BRB No. 13-0134 BLA

LINDA GAY VARNEY (Widow of CHARLES DANNY VARNEY) Claimant-Respondent v. LINDA COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/20/2013 DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order - Awarding Benefits (2011-BLA-5434) of Administrative Law Judge Alan L. Bergstrom rendered on a survivor's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with fourteen years, seven months, and twenty-three days of coal mine employment; determined that claimant was precluded from invoking the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4); and found that employer is the properly designated responsible operator herein. The administrative law judge further found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 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 its designation as the responsible operator in this case, and contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish that pneumoconiosis hastened the miner's death at Section 718.205(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's determination that employer is the properly named responsible operator. The Director takes no position on the merits of entitlement. Employer has filed a reply brief in support of its position.[2]

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

[1] Claimant, Linda Gay Varney, is the widow of the miner, who died on March 3, 2009. Director's Exhibit 10. Claimant filed a survivor's claim for benefits on June 12, 2009. Director's Exhibit 2.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the length of the miner's coal mine employment; his finding that claimant is not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended 30 U.S.C. §921(c)(4); and his finding that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

may not be disturbed.[3] 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, 363 (1965).

Employer initially argues that the administrative law judge failed to provide sufficient analysis of the responsible operator issue pursuant to 20 C.F.R. §725.495. Employer avers that the district director failed to fully investigate the relationships between D & L Coal Company (D & L Coal), Linda Coal Company (Linda Coal), and Tonya Lynn Coal Company (Tonya Lynn Coal), and that the administrative law judge failed to properly consider and weigh all relevant evidence on the issue. Employer asserts that, in crediting claimant's testimony that the miner worked at Tonya Lynn Coal for only six months following his employment with Linda Coal, the administrative law judge failed to explain why he did not rely on claimant's original testimony that the miner's employment at Tonya Lynn Coal exceeded one year. Employer posits that claimant was improperly "induced … to change her testimony" after she received an ex parte communication from the Department of Labor (DOL). Employer's Brief at 19. Further, employer contends that the administrative law judge erred in finding that employer, Linda Coal, was the successor to D & L Coal, since claimant's testimony regarding whether the two companies worked the same mine was contradictory. Employer also maintains that the district director failed to fully investigate whether Tonya Lynn Coal was a successor to Linda Coal and, thus, the "multiple failures to investigate [the miner's] employment relationship with these three companies preclude naming Linda Coal as the responsible operator here." Employer's Brief at 21. The Director disagrees, contending that the administrative law judge's responsible operator determination must be affirmed. The Director avers that employer's suggestion, that claimant was improperly "induced" by DOL to change her testimony, lacks merit; rather, the Director maintains that claimant changed her testimony after she located and reviewed additional documents relevant to the duration of the miner's employment with Tonya Lynn Coal. Additionally, the Director asserts that the administrative law judge permissibly found that employer was the successor operator of D & L Coal, as he relied upon claimant's explanation, supported by the miner's written statement, "that the companies worked the same mine but changed the name because of reclamation rules." Director's Brief at 2. Hence, the Director asserts that, because employer has proffered no evidence to support its contention that its designation as the responsible operator is erroneous, employer has failed to satisfy its burden of proof under Section 725.495(c)(2). We agree with the Director's position.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

In order to be designated as the responsible operator, an employer must be the potentially liable operator that most recently employed the miner. 20 C.F.R. §§725.493(a), (b), 725.495(a)(1). If more than one potentially liable operator may be deemed to have employed the miner most recently, then the liability for any benefits payable as a result of such employment shall be assigned as follows: (1) to the potentially liable operator that directed, controlled, or supervised the miner; (2) to a successor operator; and (3) to any other potentially liable operator deemed to have been the miner's most recent employer pursuant to Section 725.493. 20 C.F.R. §725.495(a)(2)(i)-(iii). If the operator that most recently employed the miner may not be considered a potentially liable operator in accordance with 20 C.F.R. §725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. 20 C.F.R. §725.495(a)(3). Further, the responsible operator must have employed the miner for a cumulative period of not less than one year, which is defined as "one calendar year … or, partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days'." 20 C.F.R. §§725.101(a)(32); 725.494(c). The dates and length of coal mine employment may be established by any credible evidence including, but not limited to, company records, earnings statements, co-worker affidavits, and sworn testimony. 20 C.F.R. §725.101(a)(32)(ii); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

Contrary to employer's argument, the administrative law judge's determination that employer is the responsible operator in this case is rational and supported by substantial evidence.[4] After reviewing the relevant evidence of record, the administrative law judge determined that the miner owned and operated D & L Coal, Linda Coal, and Tonya Lynn Coal, working as a foreman and miner, but that claimant's "representations are not sufficiently clear and consistent to establish the Miner's dates of employment with any precision." Decision and Order at 23. However, based on the Social Security Administration (SSA) records, 1040 Schedule C tax forms, the miner's description of his work experience, and insurance documentation from Old Republic Insurance Company, the administrative law judge determined that the miner worked for D & L Coal in 1978

[4] The administrative law judge found that employer satisfied the five requisite criteria to be considered a potentially liable operator in this case, *i.e.*: (1) that the miner's death arose at least in part out of coal mine employment in a mine operated by employer pursuant to 20 C.F.R. §725.494(a); (2) that employer was in operation after June 30, 1973 pursuant to 20 C.F.R. §725.494(b); (3) that employer is a successor operator to D & L Coal Company, as defined in 20 C.F.R. §725.492; (4) that the miner worked for employer for at least one day after December 31, 1969 pursuant to 20 C.F.R. §725.494(d); and (5) that employer possesses sufficient assets to secure payment of benefits, based on its insurance coverage with Old Republic Insurance Company, as set forth in 20 C.F.R. §725.494(e). Decision and Order at 26.

and 1979, as well as for six months in 1977 and ten months in 1980. Decision and Order at 23-25; Director's Exhibits 7, 8, 16, 17, 18. Based on claimant's notarized statement of June 4, 2010, 1040 tax forms for 1982 and 1983, insurance documentation, and a typewritten statement signed by the miner, explaining that D & L Coal changed its name to Linda Coal "because of reclamation rule," and that "Linda Coal was shut down because of high sulfur in March of 1983," Director's Exhibit 17, the administrative law judge rationally determined that Linda Coal was a successor operator to D & L Coal, employing the miner for three months ending in March 1983. Decision and Order at 23-26; Director's Exhibits 6, 7, 17, 18, 19. Although the miner's most recent coal mine employment was with Tonya Lynn Coal in 1984, the administrative law judge acted within his discretion in finding that this employment lasted for only six months, based on the miner's SSA records, as substantiated by his 1984 tax form; his business loan application on behalf of Tonya Lynn Coal dated December 8, 1983; claimant's notarized statement of June 4, 2010; payroll records and receipts; and insurance documentation through Rockwood Insurance Company in effect from February 10 to August 11, 1984. Decision and Order at 23-26; Director's Exhibits 6, 7, 8, 17, 18, 19; *see Mitchell*, 479 F.3d at 330, 24 BLR at 2-17; *Bizzarri v. Consolidation Coal Co.*, 7 BLR 1-343 (1984). While acknowledging that claimant initially testified at her deposition that the miner worked for Tonya Lynn Coal from August 1, 1983 to October 12, 1984, the administrative law judge noted that claimant stated she could not remember where she obtained these dates, which were not verified by the SSA records. Decision and Order at 22; Director's Exhibit 5 at 8, 48-50. Following a telephone call from a DOL representative requesting additional information, claimant located the miner's notice of cancellation of the insurance policy for Tonya Lynn Coal, in effect from February 10, 1984 to August 11, 1984, as well as a letter of work experience signed by the miner, indicating that D & L Coal changed its name to Linda Coal. Decision and Order at 22; Director's Exhibit 7. Claimant then submitted this documentation, with a sworn statement correcting and clarifying her deposition testimony. Decision and Order at 22; Director's Exhibits 6, 7, 19. On September 3, 2010, claimant additionally submitted the December 8, 1983 business loan application, prepared by the miner in anticipation of opening Tonya Lynn Coal at a different mine site. Director's Exhibit 7. Because the regulations explicitly provide that the district director is charged with investigating operator liability and collecting all necessary evidence from the claimant at the district level, the administrative law judge reasonably rejected employer's argument that DOL's ex parte communication with claimant was improper. Decision and Order at 22-23; *see* 20 C.F.R. §§725.404, 725.407. As employer has produced no evidence to satisfy its burden of proving that it is not the potentially liable operator that most recently employed the miner for a cumulative period of at least one year, and substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's determination that employer is the responsible operator herein.

Turning to the merits of entitlement, employer asserts that the medical opinion evidence is insufficient as a matter of law to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Employer challenges the administrative law judge's crediting of the opinions of Drs. Hanly and Negrea, that pneumoconiosis hastened the miner's death from metastatic esophageal carcinoma, over the contrary opinion of Dr. Tuteur, that there is no medical data demonstrating that either simple pneumoconiosis or a chronic dust disease of the lung arising out of coal mine employment contributed to the miner's demise. Specifically, employer argues that the opinions of Drs. Hanly and Negrea are conclusory and legally inadequate to satisfy the standard articulated in *Conley v. Nat'l Mines Corp*., 595 F.3d 297, 24 BLR 2-255 (6th Cir. 2010), and *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), that "pneumoconiosis only 'hastens' the miner's death if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Employer's arguments lack merit.

At the outset, we note that, because this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, *Conley* and *Williams* are not legally binding precedent. The Fourth Circuit has adopted the Director's approach, and has held that pneumoconiosis is a substantially contributing cause of a miner's death if it actually serves to hasten death in any way. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

In evaluating the medical opinions of record at Section 718.205(c), the administrative law judge determined that Dr. Hanly performed the autopsy on the miner, and found that the miner's left and right lungs contained "extensive anthracosis accompanied by pleural plaques bullous formation emphysema and fibrosis," conditions that he opined were consistent with pneumoconiosis. Decision and Order at 28, 31; Director's Exhibit 13. Dr. Hanly, who is Board-certified in anatomic pathology with a subspecialty in cytopathology, concluded that, although progressive metastatic esophageal adenocarcinoma caused the miner's death, "the severity of the pulmonary damage would have *undoubtedly* hastened the patient's demise by further diminishing the patient's ability to breathe." Director's Exhibit 13 [emphasis added]. Finding that Dr. Hanly's opinion was unequivocal, supported by the physical findings on autopsy, and consistent with the miner's hospitalization and treatment records documenting respiratory impairment, the administrative law judge acted within his discretion in according the opinion great weight. Decision and Order at 31-32; *see Shuff*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). While acknowledging that "the doctors who participated in the Miner's treatment and hospitalization for cancer focused on his cancer and apparently never diagnosed pneumoconiosis ... or even [noted] coal mine employment," the administrative law judge found that the treatment records of Dr. Negrea, x-ray interpretations of record, and CT scan reports from the miner's hospital

visits demonstrated progressive pulmonary abnormalities and definitive "evidence that the Miner suffered from some level of respiratory impairment that worsened over time." Decision and Order at 32. The administrative law judge recognized that Dr. Negrea was well-qualified to render an opinion in this case, as he is Board-certified in internal medicine with subspecialties in hematology and medical oncology, and he treated the miner for esophageal cancer from January 2008 until January 2009, conducted twenty-two physical examinations, noted the miner's increasing symptoms of impaired breathing, reported abnormal breath sounds, prescribed breathing medications to treat the miner's respiratory symptoms, and referred the miner to a pulmonary specialist after x-rays of the miner's lungs revealed airway abnormalities, one pulmonary nodule, tissue scarring, pleural plaques and thickening. Decision and Order at 32. Dr. Negrea opined that, "while pneumoconiosis was not the principal cause of death, in all likelihood it may have contributed [to the miner's] respiratory insufficiency, decreased exercise tolerance, poor performance status, and profound chronic weakness." Director's Exhibit 14. The administrative law judge noted that, at the time of the miner's final oncology appointment in January 2009, Dr. Negrea postponed chemotherapy indefinitely due to the miner's debilitated state. *Id.* However, because he found that Dr. Negrea's opinion was "less definitively stated," the administrative law judge permissibly concluded that it was entitled to "less probative weight." Decision and Order at 33; Director's Exhibit 14; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-604 (4th Cir. 1999). Lastly, the administrative law judge acted within his discretion in finding that the opinion of Dr. Tuteur was less well-reasoned and entitled to little weight, as it was premised on the physician's belief that the miner did not have pneumoconiosis, contrary to the administrative law judge's findings. Decision and Order at 33-34; *see Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the weight of the evidence is sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c), and affirm his award of survivor's benefits.

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge