

H. John Taylor, Rand, West Virginia, for claimant.

Stephen E. Crist (State of West Virginia Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the widow of the deceased miner, appeals the Decision and Order (97-BLA-818) of Administrative Law Judge Daniel L. Leland denying 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). The administrative law judge found twenty-nine and one-half years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge determined that employer was the responsible operator and concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. Decision and Order at 3, 6. The administrative law judge further found, however, that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 7. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish that the miner's death was due to pneumoconiosis. Carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.[2]

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

[1]The miner died on September 6, 1995. Director's Exhibits 1, 15. Claimant filed her survivor's claim, the subject of the instant appeal, on October 4, 1995. Director's Exhibit 1.

[2]We affirm the findings of the administrative law judge on the length of coal mine employment, the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a) and 718.203, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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); *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. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Fourth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death.[3] *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

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 that there is no reversible error contained therein. Initially, claimant asserts that the administrative law judge neglected to analyze the 1988 reports of Drs. Gaziano and Zaldivar. Claimant's contention is without merit. The administrative law judge specifically set forth this evidence and relied upon it to find the existence of pneumoconiosis established. *See* Decision and Order at 4, 6. Moreover, contrary to claimant's assertion, these 1988 reports are not probative of the issue of the miner's cause of death in 1995.Thus the administrative law judge's failure to analyze the 1988 reports at Section 718.205, and the fact that Drs. Tuteur and Hansbarger did not reference them, is of no consequence as they do not address the issue of death due to pneumoconiosis. *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Contrary to claimant's contention, the administrative law judge, in the instant case, rationally found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205.[4] *Neeley, supra*; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In weighing the medical opinion evidence of record and finding it insufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge permissibly relied on the opinions of Drs. Fino, Tuteur and Zaldivar, all of whom are pulmonary specialists, as well as on the opinion of Dr. Hansbarger, a pathologist. All four doctors opined that the miner's death was the result of a pulmonary disease caused by cigarette smoking. Decision and Order at 7; Director's Exhibits 43, 44; Cyprus Kanawha Exhibits 1, 3, 4, 5. In so finding, the administrative law judge, within his discretion as fact-finder, rationally accorded significant weight to these opinions on the basis of the physicians' qualifications, the reasoning contained in these reports and their consistency with the miner's very heavy cigarette smoking history. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 7. In addition, the administrative law judge acted within his discretion in according less weight to the opinion of Dr. D'Brot, the miner's attending physician, who listed pneumoconiosis as a cause of death in the hospital records. The administrative law judge accorded the opinion less weight because the doctor did not explain this finding and because on the death certificate the doctor had attributed the cause of death to chronic obstructive lung disease from cigarette smoking, not pneumoconiosis. Decision and Order at 7. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark, supra; Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fields, supra; Wetzel, supra; Lucostic, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*; Decision and Order at 7; Director's Exhibits 15, 16, 18. The administrative law judge also rationally concluded that the opinion of Dr. Gaziano was insufficient to establish that the miner's death was due to pneumoconiosis as the physician's brief report was

[4]The administrative law judge properly concluded that the presumption at 20 C.F.R. §718.304 is not applicable in this case as the record indicates that there is no evidence of complicated pneumoconiosis contained therein. 20 C.F.R. §718.205(c)(3).

conclusory, lacked any reasoning and since his qualifications were inferior to the other doctors who submitted opinions. Finally, the administrative law judge weighed the lack of expertise of Drs. D′ Brot and Gaziano against the established expertise of Drs. Fino, Tuteur, Zaldivar and Hansbarger. Decision and Order at 7. *See Clark, supra*; *Lafferty, supra*; *Fields, supra*; *Wetzel, supra*; *Hutchens, supra*; *Kuchwara, supra*; *Piccin, supra*; Decision and Order at 7.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's denial of benefits in this survivor's claim as it is supported by substantial evidence and is in accordance with law. *Shuff, supra*; *Neeley, supra*; *Trumbo*, *supra*.

Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement for a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Shuff, supra*; *Trumbo, supra.*

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge