

BRB No. 04-0755 BLA

NAOMI SHORT)	
(Widow of SAM SHORT, JR.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ARCH OF WEST VIRGINIA/APOGEE)	DATE ISSUED: 05/16/2005
COAL COMPANY)	
)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Benefits (2001-BLA-0579) of Administrative Law Judge Richard A. Morgan 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). This survivor’s claim is before the Board for the second time.¹ When the survivor’s claim was previously before the Board, pursuant to an

¹ The record indicates that the miner filed an application for benefits on January 15, 1991, which were awarded by Administrative Law Judge Frederick D. Neusner on January 6,

appeal by employer, the Board reversed the administrative law judge's finding that employer was collaterally estopped from relitigating the issue of the existence of pneumoconiosis in the survivor's claim and the Board vacated the administrative law judge's finding that the existence of pneumoconiosis was established. Accordingly, the Board remanded the case, instructing the administrative law judge to determine whether claimant established the existence of pneumoconiosis arising out of coal mine employment. Further because the Board vacated the administrative law judge's finding of the existence of pneumoconiosis it also vacated his finding that death due to pneumoconiosis was established and remanded the case for reconsideration of that issue. *Short v. Arch of West Va./Apogee Coal Co.*, BRB No. 02-0857 BLA (Sep. 16, 2003)(unpub.). On remand, the administrative law judge found, weighing the evidence as a whole, that the evidence established that the miner suffered from the presence of coal workers' pneumoconiosis based on biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2), and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), and that claimant was entitled to the rebuttable presumption at 20 C.F.R. §718.203(b), that pneumoconiosis arose out of coal mine employment, based on the miner's over ten years of coal mine employment.² The administrative law judge also found, however, that the evidence failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the evidence in finding that the miner's death was not due to pneumoconiosis at Section 718.205(c). Employer responds, urging affirmance of the administrative law judge's decision denying benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith*,

1993. Director's Exhibit 23. On appeal, the Board affirmed the award of benefits on the miner's claim. *Short v. Arch of W. Va., Inc.*, BRB No. 93-1013 BLA (Aug. 18, 1994) (unpub.). The miner died on February 22, 2000, Claimant's Exhibit 9. Claimant filed for survivor's benefits on March 24, 2000. Director's Exhibit 1.

² The administrative law judge's findings that the evidence established the existence of coal workers' pneumoconiosis and that the pneumoconiosis arose out of coal mine employment are affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. Death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or where the presumption set forth at Section 718.304, relating to complicated pneumoconiosis, is applicable. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause of a miner's death" if it hastened the miner's death. 20 C.F.R. §718.205(c)(2). *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).³

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 is supported by substantial evidence and contains no reversible error. Pursuant to Section 718.205(c), claimant contends that the administrative law judge erred by failing to accord determinative weight to the medical reports of Drs. Zaldivar and Gaziano, the miner's treating physicians. The administrative law judge accorded little weight to these opinions, that pneumoconiosis contributed to the miner's death from respiratory failure, Director's Exhibits 9, 15, 17; Decision and Order at 13, despite the doctors' status as treating physicians, because they provided only a " cursory" and "superficial" analysis regarding the cause of the miner's death and were not, therefore, well-reasoned. Decision and Order at 13.

As the administrative law judge is not required to credit the opinion of a treating physician, 20 C.F.R. §718.104(d)(5); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Trumbo*, 17 BLR 1-85, and it is within the administrative law judge's discretion to determine whether a medical report is adequately reasoned and persuasive, we find no error in the administrative law judge's consideration of the opinions of Drs. Gaziano and Zaldivar. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Billips v. Bishop Coal Co.*, 76 F.3d 371, 20 BLR 2-130 (4th Cir. 1996); *Trumbo*, 17 BLR 1-85; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

³ Since the miner's last coal mine employment took place in the State of West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

In contrast, the administrative law judge permissibly credited the opinions of Drs. Naeye, Oesterling, Bush, Caffrey, Castle, Repsher and Spagnolo, that the miner's death was not due to, or hastened by pneumoconiosis, as the administrative law judge found that these opinions by doctors, who were either Board-certified pathologists or Board-certified pulmonologists, were better documented and reasoned and more persuasive than the opinions of Drs. Zaldivar and Gaziano. Employer's Exhibits 5, 6, 8, 10-13; Decision and Order at 13; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, the administrative law judge permissibly concluded that the administrative law judge did not err in crediting the above physicians on the cause of death because they either diagnosed the existence of pneumoconiosis, as found by the administrative law judge, or stated that, even if claimant had simple pneumoconiosis, it did not play a role in the miner's death. Employer's Exhibits 5, 6, 8, 10, 12, 13; Decision and Order at 8, 10. Thus, contrary to claimant's contention, these physicians' opinions were not based on the inaccurate premise that the miner did not have pneumoconiosis. See *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); see also *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001) (*en banc*).

Because it is within the discretion of the administrative law judge, as the trier of fact, to determine whether a medical report is adequately documented and reasoned and the administrative law judge has properly exercised that discretion in this case, we affirm the administrative law judge's finding that the medical reports of record do not support a finding of death due to pneumoconiosis under Section 718.205(c), or entitlement to benefits. See *Kirk v. Director, OWCP*, 86 F.3d 1151, 20 BLR 2-276 (4th Cir. 1996); *Shuff*, 967 F.2d 977, 16 BLR 2-90. Moreover, we note that even if the administrative law judge's consideration of the latter opinions contained error, it would be harmless, and could not result in an award of benefits, because the administrative law judge properly accorded little weight to the opinions of Drs. Zaldivar and Gaziano, the only opinions which supported a finding of death due pneumoconiosis. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge