

BRB No. 97-1737 BLA

VERONICA SIMONETTI)
(Widow of BIAGIO SIMONETTI))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: _____
)
 BCNR MINING CORPORATION)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Donna M. Lowman (United Mine Workers of America), Belle Vernon, Pennsylvania, for claimant.

Gary K. Stearman (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (87-BLA-3822) of Administrative Law Judge David W. Di Nardi on a consolidated miner's claim and 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.* This case is before the Board for a fourth time.¹ The procedural history was set forth in *Simonetti v. BCNR Mining Corp.*, BRB No. 95-1275 BLA (July 26, 1996) (unpublished), which is incorporated by reference herein.² Most recently, the Board remanded the case for the administrative law judge to reconsider entitlement in both the miner's claim and the widow's claim. *Simonetti*, BRB No. 95-1275 BLA, slip op. at 5. On remand, the administrative law judge³ found that claimant failed to establish that the miner was totally disabled by pneumoconiosis pursuant to 20 C.F.R. §§718.204(c)(4) and 718.204(b). With respect to the widow's claim, the administrative law judge found that claimant failed to establish that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. Claimant appeals, challenging the administrative law judge's findings at 20 C.F.R. §§718.204(c)(4), 718.204(b) and 718.205(c). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

¹ Claimant is the widow of Biagio Simonetti, who initially filed a claim on March 18, 1983. Director's Exhibit 1. The miner's claim was pending when he died on January 3, 1987. Claimant filed her survivor's claim on January 9, 1987. *Id.* The two claims were ultimately consolidated by the district director.

² The Board previously affirmed the finding of forty-three years of coal mine employment, and that claimant has established the existence of pneumoconiosis at §718.202(a)(4), and causal relationship pursuant to 20 C.F.R. §718.203(b). *Simonetti v. BCNR Mining Corp.*, BRB No. 92-0234 BLA (Aug. 22, 1994) (unpublished); *Simonetti v. BCNR Mining Corp.*, BRB No. 89-0641 BLA (Apr. 30, 1991) (unpublished).

³ The case was heard originally by Administrative Law Judge Charles P. Rippey. On remand, the case was reassigned to Administrative Law Judge David W. DiNardi.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law, they are binding upon this Board and must be affirmed. 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).

In appealing the denial of the survivor's claim, claimant argues that the administrative law judge failed to consider the miner's death certificate. Despite claimant's contention, the administrative law judge properly discussed the miner's death certificate listing pneumoconiosis as a contributing cause of death. The administrative law judge permissibly assigned the death certificate little probative weight, noting that the record is devoid of any evidence to indicate whether the doctor who signed the document had any familiarity with the miner's condition. Decision and Order at 22; see *Addison v. Director, OWCP*, 1-68 (1988). Claimant also argues that the administrative law judge improperly discredited the opinion of the autopsy prosector, Dr. Perper. The administrative law judge found that, contrary to the evidence, Dr. Perper believed that the record did not contain an exercise arterial blood gas test, and thus wrongly assumed that the miner's pneumoconiosis was severe enough to cause hypoxia during exercise and to contribute to his death. Claimant contends that Dr. Perper's report and deposition establish that Dr. Perper was aware of Dr. Kristofic's exercise blood gas testing but opined that the level of the exercise testing was insignificant. However, both Dr. Kristofic, who conducted the test, Director's Exhibit 13, and Dr. Wald, who reviewed the test, Director's Exhibit 23, characterized it as an exercise blood gas test, and both interpreted the results as normal. The administrative law judge, therefore, reasonably accorded little weight to Dr. Perper's opinion which included the statement that "there was no analysis of those [blood] gases under exertional condition," Claimant's Exhibit 2, and within his discretion, properly relied on the opinions of Drs. Naeye and Fisher, who reviewed the autopsy protocol and slides, that the miner's pneumoconiosis was too mild to have played a role in his death, because he found them better supported by the evidence of record. See *Lukosevicz v. Director, OWCP*, 888 F2d. 1001, 10 BLR 2-100 (3d Cir. 1989); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); 20 C.F.R. § 718.205(c). We thus affirm the denial of benefits in the survivor's claim.

In appealing the denial of the miner's claim, claimant correctly asserts that the administrative law judge failed to follow the Board's remand instructions to compare the exertional requirements of the miner's usual coal mine employment with the limitations listed in the medical reports of Drs. Bajwa and Kristofic pursuant to *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104

(1986) (*en banc*). The Director argues that the administrative law judge did not make this comparison because he determined that these functional assessments were not credible and, hence, the opinions were less persuasive than Dr. Wald's diagnosis of no pulmonary impairment. The administrative law judge implicitly found that the disability diagnoses of Drs. Kristofic and Bajwa were unreasoned because they were not supported by objective evidence, which he termed "more reliable than subjective complaints." Decision and Order at 19. We hold that the administrative law judge acted within his discretion as fact-finder in finding that the statements regarding claimant's physical limitations in the doctors' reports were merely a narrative of claimant's symptoms and, as such, were insufficient to establish a totally disabling respiratory impairment. See *Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Furthermore, the administrative law judge properly relied on the opinion of Dr. Wald,⁴ who diagnosed no disability, because he found it comprehensive, well-reasoned and well-documented. The administrative law judge noted that this was the most recent physical examination report in the record and was consistent with all of the objective evidence in the record, which was non-qualifying. Inasmuch as the administrative law judge has properly considered and weighed the contrary, probative evidence related to the miner's disability, we affirm the finding that total disability is not established at Section 718.204 (c) as rational and based on substantial evidence. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Shedlock v.*

⁴The administrative law judge noted that "Dr. Wald had specifically addressed and disputed the exercise tolerance test relied upon by Dr. Kristofic, provided a detailed explanation why this does not suggest lung impairment. Dr. Wald noted that arterial blood gas tests conducted both before and after the exercise tolerance test were completely consistent with normal respiratory function. He, therefore, attributed the miner's shortness of breath to cardiac function and physical deconditioning, on the basis of the exercise test." Decision and Order at 18.

Bethlehem Mines Corp., 9 BLR 1-195 (1986). We, therefore, affirm the denial of benefits in the miner's claim.⁵

Accordingly, the Decision and Order on Remand - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁵Inasmuch as claimant has failed to establish total disability at 20 C.F.R. §718.204(c), a requisite element of entitlement, we need not address claimant's arguments regarding causation at 20 C.F.R. §718.204(b). *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).