BRB No. 99-0388 BLA

ROBERT W. TAYLOR (Son of ORETHA and ROBERT TAYLOR, Deceased)	)	
Claimant-Petitioner	)	
v.	)	
EASTERN ASSOCIATED 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 Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (98-BLA-0047) of Administrative Law Judge Jeffrey Tureck denying 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 accepted the stipulation of the parties

[1]Claimant is Robert W. Taylor, the son of Robert Taylor, the miner, and Oretha Taylor, the miner's widow. The miner filed a claim for benefits on June 21, 1973, which was denied on September 12, 1989. Director's Exhibit 31. The miner died on January 17, 1997, and the miner's widow filed the instant survivor's claim on April 7, 1997. Director's Exhibits 1, 17. The miner's widow died on August 21, 1998, and claimant is pursuing the claim on her behalf.

that the miner had 26.7 years of qualifying coal mine employment, pneumoconiosis arising out of his coal mine employment, that the miner's daughter Nancy was a dependent under the Act, and that employer was properly designated the responsible operator herein, but found that the weight of 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, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence of record and in permitting employer to submit post-hearing "surrebuttal" medical reports. Employer has not responded to the appeal. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim filed on or after January 1, 1982, only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established, and the evidence establishes the existence of pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.1, 718.205(c), 718.202(a), 718.203; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); *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). The United States Court of Appeals, within whose jurisdiction this case arises, has held that pneumoconiosis should be considered a "substantially contributing cause" of a miner's death if it actually hastened the miner's death.[2] *Shuff, supra*.

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

Turning first to the procedural issue, claimant contends that, after allowing employer to conduct post-hearing depositions of Drs. Naeye and Kleinerman, and admitting a rebuttal report by Dr. Fechner into the record upon claimant's showing of prejudice, the administrative law judge abused his discretion by allowing employer to submit surrebuttal reports from Drs. Naeye and Kleinerman without any showing of prejudice. Claimant argues that, while the administrative law judge indicated that claimant did not allege prejudice or seek the opportunity to submit further evidence to rebut employer's surrebuttal evidence, claimant, unlike employer, lacked the economic resources to continue obtaining expert medical opinions from highly-credentialed experts. Claimant thus maintains that the administrative law judge's admission into evidence of employer's surrebuttal evidence interfered with claimant's right to a fair hearing. We disagree. The administrative law judge determined that, in his rebuttal report, Dr. Fechner for the first time listed studies which supported his position that centrilobular emphysema can occur in simple pneumoconiosis in the absence of smoking, and the physician challenged employer's experts' contention that the prosector overrepresented the severity of the miner's pneumoconiosis in preparing the autopsy slides. In his Order Closing Record issued on August 28, 1998, the administrative law judge explained that he believed the record would be incomplete if employer's experts were not provided with the opportunity to fully address these "unusual and vital" issues. Order at 1-2. Inasmuch as the administrative law judge is afforded broad discretion in resolving procedural issues, *see Clark v. Karst-Robbins Coal* Co., 12 BLR 1-149 (1989)(*en banc*), and Section 556(d) of the Administrative Procedure Act (APA)[3] explicitly provides that "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts," we reject claimant's arguments and conclude that the administrative law judge did not abuse his discretion in admitting employer's surrebuttal evidence into the record, as he deemed it necessary for a "full and true disclosure of the facts." 5 U.S.C. §556(d); *see* 20 C.F.R. §§725.455(c), 725.456(e); *Clark, supra.*

[3]The requirements of the APA are incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

Turning to the merits, 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, contains no reversible error, is consistent with applicable law, and must be affirmed. The administrative law judge accurately summarized the conflicting medical opinions and their underlying bases pursuant to Section 718.205(c), and determined that, while all physicians agreed that the miner had pneumoconiosis and that the immediate cause of death was acute pneumonia, Drs. Skovronsky, DiCicco and Fechner opined that pneumoconiosis hastened the miner's death, whereas Drs. Naeye and Kleinerman concluded that the miner's pneumoconiosis was too mild to affect lung function or hasten his death from pneumonia, unrelated to pneumoconiosis, which resulted from the effects of a stroke. Decision and Order at 3-9. The administrative law judge noted that the autopsy report listed pneumoconiosis as a diagnosed condition but did not indicate any connection between that condition and the miner's death, and the administrative law judge permissibly accorded little weight to the supplemental report of Dr. Skovronsky, the autopsy prosector, because he found that the physician failed to adequately explain how pneumoconiosis hastened the miner's death. Decision and Order at 3-4; Claimant's Exhibits 9, 13; *see generally Clark, supra*. The administrative law judge also reasonably found that the opinion of Dr. DiCicco was not persuasive despite his status as the miner's treating pulmonologist,[4] as it was undermined by the physician's belief that the miner's pulmonary function studies showed evidence of significant obstructive airways disease,[5] for which the administrative law judge found no support in the record.[6] Decision

[4]Claimant correctly maintains that, in contrast to his detailed recitation of the credentials of employer's experts, the administrative law judge did not set forth the full qualifications of Drs. Skovronsky and DiCicco. Inasmuch as the administrative law judge permissibly discounted the opinions of Drs. Skovronsky and DiCicco as insufficiently explained or supported, however, a more complete acknowledgment of these physicians' qualifications would not serve to rehabilitate their opinions. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983) .

[5]The administrative law judge accurately determined that the record contained three pulmonary function studies, none of which documented a significant obstructive impairment. Decision and Order at 4-5; Director's Exhibit 31. The administrative law judge noted that the study conducted on February 12, 1974, contained no tracings and its validity could not be assessed, but that Dr. Kleinerman interpreted its results as indicating mild restriction and no clinically significant obstruction. Decision and Order at 5; Employer's Exhibit 2 at 2. Additionally, Dr. Pushkin reported the results of the study he conducted on October 8, 1974, as normal; and with regard to the tests conducted on April 10, 1980, which were interpreted as showing minimal restrictive ventilatory insufficiency and normal maximum breathing capacity, Dr. Rasmussen indicated that "[n]othing by physical exam or vent study...suggests significant loss of respiratory functional capacity." Decision and Order at 5; Director's Exhibit 31.

and Order at 4-5; Claimant's Exhibits 12; *Clark, supra; King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). The administrative law judge acknowledged that Dr. Fechner was a highly qualified pathologist, but determined that his specialties were not in the field of pulmonary pathology, whereas Drs. Naeye and Kleinerman were preeminent experts in the pathology of occupational lung diseases. The administrative law judge then acted within his discretion as trier-of-fact in finding that Dr. Fechner's opinion[7] was outweighed by the contrary opinions of Drs. Naeye and Kleinerman,[8] based on his determination that Drs. Naeye and Kleinerman possessed superior qualifications relevant to the issue in dispute, fully explained their positions in their depositions, and provided reports consistent with the underlying data which were more detailed and better reasoned than those provided by Dr. Fechner.[9] Decision and Order at 8-9; *see Sterling*

---

[6]Since the administrative law judge's above-stated reason for discounting Dr. DiCicco's opinion is valid, we need not address claimant's other assertions of error. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele, supra.*

[7]Claimant argues that, because the physicians reached similar conclusions, it was irrational for the administrative law judge to discredit Dr. DiCicco's opinion and then find that Dr. Fechner's opinion constituted probative evidence in support of claimant's position. We disagree. The administrative law judge determined that Dr. Fechner relied in part on the miner's pulmonary function studies as evidence of longstanding impairment and support for his conclusion that pneumoconiosis decreased the pulmonary reserve that would have prolonged the miner's life. Decision and Order at 5; Claimant's Exhibits 15, 24. While the administrative law judge indicated that Dr. Fechner's reliance on the studies was "a dubious proposition," Decision and Order at 5, the administrative law judge implicitly found that the studies provided some support for the physician's conclusions, whereas the administrative law judge determined that there was no support for Dr. DiCicco's conclusion that the studies showed significant obstructive airways disease, Decision and Order at 4-5.

[8]We reject claimant's assertion that the opinions of Drs. Naeye and Kleinerman are hostile to the Act. These physicians did not foreclose any possibility that simple pneumoconiosis can be totally disabling, and their belief that simple pneumoconiosis does not generally progress once coal dust exposure ceases is not tantamount to an opinion that pneumoconiosis is not a progressive disease. Employer's Exhibits 4, 5; *see generally Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988).

[9]We find no support in the record for claimant's assertion that Drs. Naeye and Kleinerman artificially narrowed the hastening death inquiry by focusing exclusively on pneumoconiosis in its clinical sense. Both physicians reviewed the medical record, autopsy report, and autopsy slides, and concluded that pneumonia, unrelated to dust exposure in coal mine employment, was the only respiratory or pulmonary condition which caused or hastened the miner's death. Decision and Order at 6-8; Director's Exhibit 19; Employer's Exhibits 2, 4, 5.

Smokeless Coal Co. v. Akers, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *King, supra*. The administrative law judge's finding that the weight of the evidence of record was insufficient to establish death due to pneumoconiosis at Section 718.205(c) is supported by substantial evidence, in accordance with law, *see Shuff, supra*, and thus is affirmed. Consequently, we affirm his 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge