

BRB No. 97-0473 BLA

VIOLA M. NARDONE)	
(Widow of JOSEPH P. NARDONE))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Respondent)	

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Dorothy L. Page (J. Davitt McAteer, Acting 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, the United States Department of Labor.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-0443) of Administrative Law Judge Robert D. Kaplan denying benefits on claims 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 miner's first claim filed on January 30, 1980 was finally denied by the district director on April 9, 1981. Director's Exhibit 35. His second claim filed on February 5, 1986 was denied on August 18, 1988 by Administrative Law Judge Thomas W. Murrett, who credited the miner with ten years of coal mine employment, found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1),¹ but concluded that the

¹ The administrative law judge found that pneumoconiosis was established based on the true-doubt rule, which was invalidated in *Director, OWCP v. Greenwich Collieries [Ondecko]*, U.S. , 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director*,

medical evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, he denied benefits. The Board affirmed the administrative law judge's Decision and Order as supported by substantial evidence. *Nardone v. Director, OWCP*, BRB No. 88-3038 BLA (Feb. 27, 1990)(unpub.). The miner filed a third claim on June 20, 1994 which was pending at the time of his death on April 10, 1995. Director's Exhibit 1. Claimant filed a survivor's claim on May 3, 1995. Director's Exhibit 19.

Administrative Law Judge Robert D. Kaplan accepted the parties' stipulation to ten years of coal mine employment and noted that the existence of pneumoconiosis was not contested. Director's Exhibit 36; [1996] Hearing Transcript at 22. Because the miner's third claim was filed more than one year after the denial of his second claim, the administrative law judge considered the new evidence in accord with *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995) to determine whether it established total respiratory disability pursuant to Section 718.204(c), the element of entitlement previously adjudicated against the miner. The administrative law judge found that the new evidence did not establish this element and concluded that therefore a material change in conditions was not established as required by 20 C.F.R. §725.309(d). Accordingly, he denied benefits on the miner's claim. The administrative law judge also denied the survivor's claim based on his finding that the medical evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

On appeal, claimant contends that the administrative law judge erred in his weighing of the medical opinion evidence at Sections 718.204(c)(4) and 718.205(c)(2). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, urging affirmance of the denial of the miner's claim but asserting that remand of the survivor's claim is required because the administrative law judge inaccurately analyzed one of the medical opinions of record.²

OWCP, 990 F.2d 730, 17 BLR 2-64 (10th Cir. 1993). The Director, Office of Workers' Compensation Programs (the Director) did not contest the existence of pneumoconiosis below, and does not raise the issue on appeal.

² We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.204(c)(1)-(3) and 718.205(c)(1), (3). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Pursuant to Section 718.204(c)(4), claimant contends that the administrative law judge erred in according diminished weight to the opinions of the miner's treating physicians, Drs. Aquilina and Gibbons. Claimant's Brief at 4-6. Dr. Gibbons indicated in an April 5, 1995 letter that the miner had been his patient since 1982 and that it was his "understanding that the Department of Labor previously determined that he had black lung."³ Director's Exhibit 17. Dr. Gibbons opined that the miner "suffers from significant shortness of breath and is essentially disabled from his coal workers' pneumoconiosis." *Id.* Dr. Aquilina stated in a September 19, 1995 letter and in his deposition that he had treated the miner's pulmonary system for approximately ten years, ending five months before the miner's death. Director's Exhibit 25; Claimant's Exhibit 1. Based on his observations of increasing shortness of breath and on the miner's January 1994 non-qualifying⁴ pulmonary function study results, he opined that the miner's pulmonary condition was totally disabling.

³ The record indicates that Dr. Gibbons treated the miner for heart disease, peripheral vascular disease, anemia, abdominal aortic aneurysm, acute bronchitis, and gastric cancer. Director's Exhibits 21-23.

⁴ A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2). Both sets of objective tests submitted with the miner's third claim exceed the applicable values. Director's Exhibits 6, 7, 10, 11.

In contrast, Dr. Talati examined and tested the miner in August 1994 and diagnosed non-disabling mild chronic obstructive pulmonary disease due to smoking. Director's Exhibit 8. Dr. Talati based his opinion that the miner suffered "no pulmonary impairment" in part on the non-qualifying pulmonary function and blood gas study results.⁵ *Id.* Dr. Spagnolo reviewed all of the new medical evidence and concluded that the miner had been disabled by metastatic gastric cancer. Director's Exhibit 26. Dr. Spagnolo opined that the miner's blood gas studies were normal and that his pulmonary function studies were nearly normal, indicating that his pneumoconiosis was too mild to interfere with his lung function. *Id.*

In finding that total disability was not established, the administrative law judge considered the treating status of Drs. Gibbons and Aquilina, Decision and Order at 6, but permissibly found that "the opinions of Drs. Talati and Spagnolo outweigh the contrary opinions of Drs. Gibbons and Aquilina," because he concluded that their opinions were better supported by the objective evidence. See *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge permissibly accorded diminished weight to the opinions of Drs. Gibbons and Aquilina because he concluded that they did not adequately explain their disability opinions with reference to the recent objective study evidence. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, the administrative law judge reasonably questioned Dr. Aquilina's belief that the miner's employment required him to perform heavy manual labor, when the record contains no evidence indicating that the miner's job as a coal truck driver required heavy labor. Director's Exhibit 35; [1987] Hearing Transcript at 28; see *Clark, supra*; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). An administrative law judge may, but is not required to credit the opinion of a treating physician, see *Berta v. Peabody Coal Co.*, 16 BLR 1-69 (1992); *Wetzel, supra*, and the Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable, see *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Because the administrative law judge rationally weighed the medical opinions, we affirm his finding pursuant to Section 718.204(c)(4), and the denial of benefits on the miner's claim pursuant to Section 725.309(d). See *Swarrow, supra*.

Pursuant to Section 718.205(c)(2), claimant contends that the administrative law judge improperly discounted Dr. Gibbon's opinion as inadequately explained, when the physician explained how he believed the miner's pneumoconiosis hastened his death. Claimant's Brief at 7. For survivor's claims filed after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held

⁵ Dr. Talati interpreted the August 24, 1994 pulmonary function study as showing a "mild obstructive ventilatory defect keeping in mind that this was a suboptimal effort." Director's Exhibit 7.

that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In a June 6, 1995 letter, Dr. Gibbons opined that the miner's pneumoconiosis contributed to his shortness of breath during his last year of life, which decreased his ability to tolerate his underlying gastric cancer, and that the increased work of breathing contributed to the miner's weight loss and weakness. Director's Exhibit 24. Dr. Gibbons listed "respiratory failure" on the final hospital discharge summary, Director's Exhibit 23, and listed "anthrasilicosis" on the death certificate as a significant condition contributing to the miner's death from gastric cancer. Director's Exhibit 20. The administrative law judge did not explain specifically how he concluded that Dr. Gibbons' "statements are [too] general" to indicate that pneumoconiosis hastened the miner's death. Decision and Order at 9; see *Lukosevicz, supra*; 20 C.F.R. §718.201.

However, the administrative law judge offered a second, valid rationale for his weighing of Dr. Gibbons' opinion. See *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983)(Miller, J., dissenting). Specifically, the administrative law judge rationally questioned Dr. Gibbons' conclusion because he found that "Dr. Gibbons did not consider whether the breathing difficulty that the physician stated that the miner had was caused by the miner's . . . smoking history rather than" his pneumoconiosis. Decision and Order at 9; see *Clark, supra*. The administrative law judge noted the varying smoking histories in the record, which range from three-quarters to one pack of cigarettes per day for twenty to twenty-five years, Director's Exhibits 8, 35, and accurately noted that Dr. Gibbons recorded that the miner "smoked 5-6 per day for years."⁶ Director's Exhibit 22. Therefore, we affirm the administrative law judge's analysis of Dr. Gibbons' opinion.⁷

The Director contends that the administrative law judge's basis for weighing Dr. Aquilina's opinion at Section 718.205(c)(2) was "not entirely correct," and thus remand is required for him to reweigh the physician's opinion. Director's Motion at 5. Dr. Aquilina opined that pneumoconiosis hastened the miner's death by reducing his ability to respond to treatment for his gastric cancer. Claimant's Exhibit 1 at 12-13. The administrative law judge accorded reduced weight to Dr. Aquilina's opinion because "Dr. Aquilina last saw the miner . . . five months before the miner died and prior to the initial detection of the gastric cancer in January 1995 and there is no indication that Dr. Aquilina relied on any medical

⁶ The five-to-six per day notation may refer to the history of smoking five to six cigars per day that the miner related to another hospital physician. Director's Exhibit 22 at 8.

⁷ The parties do not raise the administrative law judge's failure to discuss specifically Dr. Gibbons' entry of anthrasilicosis on the death certificate. Director's Exhibit 20. Because the administrative law judge permissibly accorded diminished weight to Dr. Gibbons' opinion letter, his omission of Dr. Gibbons' notation on the death certificate constitutes harmless error. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

records in arriving at this opinion.” Decision and Order at 8. The Director asserts that “although this is literally true, the [administrative law judge] overlooked Dr. Aquilina's testimony [that] Dr. Gibbons kept Dr. Aquilina informed of the miner's progress during his hospitalization, and that the two doctors continued to discuss the case after the miner's death.” Director's Motion at 5.

Although the administrative law judge considered Dr. Aquilina's reports and his deposition, he did not address Dr. Aquilina's testimony that he discussed the miner's case with Dr. Gibbons during the time that the miner was no longer in his care. Claimant's Exhibit 1 at 12. Nevertheless, after consideration of the record and the administrative law judge's analysis at Section 718.205(c)(2), we conclude that the administrative law judge's inaccurate statement does not require remand. See *Pruett v. Pickands Mather & Co.*, 6 BLR 1-824 (1984). The administrative law judge correctly observed that Dr. Aquilina had no contact with the miner after November 1994. Claimant's Exhibit 1 at 19. Thus, the physician's opinion concerning the miner's condition at the time of his death was necessarily based on Dr. Gibbons' opinion and on the records prepared by Dr. Gibbons, to whose conclusions the administrative law judge permissibly accorded diminished weight. See *Clark, supra*. Consequently, remand for a reweighing of Dr. Aquilina's opinion is unnecessary on this record. Therefore, we reject the Director's contention and affirm the administrative law judge's finding pursuant to Section 718.205(c)(2).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge