

BRB No. 97-1466 BLA

SHIRLEY M. FULKERSON)		
(Widow of J.C. FULKERSON))		
)		
Claimant-Respondent)		
)		
v.)		
)		
ISLAND CREEK COAL COMPANY)		
)		
Employer-Petitioner)		
)		
DIRECTOR, OFFICE OF WORKERS')	DATE	ISSUED:
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order - Awarding Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

John W. Walters (Jackson & Kelly), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-1452) of Administrative Law Judge Mollie W. Neal awarding benefits 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 adjudicated the claim, filed on April 1, 1994, pursuant to the provisions at 20 C.F.R. Part 718, and found that the weight of the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and death 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 findings pursuant to Sections 718.202(a)(4) and 718.205(c). Claimant responds,¹ urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to 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, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish 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, or that death was caused by complications of pneumoconiosis, and that the miner had pneumoconiosis which arose out of coal mine employment.² See 20 C.F.R. §§718.205(c), 718.202(a), 718.203; see *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 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).

Employer contends that the administrative law judge erred in evaluating the evidence pursuant to Sections 718.202(a)(4) and 718.205(c). Specifically, employer argues that the administrative law judge did not consider the relative qualifications of

¹Claimant Shirley M. Fulkerson is the widow of the deceased miner, J.C. Fulkerson, who died on March 5, 1994. Director's Exhibit 1.

²This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

the physicians, substituted her own conclusions for those of the physicians, and provided invalid reasons for failing to credit the opinions of pulmonary experts Drs. Anderson, Fino, Jarboe and Morgan, that the miner did not have pneumoconiosis and that his death was unrelated to pneumoconiosis, over the contrary opinion of Dr. Simpao, who has no special qualifications.³

³The record reflects that Dr. Simpao is experienced in the treatment of pulmonary and respiratory diseases, see Employer's Exhibit 11, but unlike Drs. Anderson, Fino, Morgan and Jarboe, he is not Board-certified in any specialty.

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, consistent with applicable law, and must be affirmed. In finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge accurately reviewed the physicians' conclusions and the bases therefor. Decision and Order at 8-13. The administrative law judge determined that Dr. Simpao, who diagnosed pneumoconiosis and concluded that the miner's severe chronic obstructive pulmonary disease was caused by both smoking and dust exposure in coal mine employment, treated the miner not merely occasionally but frequently during multiple hospitalizations and office visits between 1981 and the miner's death in 1994. Decision and Order at 8, 9, 15; Director's Exhibits 6, 8, 9; Employer's Exhibits 9, 11.

In contrast, Drs. Fino, Morgan and Jarboe, who reviewed medical records, and Dr. Anderson, who also reviewed records and examined the miner once in 1984, opined that the x-ray evidence was negative for pneumoconiosis, and that the miner's chronic obstructive pulmonary disease was due entirely to smoking. Decision and Order at 8-13; Director's Exhibit 18; Employer's Exhibits 1, 4, 5, 7, 12-14. The administrative law judge reasonably determined that although claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(1), the x-ray evidence did not conclusively establish either the presence or absence of pneumoconiosis inasmuch as the record contained multiple positive and negative interpretations by dually-qualified Board-certified radiologists and B-readers. The administrative law judge further found that while Drs. Fino and Jarboe opined that the miner's treatment with bronchodilators was inconsistent with pneumoconiosis, an irreversible condition, and that the objective test results were consistent with a pulmonary impairment related to smoking, these physicians did not persuasively rule out a concurrent pulmonary condition related to dust exposure during twenty-two years of underground coal mine employment. Rather, the administrative law judge credited Dr. Simpao's deposition testimony that bronchodilators temporarily relieved the miner's bronchospasms from bronchial asthma, and that the miner's chronic obstructive pulmonary disease encompassed chronic bronchitis, emphysema and bronchial asthma, all due at least in part to coal dust exposure as well as smoking. Decision and Order at 14, 15; Employer's Exhibit 11 at 43-45, 51-53, 55-56. Weighing the opinions of the doctors against 20 C.F.R. §718.201, the regulation that defines pneumoconiosis as any pulmonary impairment significantly related to or substantially aggravated by coal dust exposure, the administrative law judge acted within her discretion as trier-of-fact in according determinative weight to the opinion of Dr. Simpao, which she found was well-reasoned and corroborated by the opinions of examining physicians Drs. Taylor

and Penman, based on his status as the miner's treating physician for more than ten years.⁴ Decision and Order at 13, 15, 16; see *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Contrary to employer's arguments, the administrative law judge was not required to defer to the opinions of the physicians with the best qualifications, see *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), but permissibly found that Dr. Simpao was more likely to be familiar with the miner's condition than Dr. Anderson, who examined claimant once in 1984 and performed an incomplete record review in 1995,⁵ or Drs. Fino, Morgan and Jarboe, who never examined the miner and whose opinions the administrative law judge found unsupported by the evidence considered as a whole.⁶ Decision and Order at 15; see generally *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). While employer asserts that Dr. Simpao's opinion is not as well reasoned as the other medical opinions, the Board is not empowered to reweigh the evidence nor substitute its

⁴Any error made by the administrative law judge in evaluating the physicians' opinions regarding the absence of radiographic or clinical pneumoconiosis is harmless, inasmuch as the administrative law judge provided valid reasons for her credibility determinations regarding the existence of "legal" pneumoconiosis as defined in 20 C.F.R. §718.201. See generally *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

⁵While employer correctly asserts that Dr. Anderson reviewed and discounted some of the positive x-ray interpretations of record in conjunction with his 1984 deposition, see Director's Exhibit 18, in his 1995 consultative review of selected records, Dr. Anderson noted that "[t]his is a somewhat unusual case in that none of the [24] x-ray readings make any mention of pneumoconiosis." Employer's Exhibit 1.

⁶The administrative law judge reasonably found that Dr. Morgan's premise, that the miner's 22 years of underground coal mine employment was an inadequate exposure to support a diagnosis of pneumoconiosis, was inconsistent with the statutory and regulatory scheme. Decision and Order at 14. The administrative law judge additionally found that Drs. Fino, Morgan and Jarboe relied in part upon an exaggerated smoking history of 100 pack years, as reported in a 1991 hospitalization record, see Director's Exhibit 19. The administrative law judge determined that the miner's actual smoking history was one pack per day for forty years until 1984, and one-third to one-half pack per day from 1984 until 1991, permissibly crediting the histories recorded by Drs. Halprin, Simpao, Taylor and Anderson between 1981 and 1984, which she found consistent with each other and with the widow's testimony, over the uncorroborated 1991 hospital notation. Decision and Order at 10-12, 14-15.

inferences for those of the administrative law judge. See *Director, OWCP v. Rowe*, 719 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). The administrative law judge's findings pursuant to Section 718.202(a)(4) are supported by substantial evidence and thus are affirmed.

Turning to the issue of the cause of the miner's death pursuant to Section 718.205(c), the administrative law judge again accorded determinative weight to Dr. Simpao's opinion because he was the miner's treating physician and he persuasively explained how the combined effects of the miner's cardiac and pulmonary conditions hastened death. Decision and Order at 16; Employer's Exhibit 11; see *Tussey, supra*; *Onderko, supra*. The administrative law judge acted within her discretion in giving less weight to Dr. Fino's opinion that death was due primarily to the miner's heart condition on the grounds that the opinion was based largely on a finding that the miner did not have pneumoconiosis and Dr. Fino did not address whether any of the components of the miner's chronic obstructive lung disease could have contributed to death in combination with the cardiac condition. Decision and Order at 16; *Tussey, supra*. The administrative law judge acknowledged that both Drs. Jarboe and Anderson opined that even if pneumoconiosis were present, it did not contribute to the miner's death, but permissibly found both opinions to be of little probative value because the physicians did not explain the basis for this conclusion.⁷

Decision and Order at 17; see generally *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th

⁷Employer argues that Dr. Anderson explained that pneumoconiosis could not cause hypertrophic idiopathic cardiomyopathy, as indicated on the death certificate signed by Dr. Simpao, see Director's Exhibit 3. A review of Dr. Simpao's deposition testimony, however, reveals that the physician concluded that the miner's conditions of intractable congestive heart failure and hypertrophic idiopathic cardiomyopathy were not caused by pneumoconiosis but that pneumoconiosis contributed to the severity of these conditions, which all combined to cause death from cardiopulmonary arrest. Decision and Order at 9; Employer's Exhibits 9, 11.

Cir. May 11, 1989)(unpublished); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Lastly, the administrative law judge reasonably discounted Dr. Morgan's consultative opinion that pneumoconiosis, if present on autopsy, played no role in the miner's death, because Dr. Morgan's theory that the miner's twenty-two-year underground exposure to coal dust was insufficient to cause a significant impairment was contrary to the statute and regulations, which recognize the possibility of significant impairment with a ten-year exposure. Decision and Order at 14, 17. The administrative law judge's findings and inferences pursuant to Section 718.205(c) are supported by substantial evidence, in accordance with applicable law, see *Brown, supra*, and are affirmed. Consequently, we affirm her award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge