

BRB No. 00-1183 BLA

ELIZABETH FILES)
(Widow of WILLIE D. FILES))
)
 Claimant-Respondent)
)
 v.)
)
 DRUMMOND COMPANY,) DATE ISSUED:
)
 INCORPORATED)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura, Quinn & Walls, LLP), Birmingham, Alabama , for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0988) of Administrative Law Judge Gerald M. Tierney awarding benefits 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).¹ In this survivor's claim, the administrative law judge found that the

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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the

existence of pneumoconiosis had been established previously as benefits had been awarded in the miner's claim. The administrative law judge credited the miner with thirty-eight years of coal mine employment and found employer to be the responsible operator. The administrative law judge further found the evidence of record sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2000). Accordingly, benefits were awarded.

On appeal employer argues that the administrative law judge erred in his consideration of the medical opinion evidence. Claimant² responds, urging affirmance of the Decision and Order of the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.³

February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

² Claimant, Elizabeth Files, is the widow of Willie D. Files, who was awarded benefits on his claim on April 9, 1992. Director's Exhibit 21-35. The miner died on April 8, 1998. Director's Exhibit 2. Claimant filed this survivor's claim on May 11, 1998. Director's Exhibit 1.

³ We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), and 718.204(c)(1)-(3)(2000), as unchallenged on appeal. *See* 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b) and 718.204(b)(2)(i)-(iii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *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 to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, 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 the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).

Employer contends that the administrative law judge erred in according dispositive weight to Dr. Rosemore's opinion because he was the miner's treating physician. Specifically, employer contends that Dr. Rosemore's opinion is not entitled to greater weight because it was unsubstantiated by his treatment records, inconsistent with his earlier opinion, and contrary to the opinions of the better qualified physicians of record. Rather, employer contends that the opinion of Dr. Hasson was entitled to greater weight because he was a pulmonary specialist who had examined the miner and reviewed his medical records. Employer also contends that Dr. Hasson's opinion was consistent with the opinions of Dr. Soubani and Ferris, who were also treating physicians.

After careful consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. In according greater weight to the opinion of Dr. Rosemore than to the opinions of Drs. Goldstein and Hasson, the administrative law judge noted that Dr. Goldstein had never examined the miner and that Dr. Hasson had examined the miner in 1990, while Dr. Rosemore had treated the miner during the time between Dr. Hasson's 1990 examination of the miner and the miner's death in 1998. Thus, the administrative law judge permissibly found that Dr. Rosemore was the physician "in the best position to assess whether pneumoconiosis played any role in the miner's death." Decision and Order at 4; *see*

McClendon v. Drummond Coal Co., 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Further, the administrative law judge considered several factors: Dr. Rosemore knew the miner's coal mine employment history; he was aware that other physicians had diagnosed the existence of coal workers' pneumoconiosis; he knew that the miner was not a smoker; he acknowledged other underlying medical complications; and his opinion was supported by treatment and hospital records in evidence. The administrative law judge rationally found that Dr. Rosemore's opinion was a reasoned and documented opinion. *Bradberry, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Additionally, the administrative law judge could reasonably credit Dr. Rosemore's second opinion because he found it more comprehensive and because Dr. Rosemore stated that he wanted to clarify his earlier statement as to the cause of the miner's death. *See Bradberry, supra*.

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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, as the administrative law judge permissibly found that the evidence established that pneumoconiosis played a role in the miner's death, we must affirm the award of benefits. *See Bradberry, supra*.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge