BRB No. 01-0639 BLA

DANNIE J. BENTLEY (Widow of ROLLIE BENTLEY) Claimant-Petitioner v. SUN GLOW COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION AND ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Lawrence R. Webster (Webster Law Offices), Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (00-BLA-555) of Administrative Law Judge Daniel J. Roketenetz with respect to 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). Although the administrative law judge

found that claimant established that the miner, Rollie Bentley, had pneumoconiosis within the meaning of 20 C.F.R. §718.202 at the time of his death in May 1994, he found that the evidence failed to establish that the miner's death was caused, substantially contributed to, or hastened by pneumoconiosis. The administrative law judge found that while the autopsy report listed pneumoconiosis as being "present," it did not conclude that pneumoconiosis contributed to the miner's death. Decision and Order at 12. The administrative law judge also found that Dr. Mettu's opinion that pneumoconiosis worsened the miner's condition was outweighed by the opinions of Drs. Caffrey, Broudy, Fino, and Branscomb, all of whom agreed that the miner's death was not in any way hastened by pneumoconiosis. Decision and Order at 13. Therefore, the administrative law judge concluded that the evidence in the record was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[1] Accordingly, benefits were denied.

On appeal, claimant challenges the finding that she failed to prove that the miner's death was due to pneumoconiosis, contending that the autopsy report and the opinion of Dr. Mettu establish death due to pneumoconiosis within the meaning of 20 C.F.R. §718.205(c). Employer argues that claimant misconstrues the autopsy report, that substantial evidence supports the administrative law judge's finding regarding the cause of the miner's death, and that claimant has provided the Board no basis upon which to review the administrative law judge's decision.[2] Employer's Brief at 5-9. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's

[1] The Department of Labor has amended the regulations implementing the Act. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Employer does not challenge the administrative law judge's finding that claimant established simple coal worker's pneumoconiosis; therefore it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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).

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); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' 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)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens it. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Corp.*, 996 F.2d 812 (6th Cir. 1993).

Claimant asserts that the pathologist, Dr. Dennis, found pneumoconiosis to be a cause of death: "[Dr. Dennis] was of the opinion that the Decedent's pneumoconiosis played a part in his death, or he would not have listed it as a pathological diagnosis." Claimant's Brief at 4. We disagree. Although Dr. Dennis noted that "Coal Worker's Pneumoconiosis is also present" (in addition to myocardial infarction, myocarditis, small cell carcinoma, pulmonary congestion, and bronchial pneumonia), he found the miner "died as a result of overwhelming bronchial pneumonia and sepsis," which he stated in his microscopic description was associated with the miner's well advanced small cell carcinoma. Director's Exhibit 12 at 3-4. Thus, the administrative law judge's finding that the autopsy report did not conclude that pneumoconiosis contributed to the miner's death is supported by substantial evidence and is affirmed. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-11(6th Cir. 1995).

We also reject claimant's argument regarding Dr. Mettu's report. Claimant asserts that Dr. Mettu's 1999 report requires a finding that the miner's death was due to pneumoconiosis. Dr. Mettu, who treated the miner during his last hospitalization in 1994, provided a report to claimant's attorney in 1999 based on a review of the autopsy findings. Dr. Mettu stated that "[t]hough [the miner] does have cancer of the lung with extensive involvement of the mediastinum lymph nodes[,] the pneumoconiosis also made his pulmonary impairment worse and did definitely make his condition worse." Director's Exhibit 36. The administrative law judge gave little weight to Dr. Mettu's report because Dr. Mettu was not as highly qualified as the doctors who concluded that death was not hastened in any way by the miner's pneumoconiosis, there was no indication that Dr. Mettu reviewed the autopsy slides prior to giving his opinion as to the cause of the miner's death, and Dr.

Mettu's records from the miner's hospitalization in 1994 did not support his conclusions in 1999.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). An administrative law judge may give more weight to physicians' opinions, such as those of Drs. Caffrey, Broudy, Fino, and Branscomb, which he finds based on a more thorough review of the evidence of record. *See Hall v. Director, OWCP*, 8 BLR 1-193 (1985). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge when his findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Here claimant has not provided the Board with any reason to overturn the administrative law judge's weighing of the medical evidence, and we can find none. The administrative law judge properly discredited the only medical opinion of record that could support a finding that pneumoconiosis hastened the miner's death. Therefore, we affirm as rational and supported by substantial evidence the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *cf. Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989).

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits in the survivor's claim.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge