BRB No. 04-0542 BLA

INEZ M. PUGH (Survivor of ROBERT PUGH)	)	
Claimant-Respondent	)	
v.	)	
CARBOMIN CORPORATION	)	
and	)	DATE ISSUED: 03/29/2005
CONNECTICUT INDEMNITY COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-5150) of Administrative Law Judge Daniel F. Solomon rendered 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).[1] The administrative law judge found, and employer stipulated to, over 22 years of coal mine employment. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R §§718.202(a)(2), (a)(4), and 718.203(b), respectively, and also established death due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the autopsy and medical opinion evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (a)(4), and in finding the evidence sufficient to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[2] *See* 20 C.F.R.§§718.1, 718.202, 718.203, 718.205(c); *Neely*

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[1]Claimant filed the instant survivor's claim on October 15, 2001. Director's Exhibit 2. The miner's death certificate indicates that he died on September 11, 2001 due to acute cardiorespiratory arrest, due to acute respiratory failure, secondary to coal workers' pneumoconiosis and chronic obstructive lung disease. Director's Exhibit 7. Arteriosclerotic heart disease is listed under "Other significant conditions contributing to death but not resulting in the underlying causes given [above]." *Id.* On September 11, 2002, the district director issued a Proposed Decision and Order Award of Benefits. Director's Exhibit 33. Employer requested a hearing on October 10, 2002, and claim was referred to the Office of Administrative Law Judges on November 14, 2002. Director's Exhibits 42, 46. A hearing was held on September 10, 2003.

[2]The regulation at 20 C.F.R. §718.205(c) provides that death will be considered due to pneumoconiosis if any of the following criteria is met:

v. Director, OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Employer contends that the administrative law judge erred in his weighing of the autopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). The relevant evidence consists of the following: Dr. Segen, the autopsy prosector, diagnosed clinical acute myocardial infarction in a background of healed infarction of lateral wall, cardiomegaly (clinically congestive heart failure), pulmonary edema, diffuse coronary atherosclerosis, morbid obesity, and coal workers' pneumoconiosis. Director's Exhibit 11. Dr. Segen did not address the cause of the miner's death. *Id.*

Dr. Perper, a Board-certified pathologist, reviewed the pathological evidence and opined that the miner's coal workers' pneumoconiosis and associated centrilobular emphysema were contributing causes of death "both directly and indirectly through pulmonary insufficiency and through hypoxemia triggering or aggravating an arrhythmia, on the background of arteriosclerotic coronary heart disease." Claimant's Exhibit 1.

Drs. Naeye and Caffrey, Board-certified pathologists, each reviewed the pathological evidence and opined that the miner did not have pneumoconiosis and thus, pneumoconiosis did not contribute to the miner's death. Employer's Exhibits 3, 4, 5. Dr. Fino, Board-certified in internal medicine and pulmonary disease, reviewed the reports of Drs. Naeye, Caffrey, and Perper, and similarly opined that the miner did not have pneumoconiosis and thus, pneumoconiosis did not contribute to his death. Director's Exhibit 3.

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(1) Where competent medical evidence established that pneumoconiosis was the cause of the miner's death, or
(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
(3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

Employer specifically argues that the administrative law judge erroneously found the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) by relying on the fact that Dr. Segen, the autopsy prosector, as well as the consulting pathologists of record, found anthracotic pigmentation in the miner's lung tissue. Employer's Brief at 13-14. Employer further argues that the administrative law judge misleadingly implied that Dr. Segen linked his diagnosis of emphysema to the miner's coal mine employment. Employer asserts that Drs. Naeye and Caffrey "persuasively establish that this condition in Mr. Pugh was caused by his cigarette smoking history and not coal dust exposure" and that Dr. Perper's diagnoses of coal workers' pneumoconiosis and associated centrilobular emphysema are not credible. Employer's Brief at 15.

Employer's contentions lack merit. As an initial matter, it is within the discretion of the administrative law judge to determine the weight and the credibility of the medical evidence and the Board will not reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). To the extent employer seeks a reweighing of the medical evidence, its request is unavailing. In considering the weight of the relevant evidence at 20 C.F.R. §718.202(a)(2), the administrative law judge specifically noted that "[a] finding in an autopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis," Decision and Order at 11; *see* 20 C.F.R. §718.202(a)(2). The administrative law rationally relied on the diagnosis of coal workers' pneumoconiosis rendered by Dr. Segen because it was supported by the miner's twenty-two years of coal mine employment and "the quality and quantity of the yield of material obtained," and because Dr. Segen "alone had the opportunity to see the entire respiratory system as well as other body systems." Decision and Order at 11-12; *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

Moreover, the administrative law judge recognized that he could not properly rely on Dr. Segen's report based on his status as autopsy prosector, over the contrary reports of the reviewing physicians of record, namely Drs. Caffrey, Naeye, and Fino. Decision and Order at 12-13. The administrative law judge indicated, however, that in this case, Dr. Perper's opinion substantiated Dr. Segen's diagnosis of pneumoconiosis. *Id.* at 13. The administrative law judge specifically determined that Dr. Perper's opinion, which includes a diagnosis of coal workers' pneumoconiosis and associated centrilobular emphysema, *see* Claimant's Exhibit 1, was:

> based on a thorough review of the medical evidence of record, including the coal mine employment and smoking histories

> provided. I also find his reasoning consonant with the intention of the Act, for in support of his opinion regarding whether centrilobular emphysema was produced by coal mine dust exposure, Dr. Perper provided six and one-half single-spaced pages of medical citations standing for the proposition that centrilobular emphysema can be attributed to coal mine dust exposure, and some of the literature he submitted is the policy of the United States Department of Health and Human Services and the Department of Labor (CX 1). Emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. (citations omitted)

Decision and Order at 12. The administrative law judge thereby permissibly credited Dr. Perper's diagnosis of coal workers' pneumoconiosis with associated emphysema, and not any related diagnosis by Dr. Segen, as employer asserts. *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Richardson v. Director, OWCP*, 94 F.3d 164, 2 BLR 2-373 (4th Cir. 1996); *see* Decision and Order at 12, 13, 14. The administrative law judge properly found that, on the issue of the existence of pneumoconiosis, the opinions of Drs. Segen and Perper were "more logical" than the contrary opinions of Drs. Naeye and Caffrey, who found that the miner did not have pneumoconiosis or any disease related to his coal mine employment, and that the former opinions were entitled to more weight as they were better reasoned.[3] *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 12. Moreover, contrary to employer's contention, the fact that the administrative law judge discussed which physicians found black pigmentation in the miner's lung tissue, does not detract from his proper resolution of the

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[3]Employer correctly notes that the administrative law judge mischaracterized Dr. Caffrey's opinion by stating that Dr. Caffrey admitted that there was evidence of mild pneumoconiosis while denying its existence. Decision and Order at 12. Dr. Caffrey opined that the miner did not have coal workers' pneumoconiosis or any disease related to his coal mine employment, and that even if he did have pneumoconiosis, which Dr. Caffrey did not believe, it was mild in degree and did not cause pulmonary disability or cause, contribute to, or hasten death. Employer's Exhibit 5. The administrative law judge's error does not require remand as he provided valid reasons for finding Dr. Caffrey's opinion, that the miner did not have pneumoconiosis or any disease related to his coal mine employment, to be outweighed by the contrary opinions of Drs. Segen and Perper. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *see* discussion *supra*.

conflicting relevant evidence at 20 C.F.R. §718.202(a)(2). We affirm the administrative law judge's finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) as it is supported by substantial evidence and in accordance with law.

At 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge erroneously accorded greater weight to Dr. Forehand's opinion that the autopsy report proved that the miner had pneumoconiosis. *See* Director's Exhibit 30. Dr. Forehand, Board-certified in pediatrics and allergy and immunology, opined that the autopsy report constituted "[d]efinitive proof" that the miner had coal workers' pneumoconiosis. Director's Exhibit 30. Dr. Forehand opined:

> At the time of Mr. Pugh's death, he was a chronically ill man with multiple medical problems: i) high blood pressure from obesity, ii) smoker's bronchitis and coronary artery disease from cigarette smoking and iii) hypoxemia and cor pulmonale from [coal workers' pneumoconiosis]. Mr. Pugh's autopsy shows how he was effected [sic] by all three diseases. Specifically, the deposit of coal dust around pulmonary blood vessels (perivascular distraction) blocked the normal transfer of oxygen into the body heading to abnormal ABG studies and cor pulmonale (changes of intimal hyperplasia consistent with pulmonary hypertension). Through these pathophysiological mechanism, Mr. Pugh experienced a cardiopulmonary event, for which he did not have the residual cardiopulmonary function to recover.
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> Mr. Pugh's [coal workers' pneumoconiosis], a condition present on autopsy, eventually contributed to his premature death.

Director's Exhibit 30. Employer asserts that the administrative law judge should have discredited Dr. Forehand's opinion because he relied on an inaccurate smoking history. Employer also argues that the administrative law judge erred in determining that Dr. Forehand's opinion was bolstered by Dr. Segen's findings on autopsy. Employer asserts, "Again, the only possible basis for the opinion of Dr. Segen that the miner had pneumoconiosis was his finding of anthracotic pigmentation. Nowhere does Dr. Segen provide any support for Dr. Forehand's speculative conclusion that pneumoconiosis somehow impacted on the blood supply to the miner's heart, and Dr. Forehand never provides an alternative basis for this opinion." Employer's Brief at 16. Employer also asserts that the administrative law judge failed to make a definitive determination as to the credibility of the evidence at 20 C.F.R. §718.202(a)(4) and erred in principally relying on the autopsy evidence to find the existence of pneumoconiosis established at 20 C.F.R. §718.202(a).

Employer's contentions lack merit. The administrative law judge permissibly determined that Dr. Forehand's opinion, that the miner had pneumoconiosis, was entitled to more weight because it was well reasoned and documented. Specifically, the administrative law judge found that Dr. Forehand examined the miner yearly from 1996 through 1998 and again in 2001, "making him more personally familiar with Mr. Pugh's condition…," and that Dr. Forehand considered "an extensive smoking history and an accurate coal mine employment history," Decision and Order at 15. *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *see* 20 C.F.R. §718.104. In this regard, we note that Dr. Forehand made several medical findings in consideration of the miner's cigarette smoking habit and diagnosed, *inter alia*, smoker's bronchitis and coronary artery disease from cigarette smoking, *see* Director's Exhibit 30. Given the totality of Dr. Forehand's opinion, we reject employer's assertion of error in the administrative law judge's finding that Dr. Forehand considered "an extensive smoking history," Decision and Order at 17. Based on the foregoing, we affirm the administrative law judge's findings that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Further, contrary to employer's argument, the administrative law judge properly found that while Dr. Forehand's opinion was not supported by the overall negative weight of the x-ray evidence or by the negative CT scan dated March 21, 2001, it was bolstered by the autopsy findings of Dr. Segen, who diagnosed, *inter alia*, coal workers' pneumoconiosis. 20 C.F.R. §718.202(a); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Accordingly, we affirm the administrative law judge's finding that claimant met her burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Id.*

Employer next challenges the administrative law judge's finding that claimant established death due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer argues that the administrative law judge erred in according greater weight to the medical opinions of the pathologists of record over that of Dr. Fino. Employer also asserts that the administrative law judge erred in determining that Dr. Forehand's opinion supports that of Dr. Perper, and "speculated" when he found that Dr. Forehand explained the role that the miner's coal workers' pneumoconiosis played in his death. Lastly, employer argues that although the administrative law judge accorded less weight to the opinions of Drs. Naeye, Caffrey and Fino because they found that the miner did not have coal workers' pneumoconiosis or any disease related to the miner's coal mine employment, he ignored the fact that these reasoned opinions discuss the impact of the miner's exposure to coal mine dust.

Employer's contentions lack merit. The administrative law judge rationally found that of the opinions by Drs. Fino, Perper, Caffrey, and Naeye, those by Drs. Perper, Caffrey, and Naeye were more persuasive on the issue of the cause of death, given their credentials as Board-certified pathologists. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987). Thereafter, the administrative law judge, citing *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), permissibly accorded less weight to the opinion of Dr. Fino, and to the opinions of Drs. Naeye and Caffrey despite their qualifications as pathologists, as they found that the miner did not have pneumoconiosis, which was contrary to the administrative law judge's finding. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Further, substantial evidence in the record supports the administrative law judge's finding that Dr. Forehand's opinion regarding the role that coal workers' pneumoconiosis played in the miner's death, supports Dr. Perper's opinion that coal workers' pneumoconiosis and associated centrilobular emphysema were contributing causes of the miner's death. Director's Exhibit 30; Claimant's Exhibit 1. In this regard, we hold that, contrary to employer's assertion, the administrative law judge properly found that Dr. Perper's opinion was reasoned and documented, as he found that it was based on a careful review of the evidence of record, included citations to medical studies, and included "cogent reasoning," Decision and Order at 17. *Compton*, 211 F.3d at 213, 22 BLR at 2-175-76.

Based on the foregoing, we affirm the administrative law judge's finding that claimant established death due to pneumoconiosis pursuant to 20 C.F.R.§718.205(c) as it is supported by substantial evidence and is in accordance with law. We thus affirm the administrative law judge's award of benefits in this survivor's claim.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge