

BRB No. 97-0453 BLA

MARIE J. ZAWELENSKY)
(Widow of JOSEPH A. ZAWELENSKY))
)
Claimant-Respondent)
)
v.)
)
U.S. STEEL MINING COMPANY,)
INCORPORATED)
)
Employer-Petitioner) DATE ISSUED:
)
)
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.

D. Scott Newman (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-0455) of Administrative Law Judge Daniel L. Leland 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). The administrative law judge found that the parties stipulated that the miner¹ had thirty-four years of qualifying coal mine employment and pneumoconiosis which arose from his coal mine employment. The administrative law

¹The miner, Joseph A. Zawelensky, filed a claim for benefits on April 27, 1976, which was finally denied on March 29, 1983. Director's Exhibit 24. The miner died on January 5, 1995. Director's Exhibit 24. Claimant, Marie J. Zawelensky, the miner's widow, filed a survivor's claim for benefits on January 10, 1995. Director's Exhibit 1.

judge, after considering the evidence of record, concluded that claimant established that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.205. Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds declining 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); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 based on a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that death was due to, or hastened by, pneumoconiosis. See 30 U.S.C. §901(a); 20 C.F.R. §§718.1, 718.205, 725.201; *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

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. Employer initially contends that the administrative law judge erred in weighing Dr. Williams' opinion. Employer's Brief at 5. Dr. Williams, in a report dated April 5, 1996, states that "[b]oth Doctors Bush and Oesterling also describe a mild central lobular pulmonary emphysema. This finding is not specific for Coal Worker's Pneumoconiosis and is more probably related to the stated history of cigarette smoking," and concludes that the miner had, "at best, minimal coal workers' pneumoconiosis" and that the disease was "not a significant contributory cause of either [the miner's] death or to any of the diagnoses which ultimately led to his death." Employer's Exhibit 3.

The administrative law judge permissibly found Dr. Williams' opinion not well reasoned or well documented and entitled to less weight because his observations regarding the miner's emphysema "seem limited to those of Drs. Bush and Oesterling" and because he relied on a history of cigarette smoking when the record indicates that the miner smoked cigars.² Decision and Order at 8; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR

²Administrative Law Judge Daniel Goldstein, in the Decision and Order denying benefits on the living miner's claim, found that claimant never smoked cigarettes, but did smoke cigars. Director's Exhibit 24.

1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, as the administrative law judge acted within his discretion as fact-finder in questioning the reliability of this report, we affirm the administrative law judge's weighing of Dr. Williams' opinion. *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

Employer next contends that the administrative law judge erred in weighing Dr. Bush's opinion. Employer's Brief at 5-6. Dr. Bush, in a report dated January 15, 1996, reviewed the autopsy report, medical records, death certificate, and histologic slides, and opined that the miner did not have pneumoconiosis. Employer's Exhibit 2. The administrative law judge noted that the parties stipulated to the existence of pneumoconiosis and that Drs. Wecht, Oesterling, and Williams opined that the miner had pneumoconiosis. As a result, the administrative law judge rationally assigned Dr. Bush's opinion less weight because he did not diagnose pneumoconiosis. Decision and Order at 8; Director's Exhibit 10; Claimant's Exhibit 1; Employer's Exhibits 1-3; *Lafferty, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Thus, we affirm the administrative law judge's weighing of Dr. Bush's opinion.

Employer next contends that the administrative law judge erred in assigning Dr. Wecht's opinion greater weight than Dr. Oesterling's opinion. Employer's Brief at 6-11. Dr. Oesterling reviewed the autopsy slides and the miner's medical records, diagnosed micronodular coal workers' pneumoconiosis based on a single subpleural micronodule which he opined was insufficient to contribute to the miner's death in any way. Employer's Exhibit 1. Dr. Wecht, the autopsy prosector, opined that the miner had pneumoconiosis and that he would not have died when he did if he did not have coal workers' pneumoconiosis. Director's Exhibit 10; Claimant's Exhibit 1. Dr. Wecht also stated that he observed a substantial degree of black pigmentation in the lungs, emphysema in the upper lobes, micro and macro nodules, fibrosis, and focal emphysema. *Id.*

The administrative law judge first noted that Dr. Oesterling's opinion is well detailed and persuasive. Decision and Order at 9. The administrative law judge then permissibly found that Dr. Oesterling's opinion is entitled to less weight than Dr. Wecht's opinion because Dr. Wecht is the autopsy prosector, because Dr. Oesterling based his opinion solely on the single macule that he observed and did not consider Dr. Wecht's findings of micro and macro nodules, and because Dr. Wecht's discussion of how the miner's cor pulmonale constituted a substantial burden on the lungs was more rational and well reasoned than Dr. Oesterling's opinion that claimant did not have cor pulmonale. Decision and Order at 9; *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992); *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Lafferty, supra*; *Clark, supra*; *Fields, supra*; *Lucostic, supra*; *Peskie, supra*; *Fuller, supra*. Thus, we affirm the administrative law judge's weighing of the opinions of Drs. Wecht and Oesterling.

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 finding that claimant established that the miner's death was due to pneumoconiosis pursuant to Section 718.205, and the award of benefits as it is supported by substantial evidence and in accordance with law. *Lukosevicz, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge