BRB No. 01-0664 BLA

BESSIE E. CRABTREE (Widow of DEMPSEY W. CRABTREE)	)	
Claimant-Petitioner	)	
v.	)	
VIRGINIA CREWS 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 of John C. Holmes, Administrative Law Judge, United States Department of Labor.

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

John P. Scherer (File, Payne, Scherer & File), Beckley, West Virginia, for employer.

Michelle S. Gerdano (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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:

Claimant, the miner's widow, appeals the Decision and Order (2000-BLA-1041) of Administrative Law Judge John C. Holmes denying benefits on claims[1] filed by the miner and 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).[2] The administrative law judge found approximately forty-one years of coal mine employment and based on their respective filing dates, adjudicated the claims pursuant to 20 C.F.R. Part 718. Decision and Order at 1, 8. The administrative law judge further found, based upon employer's stipulation, that employer was the responsible operator and that the miner suffered from pneumoconiosis arising out of coal mine employment. Decision and Order at 2; Hearing Transcript at 6. The administrative law judge considered the relevant evidence of record and concluded that the evidence was insufficient to establish that the miner was totally disabled due to pneumoconiosis or that the miner's death was due to pneumoconiosis. Decision and Order at 9-12. Accordingly, the administrative law judge denied benefits on both claims. On appeal, claimant contends that the administrative law judge erred in failing to fully consider the evidence of record pursuant to 20 C.F.R. §718.204 and in failing to find that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the denial of

[1]Claimant is Bessie E. Crabtree, the miner's widow. The miner, Dempsey W. Crabtree, initially filed a claim for benefits on February 28, 1983, which was finally denied on March 6, 1987. Director's Exhibit 36. The miner filed his current application for benefits on July 1, 1998. Director's Exhibit 1. The miner died on February 11, 2000 and claimant filed a survivor's claim on March 11, 2000. Director's Exhibits 1, 65, 71.

[2]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 January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board issued an order on May 18, 2001 requesting supplemental briefing in the instance case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

benefits. The Director, Office of Workers' Compensation Programs, has filed a letter responding to the Board's order with respect to the impact of the new regulations in this case but has not otherwise responded to the merits of the appeal.[3]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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); *see also Shuff v. Cedar Coal Co.*, 967 F.2d

[3]The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a) and 718.203 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).[4]

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish that the miner was totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.204 and 718.205. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

[4]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* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Initially, we reject claimant's contention that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), because he did not explain why he discounted evidence favorable to the miner.[5] The administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

With respect to the merits, claimant contends that the administrative law judge erred in failing to find complicated pneumoconiosis established pursuant to 20 C.F.R. §718.304. Claimant's Brief at 18-29. We disagree. The administrative law judge noted the opinions of Drs. Hansbarger and Green, diagnosing complicated pneumoconiosis, and the contrary opinions of Drs. Bush and Crouch, stating that the miner suffered from simple pneumoconiosis only. Decision and Order at 9-10; Claimant's Exhibits 1-4; Employer's Exhibits 35, 37, 41; Director's Exhibit 72. The administrative law judge, in this instance, permissibly accorded greatest weight to the opinion of Dr. Bush as the physician was able to review extensive documentation in reaching his conclusions and Dr. Hansbarger only appears to rely solely upon the prosection. Decision and Order at 10; Employer's Exhibits 35, 41; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Kuchwara, supra*. Moreover, contrary to claimant's assertion, the irrebuttable presumption contained in Section 718.304 is not available in the instant case based upon claimant's proffered evidence. Although all the physicians noted nodules up to 1.5 centimeters in size, without characterizing them as revealing "massive lesions" or equating these findings with the size of x-ray opacities, they are insufficient to trigger the presumption. *See* 20 C.F.R. §718.304; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR 2- (4th Cir. 1999); *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984); *see also Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2- 615 (6th Cir. 1999); Claimant's Exhibits 1-4; Employer's Exhibits 35, 37, 41; Director's Exhibit 72. Thus, we affirm the administrative law judge's finding that the medical evidence is insufficient to establish entitlement to the presumption at Section

[5]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

718.304 as it is supported by substantial evidence. *See* 20 C.F.R. §718.304; *Blankenship, supra*; *Gray, supra*; *Smith v. Island Creek Coal Co.*, 7 BLR 1-734 (1985); *Lohr, supra*.

Claimant further contends that the administrative law judge erred in failing to find that the miner's total disability and death were due to pneumoconiosis. Claimant makes several contentions asserting that the administrative law judge erred in his evaluation of the medical opinion evidence. Claimant's Brief at 2-18. Claimant's contentions constitute 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 (1989). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge, in the instant case, properly considered the relevant evidence of record and permissibly concluded that it was insufficient to establish that the miner's total disability and death were due to pneumoconiosis. *Kuchwara, supra*; *Piccin, supra*.

In addressing whether the miner's total disability was due to pneumoconiosis, the administrative law judge adequately examined and discussed all of the relevant evidence as it relates to total disability causation and permissibly concluded that the weight of the credible evidence fails to carry claimant's burden pursuant to 20 C.F.R. §718.204(c).[6] Decision and Order at 11; Director's Exhibits 9, 39, 40; Employer's Exhibits 32, 42; *Lafferty, supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Kuchwara, supra*. The administrative law judge, in the instant case, properly considered the relevant evidence of record and permissibly accorded the opinions of Drs. Hippensteel, Fino and Forehand, that claimant suffers no respiratory or pulmonary impairment due to coal dust exposure, greater weight as they were well reasoned and based upon the available evidence.[7] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra; Dillon, supra*; *Fields, supra*; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-

[6]After revision of the regulations, the disability causation regulation is now set forth at 20 C.F.R. §718.204(c).

[7]Claimant asserts that the administrative law judge erred in failing to consider the qualifications of the physicians. Although an administrative law judge may assign more weight to a physician's opinion based on his qualifications, the administrative law judge, contrary to claimant's contention, is not obligated to give greater weight to a physician's opinion based solely on his superior qualifications. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985).

89, 1-90 n.1 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order at 11; Director's Exhibits 9, 39, 40; Employer's Exhibits 32, 42. Moreover, the administrative law judge, in a proper exercise of his discretion, rationally found that the only opinion supportive of claimant's burden, that of Dr. Cardona, was unreliable and thus insufficient to meet claimant's burden of proof with respect to causation as the physician relied upon an inaccurate smoking history.[8] *See* Decision and Order at 11; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Clark, supra*; *Stark, supra*; *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Piccin, supra*. We therefore affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner was totally disabled due to pneumoconiosis as it is supported by substantial evidence and is in accordance with law.[9] *See Clark, supra*.

[8]The record indicates that the miner smoked for twenty to thirty years. *See* Director's Exhibits 36, 39; Employer's Exhibit 34.

[9]As we affirm the administrative law judge's causation findings pursuant to 20 C.F.R. §718.204(c), we need not address claimant's arguments concerning the administrative law judge's total disability findings. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to the survivor's claim, the administrative law judge permissibly concluded that the miner's death was not due to pneumoconiosis. *See* 20 C.F.R. §718.205; *Shuff, supra*; *Piccin, supra*. The administrative law judge in the instant case, addressed all the relevant evidence of record, noting that only the opinions of Drs. Hansbarger and Green supported claimant's burden of proof, and permissibly accorded little weight to the opinion of Dr. Hansbarger as the physician offered no reasoning for his conclusion that pneumoconiosis hastened the miner's death. Decision and Order at 11; Claimant's Exhibits 1-4; *Shuff, supra*; *Clark, supra*; *Hutchens, supra*; *Kuchwara, supra*. Additionally, the administrative law judge rationally found that the opinion of Dr. Green was outweighed by the opinions of Drs. Crouch and Bush, that there was no hastening of death by pneumoconiosis, as their conclusions are better supported by the objective evidence and by the opinion of Dr. Fino.[10] *See Worhach, supra*; *Clark, supra*; *Dillon, supra*; *Fields, supra*; *Minnich, supra*; *Budash, supra*; *Gee, supra*; *Perry, supra*; *Pastva, supra*; Decision and Order at 11-12; Claimant's Exhibit 4; Employer's Exhibits 32, 35, 37, 41, 42. Thus, the administrative law judge, within a proper exercise of his discretion, permissibly concluded that claimant failed to prove that the miner's death was due to pneumoconiosis. *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Shuff, supra.*

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Trent, supra*; *Perry, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director,*

[10]The administrative law judge properly noted that Dr. Fino did not diagnose the existence of pneumoconiosis in his initial opinion but found the existence of the disease after reviewing additional information and permissibly concluded that the physician's opinion was not entitled to as much weight as the other opinions. Decision and Order at 12; Employer's Exhibits 32, 42; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Contrary to claimant's contention, Dr. Fino's opinion is not hostile to the Act because it does not contravene the Act's definition of pneumoconiosis. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995).

OWCP, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence indicating that the miner's total disability and death was due to pneumoconiosis is unreliable and is outweighed by the contrary evidence of record, claimant has not met her burden of proof on all the elements of entitlement. *See* 20 C.F.R. §§718.204(c), 718.205; *Shuff, supra*; *Clark, supra*; *Trent, supra*; *Perry, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray, supra*, 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). Furthermore, since the determination of whether claimant's total disability and death are due to pneumoconiosis is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's findings and therefore could not satisfy claimant's burden of proof on this issue. *See* 20 C.F.R. §718.204(d); *Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Anderson, supra; Trent, supra*; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields, supra*; *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's total disability and death were due to pneumoconiosis pursuant to Sections 718.204 and 718.205 as it is supported by substantial evidence and is in accordance with law. *See Shuff, supra*; *Clark, supra*; *Piccin, supra*.

Inasmuch as claimant has failed to establish that the miner's death and total disability were due to pneumoconiosis, requisite elements of entitlement in claims filed by a miner and a survivor pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Shuff, supra; Trumbo, supra*; *Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Trent, supra; Perry, supra.*

Accordingly, the administrative law judge's Decision and Order denying benefits in both the miner's and survivor's claims is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge