

BRB No. 05-0758 BLA

JUDY ANN WINTERS)
(Surviving Divorced Spouse of LEON)
WINTERS))
)
Claimant-Petitioner)
)
v.)
)
HAPPY HOLLOW COAL COMPANY,) DATE ISSUED: 05/23/2006
INCORPORATED)
)
and)
)
AMERICAN RESOURCES INSURANCE)
COMPANY, INCORPORATED)
)
Employer/Carrier-)
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 Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Judy Ann Winters, Princeton, Kentucky, *pro se*.

Lance O. Yeager (Ferreri & Fogle), Louisville, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman,
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: SMITH, McGRANERY, and HALL, Administrative Appeals
Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (04-BLA-5179) of Administrative Law Judge Janice K. Bullard 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). Claimant is the surviving divorced spouse of the miner, Leon Winter, who died on August 30, 2002. Director's Exhibit 3. Claimant filed the instant survivor's claim on September 11, 2002. *Id.* The district director issued a Proposed Decision and Order denying benefits on July 8, 2003. Director's Exhibit 21. At claimant's request, the matter was forwarded to the Office of Administrative Law Judges for a decision on the record. On May 27, 2003, the administrative law judge issued her Decision and Order, finding that claimant failed to establish that the miner had pneumoconiosis or that his death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Claimant appeals, challenging the denial of her claim. The Director, Office of Workers' Compensation Programs, (the Director) has filed a brief, asserting that the administrative law judge erred by failing to apply the evidentiary limitations set forth at 20 C.F.R. §725.414 with regard to employer's evidence. The Director specifically argues that employer exceeded the evidentiary limits on affirmative evidence by proffering the medical reports of Drs. Powell, Caffrey, Burki, Simpao and Traughber. The Director notes, however, that "because the [administrative law judge's] denial of benefits was based on her finding that the claimant's evidence was not credible, it does not appear that the outcome of this case would change if these reports were excluded from the record." Director's Brief at 2.¹ Employer responds to claimant's appeal, urging affirmance of the denial of benefits. Employer further asserts that it did not proffer affirmative evidence in excess of the evidentiary limitations as suggested by the Director. Employer's Brief at 11-12.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of

¹ The Director, Office of Workers' Compensation Programs, (the Director) stated in the alternative that if the case were remanded for any reason the Board should direct the administrative law judge "to review the employer's submissions for compliance with [S]ection 725.414(a)(3)'s limits and, if the employer has exceeded the limits, either excise from the record the extra reports to bring employer's evidence into compliance with [S]ection 725.414 or determine that good cause exists to exceed those limits." Director's Brief at 2.

law are rational, are supported by substantial evidence, and are in accordance with law. 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).

To establish entitlement to survivors' benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, the miner's death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).²

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c). Specifically, the administrative law judge properly found that the medical evidence of record was insufficient to meet claimant's burden of establishing that the miner's death was due to pneumoconiosis, or that pneumoconiosis contributed to or hastened the miner's death.³

The administrative law judge correctly noted that the miner's death certificate, signed by his treating physician, Dr. Wilder, listed the immediate cause of the miner's death as oat cell carcinoma, and that no other conditions were listed as contributing to death. Director's Exhibit 12; Decision and Order at 5. The administrative law judge considered that the miner had been under Dr. Wilder's care from 1993 until his death from respiratory symptoms that the doctor associated with lung cancer, chronic

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

³ Because the record contains no evidence to establish that the miner had complicated pneumoconiosis, claimant cannot establish her entitlement to benefits based on the irrebuttable presumption provided at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3).

obstructive pulmonary disease (COPD), and chronic bronchitis. In a form dated April 20, 2004, Dr. Wilder answered questions concerning the miner's death and offered her opinion that the miner's lung condition was due in part to coal dust exposure. As noted by the administrative law judge, Dr. Wilder wrote that the miner's COPD was exacerbated by coal dust exposure and that this same exposure "could have contributed" to the miner's death from lung cancer. Dr. Wilder further stated: "[the miner] had lung [cancer] on top of underlying lung disease, if [the miner] had better lungs [he] might have lasted longer." Claimant's Exhibit 2, Decision and Order at 5.

In support of her claim, claimant also provided two letters and a form completed by Dr. Kluger, the miner's radiation oncologist for treatment of his lung cancer. In his November 17, 2003 letter, Dr. Kluger wrote that it was his opinion, with a reasonable degree of medical certainty, that the miner's "documented black lung disease was a contributing factor to his death." Claimant's Exhibit 2. On a form also dated November 17, 2003, when asked whether pneumoconiosis contributed to the miner's death, Dr. Kluger noted, "I only treated the [miner] for his cancer" but since the miner had pneumoconiosis "by history" he believed that pneumoconiosis contributed to the miner's death because "the lungs were already damaged from pneumoconiosis." Claimant's Exhibit 2; Decision and Order at 5.

The remaining medical opinions of record relevant to the cause of the miner's death were proffered by employer. As noted by the administrative law judge, Dr. Caffrey reviewed the miner's medical record and lung biopsy slides obtained prior to the miner's death.⁴ Dr. Caffrey opined that the miner did not have pneumoconiosis, and that his death was solely due to oat cell carcinoma related to smoking. Similarly, Drs. Burki and Powell performed a record review and agreed that the miner's death was caused by oat cell carcinoma of the lung entirely due to smoking. Employer's Exhibits 3, 4, 9. They opined that the miner did not have pneumoconiosis, although Dr. Powell specifically acknowledged that even if the miner "had simple coalworkers [sic] pneumoconiosis it would not have contributed to his death." Employer's Exhibit 4.

In weighing the conflicting medical opinions at Section 718.205(c), the administrative law judge assumed, *arguendo*, that the miner had pneumoconiosis but found that the weight of the evidence did not support claimant's position that the miner's death was hastened by pneumoconiosis. The administrative law judge properly determined that the opinions of Drs. Wilder and Kluger, while supportive of claimant's case, were insufficiently reasoned to carry her burden of proof. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10

⁴ The miner underwent lung and skin biopsies during 2002 pertaining to the diagnosis of his lung cancer. Employer's Exhibits 6, 10.

BLR 1-19 (1987); Decision and Order at 14. In this regard, the administrative law judge permissibly found Dr. Wilder's statement that the miner "might have" lasted longer if he had not had pneumoconiosis to be speculative, particularly in view of the fact that Dr. Wilder's treatment notes made no reference to the nature or length of the miner's coal mine employment, and the doctor had failed to list pneumoconiosis as a significant condition on the death certificate. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 5, 14. The administrative law judge similarly rejected Dr. Kluger's opinion as unreasoned, noting that Dr. Kluger had failed to discuss the miner's lengthy smoking history in relation to the cause of the miner's death.⁵ Decision and Order at 14.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, see *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Because the administrative law judge has broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom, see *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if rational and supported by substantial evidence, see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In this case, we conclude that the administrative law judge properly exercised her discretion in reaching her credibility determinations, and in finding that the opinions proffered in support of claimant's case were not sufficiently reasoned to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis hastened the miner's death. We, therefore, affirm as supported by substantial evidence the administrative law judge's findings pursuant to 20 C.F.R. §718.205(c).⁶ Because claimant failed to carry

⁵ The administrative law judge properly noted that Dr. Kluger had stated the miner had pneumoconiosis "by history," and that the doctor had acknowledged that his treatment of the miner had been limited to radiation therapy for lung cancer. Decision and Order at 5. Since the administrative law judge was unable to ascertain whether Dr. Kluger had an accurate picture of the miner's risk factors, and the nature of his lung condition prior to his death, she reasonably questioned the basis for Dr. Kluger's statements regarding the role of pneumoconiosis in the miner's death.

⁶ We note our agreement with the Director that employer proffered affirmative medical evidence in excess of the evidentiary limitations, and we accept the Director's position that the record must be corrected only if the case is remanded for further consideration. In light of the Director's representation, we do not remand the case for the administrative law judge to correct the record.

her burden of proof with regard to her entitlement, *see Griffith*, 49 F.3d at 184, 19 BLR at 2-111; *Brown*, 996 F.2d at 812, 17 BLR at 2-135, we also affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge