

BRB No. 08-0239 BLA

M.E.M.)
(Widow of D.J.M.))
)
Claimant-Petitioner)
)
v.)
)
PEABODY COAL COMPANY)
) DATE ISSUED: 10/23/2008
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 – Denial of Survivor Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John H. Shumate, Jr., Mount Hope, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Survivor Benefits (2005-BLA-6013) of Administrative Law Judge Richard T. Stansell-Gamm 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).¹ The administrative

¹ Claimant is the surviving spouse of the deceased miner, who died on January 29, 2004. Director's Exhibit 9. Claimant filed her survivor's claim on May 5, 2004. Director's Exhibit 3.

law judge credited the miner with nineteen years of coal mine employment, based on the parties' stipulations, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that while the miner suffered from coal workers' pneumoconiosis, the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by failing to find that the miner's death was hastened by pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to issue a substantive response unless specifically requested to do so by the Board.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

To establish entitlement to survivor's 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, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Claimant argues that the administrative law judge erred by "arbitrarily" relying on Dr. Naeye's opinion that the miner had only minimal pneumoconiosis, and in failing to

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis arising out coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

credit the opinions of the miner's treating physicians, Drs. Hasan and Rasmussen, that the miner's death was hastened by pneumoconiosis, over the contrary opinions of Drs. Naeye and Zaldivar, that pneumoconiosis played no role in the miner's death.⁴ Claimant's Brief (unpaginated). We reject claimant's arguments as they are without merit.

In considering whether claimant satisfied her burden of proof to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge properly found that it was necessary to resolve "a potential conflict between the two probative pathology reports" by Drs. Dy and Naeye as to the extent of pneumoconiosis that was present in the miner's lungs.⁵ Decision and Order at 19.

Contrary to claimant's assertion, the administrative law judge permissibly found that Dr. Naeye's diagnosis of minimal pneumoconiosis was more persuasive based on three factors. First, the administrative law judge noted:

Dr. Dy's observation of micromacular anthracotic pneumoconiosis of 50% of the lung surface on gross examination seems contradictory since the term

⁴ Dr. Crouch reviewed the miner's autopsy slides and opined that his death was not related to coal dust exposure. Employer's Exhibit 3. Dr. Larson signed the death certificate and listed severe chronic lung disease as the cause of the miner's death. Director's Exhibit 9. However, because Dr. Crouch opined, contrary to the administrative law judge's finding, that the miner did not have pneumoconiosis, and since Dr. Larson did not address the etiology of the miner's chronic lung disease, the administrative law judge gave no weight to their opinions, as to the cause of the miner's death, pursuant to 20 C.F.R. §718.205(c). Decision and Order at 19. We affirm the administrative law judge's findings with respect to Drs. Crouch and Larson as those findings are not challenged by the parties on appeal. *See Skrack*, 6 BLR at 1-711.

⁵ Dr. Dy conducted the autopsy and reported, on gross examination, the presence of: acute bronchopneumonia, honeycomb emphysema, and micromacular anthracotic pneumoconiosis, ranging from 30 to 40 percent in the right lung, and 40 to 50 percent in the left lung. Director's Exhibit 12. On microscopic review of the autopsy slides, Dr. Dy found anthracotic dust distribution in the middle and upper lobe of the right lung, interstitial fibrosis and anthracotic pneumoconiosis in the lower lobe of the right lung, and pronounced emphysema with anthracosis in the upper lobe of the left lung. *Id.* Dr. Dy did not address the cause of the miner's death. *Id.* Dr. Naeye reviewed the miner's autopsy slides and opined that the miner had only minimal pneumoconiosis, with anthracotic pigmentation representing less than one percent of the lung tissues. Employer's Exhibit 1. Dr. Naeye also found significant centrilobular emphysema, which he attributed to smoking. *Id.* Dr. Naeye opined that the miner's pneumoconiosis was too insignificant to have caused or hastened the miner's death. *Id.*

micromacular implies microscopic identification rather than gross visual assessment. The more probative assessment of the extent of micromacular pneumoconiosis is microscopic examination. However, when Dr. Dy conducted a microscopic examination, he identified foci of pneumoconiosis without providing [any estimate] as to the amount of the [sic] such micro pneumoconiosis in the lung tissue. In contrast, Dr. Naeye rendered his assessment as to the extent of the micromacular pneumoconiosis based on his microscopic examination of the lung tissue.

Decision and Order at 19. Second, the administrative law judge questioned whether Dr. Dy's gross examination finding of anthracotic pneumoconiosis was, in fact, a reference to anthracotic pigmentation, which diagnosis would be insufficient to establish the existence of pneumoconiosis under the Act. *See* 20 C.F.R. §718.201; Decision and Order at 20. Third, the administrative law judge found that the preponderance of the radiographic and CT scan evidence, which was negative for pneumoconiosis, was "more supportive of Dr. Naeye's microscopic quantification rather than Dr. Dy's gross examination assessment." Decision and Order at 20.

It is the administrative law judge's role to evaluate the weight and credibility of the medical opinion evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Because the administrative law judge properly exercised his discretion in crediting Dr. Naeye's diagnosis of minimal pneumoconiosis, we affirm his finding as to the degree of pneumoconiosis that was present in the miner's lungs. *Mays*, 176 F.3d at 764; 21 BLR at 2-606; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

We also reject claimant's contention that the administrative law judge erred by failing to credit the opinions of his treating physicians, Drs. Rasmussen and Hasan, that the miner's death was hastened by pneumoconiosis. The regulation at 20 C.F.R. §718.104(d) provides, in pertinent part, that the administrative law judge must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record and shall consider the following factors in weighing the opinion of the treating physician: 1) Nature of relationship; 2) Duration of relationship; 3) Frequency of treatment; and 4) Extent of treatment. 20 C.F.R. §718.104(d)(5). The regulation also requires the administrative law judge to consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." *Id.*

Taking into consideration the factors set forth at 20 C.F.R. §718.104(d), the administrative law judge acknowledged that Drs. Rasmussen and Hasan were "well

positioned” to assess the cause of the miner’s death. Decision and Order at 21. However, the administrative law judge correctly noted that Dr. Rasmussen’s opinion, that the miner had “widespread” pneumoconiosis which contributed to his death was influenced by Dr. Dy’s autopsy report.⁶ Decision and Order at 21; Director’s Exhibits 12, 21. Similarly, the administrative law judge found that while Dr. Hasan opined that the miner had “pretty advanced” pneumoconiosis, which contributed to his death, Dr. Hasan’s conclusion was contrary to the preponderance of the negative x-rays for pneumoconiosis and Dr. Naeye’s report.⁷ Because neither Dr. Rasmussen nor Dr. Hasan addressed Dr. Naeye’s pathological finding of minimal pneumoconiosis, we conclude that the administrative law judge acted within his discretion in according less weight to their opinions, as to the cause of the miner’s death, pursuant to Section 718.205(c). *See Mays*, 176 F.3d at 764; 21 BLR at 2-606; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21; Decision and Order at 21.

The administrative law judge permissibly found that Drs. Naeye and Zaldivar provided reasoned and documented opinions, explaining why pneumoconiosis did not cause, contribute to, or hasten the miner’s death. *See Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21; Decision and Order at 21. Although claimant challenges the weight accorded the conflicting medical opinions as to the cause of the miner’s death, claimant’s assertions of error on appeal amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge’s findings pursuant to Section 718.205(c) and his denial of survivor’s benefits. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

⁶ Dr. Rasmussen treated the miner between October 1985 and February 2000 for COPD and pneumoconiosis. Director’s Exhibits 10, 11. In a report dated October 19, 2004, Dr. Rasmussen reviewed the medical record and specifically noted that the autopsy report “confirmed” that the miner had “widespread” pneumoconiosis. Director’s Exhibit 21. Dr. Rasmussen opined that the miner suffered “ultimately fatal chronic lung disease” due to smoking and coal workers’ pneumoconiosis, and further opined that pneumoconiosis was “a material contributing factor to [the miner’s death].” *Id.*

⁷ Dr. Hasan treated the miner from May 1986 until his death in January 2004. Director’s Exhibit 10.

Accordingly, the Decision and Order – Denial of Survivor Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge