

BRB No. 06-0853 BLA

PRICIE YOUNG	)	
(Widow of DONALD YOUNG)	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
PHELPS COAL & LAND COMPANY,	)	
INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL	)	DATE ISSUED: 07/26/2007
INSURANCE	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center), Prestonburg, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIUM:

Employer appeals the Decision and Order – Award of Benefits (04-BLA-5797) of Administrative Law Judge Thomas F. Phalen, Jr., 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). Claimant filed her survivor’s claim

on May 13, 2002.<sup>1</sup> Director's Exhibit 4. The administrative law judge accepted the parties' stipulation that the miner worked sixteen years in coal mine employment prior to his death.<sup>2</sup> The administrative law judge determined that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge also found that the weight of the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis under Section 718.205(c).<sup>3</sup> Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal unless specifically requested to do so.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

In order to establish her entitlement to survivor's benefits pursuant to Section 718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after

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<sup>1</sup> Claimant is the widow of the miner, who died on October 22, 2001. Director's Exhibit 16.

<sup>2</sup> The administrative law judge properly found that this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 202 (1989) (*en banc*); Decision and Order – Award of Benefits at 7; Director's Exhibit 3.

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Claimant contends that the administrative law judge erred in crediting him with only sixteen years of coal mine employment, but maintains that the error may be deemed harmless if the Board affirms the award of benefits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

After reviewing the administrative law judge's Decision and Order – Award of Benefits, the evidence of record, and the briefs of the parties, we affirm as supported by substantial evidence, the administrative law judge's finding at 20 C.F.R. §718.205(c). We specifically reject employer's assertion that the administrative law judge erred in finding that the evidence was sufficient to establish that the miner's death was hastened by pneumoconiosis.

After deciding to credit the autopsy findings of coal workers' pneumoconiosis, the administrative law judge reviewed the medical evidence to determine whether the disease hastened the miner's death.<sup>4</sup> The administrative law judge noted that hospital records documented the miner's treatment for lung cancer but that those records did not address the cause of the miner's death. Decision and Order at 12. Similarly, the miner's death certificate<sup>5</sup> listed the immediate cause of the miner's death as "carcinoma of the lungs with metastasis," but did not mention the existence of pneumoconiosis; therefore, the administrative law judge properly found that the death certificate was of no probative value to the analysis at 20 C.F. R. §718.205(c). Decision and Order – Award of Benefits at 12; Director's Exhibit 16. Furthermore, the autopsy prosector, Dr. Dennis opined that the miner "died a pulmonary death" with moderate degrees of cor pulmonale and black anthracosilicosis present on autopsy. Director's Exhibit 17. Because Dr. Dennis did not specifically discuss the relationship of the miner's death to pneumoconiosis, the administrative law judge placed no weight on Dr. Dennis's opinion in determining the cause of death. Decision and Order – Award of Benefits at 13.

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<sup>4</sup> Dr. Dennis performed the autopsy on October 23, 2001. Director's Exhibit 17. The macroscopic examination of the lungs revealed black coal dust deposition with macule formation greater than one centimeter in diameter with mild fibrosis. Dr. Dennis indicated that the miner "died a pulmonary death," with "moderate to severe" cor pulmonale present. *Id.* Dr. Dennis noted pathological findings consistent with lung cancer, moderate degrees of cor pulmonale, pulmonary congestion and edema, black pigment deposition, mild or simple pneumoconiosis, black anthracosilicosis with macules greater than one centimeter, fibrosis, and emphysematous changes. *Id.* Dr. Dennis opined that the cor pulmonale was presumably secondary to the lung cancer. *Id.*

<sup>5</sup> The death certificate erroneously indicated that no autopsy was performed. Director's Exhibit 16.

In contrast, the administrative law judge determined that the opinions of Drs. Green and Caffrey were probative as to whether pneumoconiosis hastened the miner's death, each physician reaching a contrary conclusion. *Id.* As noted by the administrative law judge, Dr. Green reviewed the autopsy slides and found "several pathologic changes," including lung cancer, mild to moderate pneumoconiosis, moderate emphysema, early bronchopneumonia, and small airways disease exhibiting characteristics associated with smoking and also exhibiting characteristics associated with mineral dust exposure. Decision and Order – Award of Benefits at 3; Director's Exhibit 17A; Claimant's Exhibit 1. Dr. Green attributed the miner's lung cancer to cigarette smoking, but ascribed fifty percent of the miner's emphysema to his coal mine employment and fifty percent to smoking.<sup>6</sup> Director's Exhibit 17A. Dr. Green opined that the underlying cause of death was lung cancer, but the immediate cause of death was respiratory failure. *Id.* Dr. Green explained that the miner respiratory failure resulted from four conditions: pneumoconiosis, emphysema, metastatic spread of the lung cancer, and pneumonia, which combined to hasten the miner's death. Director's Exhibit 17A; Claimant's Exhibit 1.<sup>7</sup>

In contrast, Dr. Caffrey reviewed the miner's autopsy slides and opined that the miner died from lung cancer due to cigarette smoking, and that coal mine employment did not cause, contribute to, or hasten the miner's death. Director's Exhibits 20, 22; Employer's Exhibit 1. Dr. Caffrey's microscopic examination revealed lung cancer with metastasis to the lymph nodes, minimal pneumonia, moderate centrilobular and panlobular emphysema, and one slide containing two lesions of simple pneumoconiosis that he described as representing not more than five percent of the total lung tissue. Director's Exhibit 20. Dr. Caffrey explained that the miner's simple pneumoconiosis was very minimal, as he found only two pneumoconiosis lesions upon examining the autopsy slides. *Id.* Because he felt that the miner was a fairly heavy smoker, and the evidence for pneumoconiosis was minimal, Dr. Caffrey opined that it was more likely that the miner's

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<sup>6</sup> Although the administrative law judge found that the miner had a 28 and 1/2 year smoking history, Dr. Green assumed the miner began smoking at age 16 and estimated the miner's smoking history at 30 years. Director's Exhibit 17a.

<sup>7</sup> The record contains the medical opinion of Dr. Ali, who treated the miner for his lung cancer between February and October 2001. Director's Exhibit 17a. Dr. Ali reviewed the autopsy findings and opined that the miner's death was hastened by pneumoconiosis because the miner "could have survived a little longer if the lungs were in better condition." *Id.* In assessing the probative value of Dr. Ali's diagnosis, the administrative law judge noted that Dr. Ali demonstrated some familiarity with the miner's respiratory condition, beyond just a review of the records, and considered his opinion to be logical and supportive of Dr. Green's opinion. Decision and Order – Award of Benefits at 13.

emphysema was attributable to smoking than coal dust exposure. Director's Exhibit 22; Employer's Exhibit 1. Citing the paucity of lesions, Dr. Caffrey indicated that pneumoconiosis would not have caused any disability in an individual with no other medical problems and would not contribute to death. *Id.* Dr. Caffrey instead attributed the miner's respiratory problems to advanced lung cancer, noting that the miner's symptoms began in the summer of 2001 and he died only a few months later. *Id.* Although he agreed with Dr. Green's opinion that the miner had pneumoconiosis, airway disease, and emphysema attributable to coal dust exposure, Dr. Caffrey concluded that the miner's minimal pneumoconiosis and emphysema did not cause, contribute to, or hasten the miner's death. *Id.* Instead, Dr. Caffrey opined that the miner's death was due to lung cancer, unrelated to coal dust exposure. *Id.*

In weighing the conflicting medical opinions, the administrative law judge gave controlling weight to Dr. Green's opinion that pneumoconiosis hastened the miner's death. Employer challenges the administrative law judge's reliance on Dr. Green's opinion, asserting that Dr. Green's opinion is conclusory and fails to explain the basis for his conclusion that the miner's death was hastened by pneumoconiosis.

Contrary to employer's argument, the administrative law judge properly explained why he found Dr. Green's opinion more persuasive, noting that Dr. Green had thoroughly reviewed the medical evidence, and that his findings were better supported not only by the autopsy evidence but also [claimant's] employment history, smoking history, and medical history." Decision and Order – Award of Benefits at 13; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). The administrative law judge further noted that, since both Dr. Green and Dr. Caffrey agreed that coal mine dust exposure caused, to some extent, the miner's emphysema, he found it more logical to accept Dr. Green's opinion regarding the role of coal dust exposure in the miner's death.<sup>8</sup> *Id.* In this regard, the administrative law judge permissibly credited Dr. Green's reasoning that the miner's moderate emphysema, mild to moderate pneumoconiosis,

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<sup>8</sup> Employer asserts that the administrative law judge erred in crediting Dr. Ali's opinion that the miner "could have lived a little longer if his lungs were in better condition," because this is only a statement of possibility, and could mean an hour or any minimal extent. Contrary to employer's assertion, the administrative law judge reasonably accorded the most weight to the conflicting opinions of Drs. Caffrey and Green, and ultimately determined that Dr. Green's opinion was the most persuasive. *Clark*, 12 BLR at 1-155; *Tackett*, 12 BLR at 14; Decision and Order at 13. The administrative law judge only concluded that Dr. Ali's opinion was supportive of Dr. Green's conclusions. Because we affirm the administrative law judge's award of benefits based on his reliance on Dr. Green's opinion, any error committed by the administrative law judge with respect to Dr. Ali's opinion is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

pneumonia, and lung cancer, were not trivial conditions, and that each contributed to the miner's death from respiratory failure.<sup>9</sup> See *Eastover Mining Co., v. Williams*, 338 F. 3d 501, 22 BLR 2-625 (6th Cir. 2003); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 117 (6th Cir. 1995); *Clark*, 12 BLR at 149; Decision and Order – Award of Benefits at 13; Claimant's Exhibit 1.

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), and to assess the evidence of record and draw his own conclusions and inferences therefrom, see *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when his findings are rational and supported by substantial evidence, see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because substantial evidence supports the administrative law judge's finding that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we affirm his award of survivor benefits.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

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<sup>9</sup> Dr. Caffrey cited to Dr. Green's own textbook, *Pathology of Occupational Lung Disease*, 2nd Ed., Chapter 6, p. 139, for the proposition that a miner's life expectancy is approximately the same as that of the general population, and that only four percent of coal miners' deaths are due to pneumoconiosis. The administrative law judge properly found that "Dr. Caffrey's reliance on Dr. Green's text may provide support for the general proposition that only [four] percent of coal miners' deaths are attributable to pneumoconiosis but it fails to address the specific evidence in this matter." See *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); Decision and Order – Award of Benefits at 14. Moreover, as noted by the administrative law judge, Dr. Green countered Dr. Caffrey's reliance on this text, noting that the percentage did not take into account the issue of whether a miner's death was contributed to, or hastened by, pneumoconiosis. Decision and Order – Award of Benefits at 7-8.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge