

BRB No. 99-0694 BLA

SANDRA L. BUREK)	
(Widow of RAYMOND BUREK))	
)	
Claimant-Petitioner))
)	
v.)	
)	
VALLEY CAMP COAL COMPANY)	
)	DATE ISSUED:
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 - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy, Myers, Cogan, Voegelin & Tennant), Wheeling, West Virginia, for claimant.

Ronald B. Johnson (McDermott & Bonenberger), Wheeling, West Virginia, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits (98-BLA-0975) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge credited the miner with 9.75 years of coal mine employment and noted that because the parties stipulated that the miner suffered from pneumoconiosis arising out of coal mine employment, the sole issue for resolution is whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). After consideration of the medical evidence of record, the administrative law judge found the evidence insufficient to establish entitlement to survivor's benefits. Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's weighing of the evidence at Section 718.205(c)(2). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director) has indicated 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*,

¹Claimant is Sandra Burek, the surviving spouse of the miner, Raymond Burek, who died on April 21, 1997. Director's Exhibit 5. The miner filed a claim on January 17, 1995 and had been awarded benefits on July 23, 1996. Director's Exhibit 23.

113 S.Ct. 969 (1993); *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). The United States Court of Appeals for the Fourth Circuit, under whose jurisdiction this case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). See *Shuff, supra*.

The administrative law judge considered the evidence addressing the cause of the miner's death: the death certificate,² hospital records from November 20, 1996 to April 2, 1997, medical reports from Drs. Lenkey, Gaziano, Garson, and Altmeyer, and the deposition of Dr. Altmeyer. The administrative law judge found that Dr. Garson did not directly address whether pneumoconiosis contributed to the miner's death, and thus, the opinion was not relevant. Decision and Order at 6. The administrative law judge next found that Dr. Lenkey, the miner's treating physician, failed to clearly state that pneumoconiosis substantially contributed or hastened death, and that the physician's opinion was not supported by any specific documentation. Decision and Order at 6 - 7. The administrative law judge then found that Dr. Gaziano's opinion was not probative because the physician failed to offer any specific reason for his conclusion that pneumoconiosis was a significantly contributing factor in the miner's death. Decision and Order at 7. The administrative law judge accorded considerable weight to Dr. Altmeyer's opinion, even though the physician did not believe that the miner had pneumoconiosis, because the physician stated that even if the miner had suffered from pneumoconiosis, it could not have substantially contributed to death, and his opinion was supported by his 1994 examination of the miner and pertinent medical records. Finding that Dr. Altmeyer's opinion was well reasoned, and that he possessed excellent credentials, the administrative law judge found that the preponderance of the evidence failed to establish that the miner's death was caused, contributed to or hastened by pneumoconiosis. Decision and Order at 7.

²The death certificate was prepared by Dr. Lenkey and listed pulmonary arrest as the cause of death. Director's Exhibit 5.

Claimant contends that the administrative law judge erred in rejecting Dr. Lenkey's opinion.³ Claimant argues that Dr. Altmeyer's failure to dispute Dr. Lenkey's opinion creates an inference that the latter physician's well-reasoned opinion is indisputable, that Dr. Lenkey was the miner's treating physician and saw the miner more recently than Dr. Altmeyer, and that the administrative law judge did not properly consider the physician's credentials.

Initially, we disagree with claimant's contention that the administrative law judge erred in rejecting Dr. Lenkey's opinion. Although the administrative law judge noted Dr. Lenkey's status as the miner's treating physician, Decision and Order at 5, he was not required to defer to Dr. Lenkey's opinion because he was the miner's treating physician. *Grizzle v. Pickands Mather and Co./Chisolm Mines*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Moreover, we reject claimant's contention that the opinion should have been accorded greater weight because Dr. Lenkey saw the miner more recently than Dr. Altmeyer. The issue of recency is pertinent where the underlying issues concern the existence of pneumoconiosis or of disability, neither of which is at question in the instant case, and the United States Court of Appeals for the Fourth Circuit has held that recency in and of itself is not a sufficient reason to credit one medical opinion over another. See *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Furthermore, claimant's contention that the administrative law judge understated Dr. Lenkey's credentials in that he did not acknowledge that Dr. Lenkey is a diplomate of the American Board of Pulmonary Medicine as well as a diplomate in internal medicine is without merit. The administrative law judge found that Dr. Lenkey is board-certified in internal medicine, and that Dr. Altmeyer is board-certified in pulmonary and internal medicine. Decision and Order at 5 - 6. His findings regarding the weight to be accorded to these opinions was not based on the relative credentials of the physicians. The administrative law judge merely stated in his concluding paragraphs that he had noted Dr. Altmeyer's "excellent credentials", and then went on to state his reasons for according determinative weight to the

³On January 6, 1998, Dr. Lenkey wrote a one page opinion regarding the cause of the miner's death. Dr. Lenkey stated: "It is my opinion that Mr. Burek's lung disease was, in part, due to his having worked in the coal mines underground for many years. Based on his pulmonary physiologic impairment, which was 100%, approximately 50% of that is and should be attributable to his occupational related lung disease because of his long-term exposure to coal dust during a time period when many safety precautions were not taken underground. It is my best informed and educated opinion that Mr. Burek's death, in part, was attributable to his previous lung disease, much of which was acquired during his many years working underground." Director's Exhibit 14; Claimant's Exhibit 3.

physician's opinion. We also disagree with claimant that Dr. Altmeyer's failure to dispute Dr. Lenkey's 1998 report creates the inference that employer finds Dr. Lenkey's report indisputable. Claimant bears the burden of affirmatively proving her case and no presumption is created in claimant's favor merely by presenting evidence which is not directly refuted by employer's evidence. See *Director, OWCP v. Greenwich Collieries* [Ondecko], 114 S.Ct. 2251, 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).

Further, we reject claimant's contention that the administrative law judge should have determined that Dr. Lenkey offered a well-reasoned and documented opinion. The administrative law judge found that Dr. Lenkey, although opining that pneumoconiosis was a factor in the miner's death, failed to comment on the degree to which it played a part in the miner's death. The administrative law judge thus rationally found that Dr. Lenkey's statement, that the miner's death was "in part" attributable to his previous lung disease, failed to clearly state to what extent pneumoconiosis factored in the miner's death to permit a finding that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2). See *Shuff, supra*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, the administrative law judge permissibly found that Dr. Lenkey failed to offer a basis for his conclusion, and thus, did not provide a well-reasoned and documented opinion. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Such a determination is within the discretion of the administrative law judge and will not be disrupted by the Board if it is a rational determination. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Claimant also contends that the administrative law judge erred in finding that Dr. Gaziano's opinion was not "especially probative". Dr. Gaziano checked "yes" to the question of whether pneumoconiosis was a significantly contributing factor in the miner's death. The physician further stated the miner had had coal workers' pneumoconiosis, that the hospital records showed respiratory failure, and that according to Dr. Lenkey and the death certificate, the miner had died of lung diseases. Claimant's Exhibit 4. The only argument made by claimant in this regard is that Dr. Gaziano's opinion confirms Dr. Lenkey's opinion. The administrative law judge, however, rationally found that Dr. Gaziano based his conclusion primarily on Dr. Lenkey's report and offered no specific reasoning for his conclusion and therefore acted within his discretion in determining that Dr. Gaziano's opinion was unreasoned and undocumented. See *Clark, supra*; *Fields, supra*; Decision and Order at 7.

Claimant next contends that the administrative law judge erred in finding that Dr. Garson's report was not relevant and in failing to consider the opinions of Drs. Del Vecchio and Kovalick. These contentions lack merit. Dr. Del Vecchio saw the miner in September 1986, and Dr. Kovalick saw the miner a month prior to his death, during his March 1997 hospital admission. Director's Exhibits 9, 19. As neither of these physicians submitted an opinion on the cause of the miner's death, their previous opinions are not probative on the issue that was before the administrative law judge. Thus, the administrative law judge committed no error in not considering these opinions. Similarly, Dr. Garson's September 8, 1998 opinion only rebuts Dr. Altmeyer's opinion that the miner did not suffer from pneumoconiosis; Dr. Garson explains why the x-rays of record support a finding of pneumoconiosis and states that the miner suffered from a chronic obstructive pulmonary disease due to cigarette smoking and simple coal worker's pneumoconiosis, but does not offer his opinion of the cause of the miner's death. Claimant's Exhibit 2. Inasmuch as none of these opinions is pertinent to the inquiry at Section 718.205(c)(2), particularly in light of employer's concession that pneumoconiosis is established, we hold that no error was committed by the administrative law judge.

Claimant next contends that the presumption contained at 20 C.F.R. §718.303 should have been applied to the instant case. This contention is without merit. The presumption is inapplicable in any claim filed after January 1, 1982, and as this claim was filed on June 3, 1997, the presumption does not apply. See 20 C.F.R. §718.303(c).

Lastly, claimant raises several allegations of error regarding the administrative law judge's decision to credit Dr. Altmeyer's opinion.⁴ Claimant contends that the administrative law judge should not have accorded weight to Dr. Altmeyer's opinion because the physician was biased, did not believe that the miner suffered from pneumoconiosis, misunderstood the record, and offered an opinion which is hostile to the Act. These contentions are without merit. Dr. Altmeyer clearly articulated his reasons for determining that the miner had not suffered from pneumoconiosis but rather, chronic obstructive pulmonary disease due to the miner's lengthy smoking history. The administrative law judge permissibly found the opinion to be well documented as it was based on Dr. Altmeyer's 1994 examination of the miner and

⁴On February 25, 1998, Dr. Altmeyer opined that the miner suffered from severe chronic obstructive pulmonary disease due to cigarette smoking, as evidenced by pulmonary function studies showing reversibility after bronchodilator and a reduced diffusing capacity. Dr. Altmeyer stated his belief that the miner had not had pneumoconiosis but that even assuming that he had, it could not have substantially contributed to death. Director's Exhibit 11.

other pertinent medical records. Claimant has failed to demonstrate that Dr. Altmeyer's opinion on the cause of death in this case is based upon anything other than the physician's analysis of the medical evidence and his examination of the miner, and not on any general assumptions regarding simple pneumoconiosis and its potential role in death. See *generally Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); Director's Exhibit 14; Employer's Exhibit 1. We also reject claimant's assertion that because Dr. Altmeyer receives compensation for examining miners on behalf of employers, his opinion somehow lacks credibility and is biased. As the administrative law judge did not find that claimant persuasively established that Dr. Altmeyer is biased, we hold that the administrative law judge properly considered Dr. Altmeyer's opinion along with the other pertinent evidence of record. See *generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). We further note that claimant's lengthy arguments regarding Dr. Altmeyer's alleged erroneous determination that the miner had not suffered from pneumoconiosis are without merit. See *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Inasmuch as the administrative law judge's findings are supported by substantial evidence and are rational, we affirm his conclusion that the preponderance of the evidence failed to establish that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c)(2). See *Shuff, supra*; *Neeley, supra*.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge