BRB No. 01-0393 BLA

JUDY G. LILLY (Widow of HARRY W. LILLY) Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: _____ DECISION and ORDER

Appeal of the Decision and Order on Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-1648) of Administrative Law Judge Linda S. Chapman awarding benefits on claims filed by the miner and the survivor 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] This case has been

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on

before the Board previously.[2] In the original decision, the administrative law judge properly noted that the miner's claim was a modification request and, considering both the miner's and survivor's claims, found eighteen years of coal mine employment. Decision and Order dated January 29, 1999 at 3.

Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that claimant, the miner's widow, established the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's total disability and death were due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204 and 718.205(c) (2000). Decision and Order dated January 29, 1999 at 7-22. The administrative law judge therefore concluded that claimant established modification in the miner's claim pursuant to 20 C.F.R. §725.310 (2000). Decision and Order dated January 29, 1999 at 21. Accordingly, benefits were awarded.

On appeal, the Board affirmed in part and vacated in part the administrative law judge's findings pursuant to Sections 718.204(b) and 718.205(c)(2) (2000), and remanded the case for further consideration. *Lilly v. Eastern Associated Coal Corp.*, BRB No. 99-0705 BLA (April 7, 2000)(unpublished).

On remand, the administrative law judge fully considered the medical opinions of record and concluded that they were sufficient to establish that the miner's death and disability were due to pneumoconiosis. Decision and Order on Remand at 2-8. Accordingly, benefits were awarded in both the miner's and survivor's claims. In the instant appeal, employer contends that the administrative law judge erred in failing to give proper weight to the contrary evidence at Sections 718.204(b) and 718.205(c)(2) (2000). Claimant responds urging affirmance of the administrative law judge's Decision and Order 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,

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January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

[2]The procedural history of this case has previously been set forth in detail in the Board's prior decision in *Lilly v. Eastern Associated Coal Corp.*, BRB No. 99-0705 BLA (April 7, 2000)(unpublished), which is incorporated herein by reference.

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).

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to prove any one of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed 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 or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5) (2001); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (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 of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Employer initially argues that the administrative law judge erred in evaluating the medical opinion evidence pursuant to Sections 718.204(b) and 718.205(c)(2) (2000), as she failed to give proper weight to the contrary evidence that establishes that the miner is not disabled as a result of pneumoconiosis and that the miner's death was not due to pneumoconiosis. Employer's Brief at 17-23. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when

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

deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Employer argues that in finding the evidence sufficient to establish total disability due to pneumoconiosis and death due to pneumoconiosis pursuant to Sections 718.204(b) and 718.205(c)(2) (2000), the administrative law judge failed to provide valid reasons for according determinative weight to the opinions of Drs. Dy, the autopsy prosector, and Rasmussen, the treating physician, and for discounting the contrary opinions of Drs. Renn, Tuteur, Fino and Kleinerman. We disagree. In evaluating the medical opinions of record, the administrative law judge properly reviewed the qualifications of the physicians and the underlying bases for their conclusions, and determined that the opinions of Drs. Renn, Tuteur, Fino and Kleinerman conflicted with the opinion of the autopsy prosector, Dr. Dy, and the miner's treating physician, Dr. Rasmussen, with regard to both the causation of the miner's disability and the cause of his death. Decision and Order on Remand at 3-8. While Dr. Dy opined, based on his gross and microscopic examinations, that the miner had moderate macular anthracotic pneumoconiosis in his left lung and mild macular anthracosis in his right lung, and Dr. Rasmussen opined that pneumoconiosis was a contributing cause of the miner's total disability and death, the remaining physicians concluded that the miner's pneumoconiosis was too mild to have contributed to his disability or death. Director's Exhibits 9, 34, 69; Claimant's Exhibit 2; Employer's Exhibits 4-7, 10-11.

The administrative law judge determined that the autopsy resulted in a finding of moderate pneumoconiosis and that Drs. Fino, Renn and Tuteur did not consider this fact in forming their opinions that the miner suffered from mild pneumoconiosis. The administrative law judge further found that Dr. Kleinerman did not explain why he characterized the miner's pneumoconiosis as mild, and did not discuss how the autopsy evidence supported such a characterization. Decision and Order on Remand at 3-5. In view of the conflict between these opinions and the prosector's ultimate conclusion that the pneumoconiosis found on autopsy was moderate, the administrative law judge concluded that the opinions of Drs. Fino, Renn, Tuteur and Kleinerman were not entitled to significant weight as these opinions were not sufficiently documented or explained. Decision and Order on Remand at 3-5. Since the physicians found only mild pneumoconiosis without further explanation, the administrative law judge reasonably accorded little weight to the opinions of Drs. Renn, Tuteur, Fino and Kleinerman, as the reliability of the opinions was undermined because the physicians did not have a complete picture of the autopsy evidence. Decision and Order on Remand at 3-5; *see generally Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 BLR 1-103 (1979).

Employer also contends that the administrative law judge erred in relying on the opinion of the autopsy prosector, Dr. Dy. Employer's Brief at 17-18. Contrary to employer's

assertion, although the administrative law judge may not mechanically accord greater weight based solely upon the physician's status as the autopsy prosector, the administrative law judge is not prohibited from according weight to the opinion based upon more than a mechanical recognition of the physician's status as prosector. *See BethEnergy Mines, Inc. v. Director, OWCP [Rowan]*, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996); *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic, supra*; *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). The administrative law judge, in the instant case, acted within her discretion as fact-finder in concluding that the opinion of Dr. Dy, in comparison to the contrary opinions of record, better indicated the degree of pneumoconiosis suffered by the miner, as the physician's conclusions were explained and supported by both his microscopic and gross examinations.[4] *Lucostic, supra*; *Hutchens, supra*; Director's Exhibit 69; Decision and Order on Remand at 3-5.

We also reject employer's assertion that the administrative law judge mechanically accorded greater weight to the opinion of Dr. Rasmussen based on his status as the miner's treating physician. Employer's Brief at 21-22. Contrary to employer's contention, the administrative law judge may credit the opinion of a treating physician over those of reviewing physicians, as the length of time a physician has treated a miner is an important factor in determining the value of the physician's opinion because of the correlative degree of the physician's familiarity with the patient. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). However, in the instant case, the administrative law judge found that the opinion of Dr. Rasmussen was entitled to greater weight as the physician not only examined the miner but also has extensive experience in the clinical treatment of coal miners, and as his opinion is better supported by the objective evidence of record, including the autopsy report of Dr. Dy. *Clark, supra*; *Lucostic, supra*;

[4]Contrary to employer's assertion, the administrative law judge fully complied with the Board's instructions on remand. Employer's Brief at 18-19; Decision and Order on Remand at 3, 5.

Decision and Order on Remand at 6-8. Consequently, as the administrative law judge has offered more than one valid reason for according greater weight to the opinion of Dr. Rasmussen, we affirm his weighing of this opinion as supported by substantial evidence.[5] *See* Decision and Order on Remand at 5-6; *Clark, supra*; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-1445 (1984).

Employer further contends that the administrative law judge erred in her consideration of the medical opinion evidence under Section 718.204(b) (2000), as Dr. Rasmussen's opinion is too speculative to meet claimant's burden of proof thereunder. Employer also maintains that Section 718.205(c) (2000) requires proof of more than a *de minimis* contribution in determining if claimant has met her burden of establishing that the miner's death was due to pneumoconiosis. Employer's Brief at 23-28. These contentions lack merit. The Board addressed, and rejected, employer's contentions with respect to Dr. Rasmussen's opinion and the *de minimis* contribution in its prior Decision and Order. Thus, we decline to further review the administrative law judge's findings at Sections 718.204(b) and 718.205(c)(2) (2000), as they constitute the law of the case. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *Lilly*, *supra* at 4, 8.

The administrative law judge is empowered to weigh the medical evidence and to draw her 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, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As employer makes no other specific challenge to the administrative law judge's findings on the merits, we affirm the administrative law judge's findings that the evidence of record is sufficient to establish that the miner's disability and death were due to

[5]In her consideration of the evidence on remand, the administrative law judge properly acknowledged that Drs. Kleinerman, Fino, Tuteur and Renn possessed superior qualifications, but permissibly found that their opinions did not outweigh the contrary opinion of Dr. Rasmussen, which the administrative law judge determined was better explained and supported by its underlying documentation. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order on Remand at 3-6.

pneumoconiosis pursuant to Sections 718.204(b) and 718.205(c)(2) (2000), as they are supported by substantial evidence and in accordance with law. *See Shuff, supra*; *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Neeley, supra*; *Trumbo, supra*; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge