

BRB No. 91-0359 BLA

PAULINE RUSH)
(Widow of GORDON RUSH))

Claimant)

v.)

EASTERN ASSOCIATED COAL)
CORPORATION)

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)
Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel A. Sarno, Jr.,
Administrative Law Judge, United States Department of Labor.

Laura Montgomery (Arter & Hadden), Washington, D.C., for
employer.

Matthew P. Levin (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S.
Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;
Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation
and Legal Advice), Washington, D.C., for the Director, Office of Workers'
Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (84-BLA-7499) of Administrative Law Judge Daniel A. Sarno, Jr., awarding benefits on a miner's claim and 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). This case is on appeal before the Board for the second time. In

his initial Decision and Order, the administrative law judge found that the miner's claim filed on July 25, 1979 had been abandoned, and adjudicated the merits of the miner's second claim filed on August 8, 1983, as well as the survivor's claim filed on April 13, 1984, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge accepted the stipulation of the parties that the miner had forty years of coal mine employment and suffered from pneumoconiosis, and found that the miner was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded on both the miner's and survivor's claims.

On appeal, the Board affirmed the administrative law judge's findings pursuant to Sections 718.203(b) and 718.204(c) on the miner's claim, but remanded this case for the administrative law judge to separately determine whether the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The Board further vacated the administrative law judge's findings pursuant to Section 718.205(c) on the survivor's claim and instructed the administrative law judge on remand to address and weigh all relevant evidence of record in determining whether the miner's death was significantly related to or significantly aggravated by pneumoconiosis. *Rush v. Eastern Associated Coal Co.*, BRB No. 86-2790 BLA (Jan. 31, 1990)(unpublished).

On remand, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), and death due to pneumoconiosis pursuant to Section 718.205(c). Consequently, the administrative law judge again awarded benefits on both claims.

In the instant appeal, employer challenges the administrative law judge's findings pursuant to Sections 718.204(b) and 718.205(c). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. Claimant has not participated 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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order on Remand of the administrative law judge is supported by substantial evidence, consistent with applicable law, and must be affirmed. Contrary to employer's arguments, in evaluating the evidence pursuant to Section 718.204(b) on the miner's claim, the administrative law judge permissibly discounted the opinion of Dr. Geiss that the miner's simple pneumoconiosis did not cause any respiratory impairment, as the physician admitted that he did not consult the objective tests of record and could not determine from the autopsy alone whether any respiratory impairment existed, but based his conclusions solely on his pathological findings which did not reveal complicated pneumoconiosis.¹ Decision and Order on Remand at 2, 3; Administrative Law Judge's Exhibit 1 at 10, 11, 14, 15, 20-22; see generally *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Although employer correctly notes that no physician of record explicitly diagnosed total disability due to pneumoconiosis, the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this claim lies, only requires that claimant establish that pneumoconiosis was a contributing cause of the miner's total disability. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). The record reflects that Dr. Anderson, the miner's treating cardiologist, diagnosed chronic lung disease most likely secondary to coal workers' pneumoconiosis, and opined that chronic obstructive pulmonary disease was a significant condition contributing to death. Decision and Order on Remand at 2; Director's Exhibits 11, 19. Additionally, in his most recent report, Dr. Manchin, an examining physician, diagnosed pneumoconiosis with a moderate to severe loss in respiratory functional capacity, and the administrative law judge determined that claimant's usual coal mine employment involved heavy manual labor. Decision and Order on Remand at 2; Director's Exhibit 22. Consequently, the administrative law judge acted within his discretion as trier-of-fact in relying on the opinions of Drs. Anderson and Manchin to support his finding that the evidence was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), see *Robinson, supra*, and we affirm that finding as supported by substantial evidence. We therefore affirm the award of benefits on the miner's claim.

Turning to the survivor's claim, employer contends that the evidence is insufficient to establish death due to pneumoconiosis under Section 718.205(c), since Dr. Geiss ruled out pneumoconiosis as a cause of death and Dr. Anderson listed chronic obstructive pulmonary disease as a significant condition contributing to

¹ Employer's arguments that the administrative law judge ignored the Board's instructions on remand, mischaracterized the evidence and drew irrational inferences are without foundation in the record.

death on the miner's death certificate but did not indicate its cause. Employer's arguments are without merit. The administrative law judge reasonably determined that Dr. Geiss' opinion was inconsistent, inasmuch as the physician stated that pneumoconiosis did not contribute to the miner's death, but conceded he could not exclude emphysema as a contributing cause of death, and also opined that a portion of the miner's emphysema was caused by coal workers' pneumoconiosis. Administrative Law Judge's Exhibit 1 at 9, 11-13, 20, 21, 27. The administrative law judge therefore permissibly accorded little weight to the opinion of Dr. Geiss, see generally *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), and gave determinative weight to the opinion of Dr. Anderson, based on his status as the miner's treating physician from September 1981 until January 1984, and his personal familiarity with the miner's heart and lung problems. Decision and Order on Remand at 3, 4; see generally *Berta v. Peabody Coal Co.*, 16 BLR 1-69 (1992); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Although Dr. Anderson did not specify the cause of the miner's chronic obstructive pulmonary disease on the death certificate, the administrative law judge determined that coal workers' pneumoconiosis was the sole etiology listed in Dr. Anderson's hospital records for the miner's chronic lung disease. Decision and Order on Remand at 2, 3; Director's Exhibits 11, 19. Consequently, we affirm the administrative law judge's finding that the opinion of Dr. Anderson is sufficient to establish death due to pneumoconiosis at Section 718.205(c), see generally *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), and we affirm his award of benefits on the survivor's claim.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits on the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge